

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. 2016-000460

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DomainsNewMedia.com, LLC, Respondent

Vs.

Hilton Head Island-Bluffton Chamber of Commerce, Appellant

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**BRIEF OF SOUTH CAROLINA PRESS ASSOCIATION  
AMICUS CURIAE**

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## **QUESTION PRESENTED**

WAS THE COURT BELOW CORRECT IN CONCLUDING AS A MATTER OF LAW THAT APPELLANT WAS A “PUBLIC BODY” AS THAT TERM IS DEFINED IN THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT, AND, THUS, SUBJECT TO THE ACCESS REQUIREMENTS FOR RECORDS AND MEETINGS MANDATED BY THE ACT?

## ARGUMENT

THE COURT BELOW WAS CORRECT IN CONCLUDING AS A MATTER OF LAW THAT APPELLANT WAS A “PUBLIC BODY” AS THAT TERM IS DEFINED IN THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT, AND, THUS, SUBJECT TO THE DISCLOSURE REQUIREMENTS FOR RECORDS AND MEETINGS MANDATED BY THE ACT.

The threshold determination to be made by any court considering an action seeking access to records or meetings under the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. §§30-4-10, *et seq.* (1976 Rev. 2007), is whether the person or entity in possession of the records or convening the meeting is a “public body.” S.C. Code Ann. §30-4-20(a) (1976 Rev. 2007). The statutory definition is comprehensive and detailed, but for purposes of this litigation, the definition may be distilled to the expenditure of public funds by appellant on grounds that the definition of a “public body” includes “...any organization, corporation, or agency...expending public funds....” S.C. Code Ann. §30-4-20(a) (1976 Rev. 2007).

It is of no significance in terms of its status as a public body that appellant is a not-for-profit corporation. In *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), appellant there argued, as appellant does here, that its status as a private not-for-profit corporation precluded a finding that it was a “public body” under the FOIA. This

court rejected that argument in *Weston* as it must in this case. Appellant acknowledges that it “receives funds from the Town of Hilton Head Island, the Town of Bluffton and Beaufort County through the local accommodations tax....” (Appellant’s br. p. 9) Appellant also acknowledges that it received a grant in excess of One Million Dollars from the South Carolina Department of Parks Recreation and Tourism in the 2012 fiscal year. (Appellant’s br. p. 9). It should be beyond argument that these funds received by appellant are public funds.

The accommodations tax funds received by appellant are first collected by governmental bodies, “allocated to a special fund,” and “Immediately upon an allocation to the special fund, a municipality or county shall distribute the tourism promotion funds to the organizations selected or created to receive them. S.C. Code Ann. §6-4-10(3) (1976 Rev. 2004). Appellant is the organization receiving the distribution of tax funds allocated to the special account by the governments of Hilton Head Island, Bluffton and Beaufort County. The receipt of tax money by way of a bulk distribution from a special account to appellant does not transmogrify the tax money into private funds. Appellant acknowledges that it directs the expenditure of the public funds it receives, stating that it “submit[s] a budget to the local government entities of planned expenditures.” (Appellant’s br. p. 10) In *Weston* the trial court and this court analyzed four transactions by which funds were received by appellant from governmental entities. With respect to two of the transactions, this court noted appellant either directed or expended public funds. *Weston, supra*, 401 S.E.2d 161, 163 (1991). As in *Weston*, appellant here has “clearly directed the expenditure of the public funds it received. *Id.*

Appellant contends that it is not a public body because it “provides identifiable goods and services in exchange for the money it receives.” (Appellant’s br. p. 12) By making this

argument appellant seeks to camouflage its use of tax money by coming within the practical limitation on the definition of “public body” recognized by this court in *Weston*:

As the trial judge correctly noted, this decision does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length basis.

*Weston, supra*, 401 S.E.2d 161, 164 (1991).

Even assuming appellant is a “business enterprise,” its receipt of tax money distributed in bulk from a special account, is not in return for supplying specific goods or services. An examination of appellant’s budget for the 2012 fiscal year does not reveal in most instances the specific goods and services provided in exchange for the public money received by appellant. (Record pp. 139-142) For example, an expenditure of \$263,792 for “Leisure Media & Promotions” is hardly specific. (Record p. 139) Nothing in the record indicates that the transfer of tax money to appellant is in any way a “procurement” or made in conformity with the South Carolina Consolidated Procurement Code. S.C. Code Ann. §§11-35-10, *et seq.* (1976 Rev. 2011). One of the central principles of the FOIA is that citizens are entitled to learn who is receiving public money, and what the public is receiving in exchange. In other words, who is getting the money and what are they doing with it? For that reason the public is to have access to “information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies.” S.C. Code Ann. §30-4-50(A)(6) (1976 Rev. 2007). Part of the impetus for allowing citizens to learn who is getting their money and what they are doing with it is to guard against self-dealing. This goal is given voice in the FOIA provision allowing anonymous gifts to public bodies unless maker of the gift or member of his immediate family has “any business transaction with the recipient of the gift within three years before or after the gift is made.” In an instance where there is a business transaction, the identity

of the maker of the gift is not exempt from disclosure. S.C. Code Ann. §30-4-40(a)(11) (1976 Rev. 2007). Having access to the records of a public body, a citizen may learn who is getting public money and what is being done with it.

If appellant were to purchase office supplies from Oconee Office Supply using either the tax money or grant money that it has received, Oconee Office Supply would not become a public body for selling supplies, but that circumstance bears no resemblance to the manner in which appellant receives tax money and directs its expenditure. Purchases made by appellant through the expenditure of public funds causes appellant to come within the definition of a “public body,” but the business selling to appellant does not correspondingly become a public body. But, because those purchases would be made with the expenditure of public funds, documents relating to the purchase would be public records so that citizens could see who had gotten their money and what had been received in exchange.

In enacting the FOIA the General Assembly found “that it is vital in a democratic society that public business be performed in an open and public manner,” and directed that the Act “be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials.” S.C. Code Ann. §30-4-15 (1976 Rev. 2007). This court, consistent with the directive of the General Assembly, has held that the essential purpose of the FOIA is to protect the public from secret government activity. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001); *Wiedmann v. Town of Hilton Head Island*, 330 S.C. 532, 500 S.E.2d 783 (1988). If appellant is permitted to launder tax money and shelter from disclosure the uses and recipients of that money, the purpose of the FOIA is thwarted.

If appellant wishes to operate free of public scrutiny, its choice is simple: do not accept or expend public funds. When an entity receives and expends public funds, its activities are fair

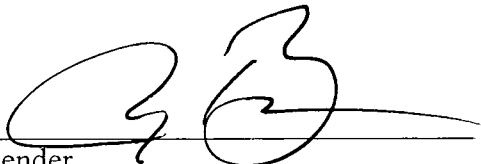
game for comment, critique and even criticism. Appellant devotes more than four pages of it brief to complaints about requests for access to records made by respondent and *The Island Packet* newspaper. (Appellant's br. pp. 4-8) Appellant states that respondent's founder "has been on a mission to uncover what he believes to be 'abuses'" by appellant. If appellant's expenditures of public funds were legitimate, the disclosure of records supporting the expenditures would prove legitimacy. Retreating behind the fiction that it is not a public body undermines appellant's protestations about challenges to its expenditures of public money.

### CONCLUSION

Appellant receives tax funds distributed from special government accounts and has received a grant from the South Carolina Department of Parks, Recreation and Tourism. Both the tax money and the grant money are public funds. Appellant directs the expenditure of this public money. The receipt of public money by appellant through the bulk transfers described in the record, and the expenditure of these public funds cause appellant to fit squarely within the definition of "public body." As a "public body," appellant is subject to the access requirements of the FOIA, whether it likes the person making the request for access or not. The decision of the court below should be affirmed.

Columbia, South Carolina

October 16, 2017



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By my signature above I certify that this brief complies with Rule 211(b), SCACR.

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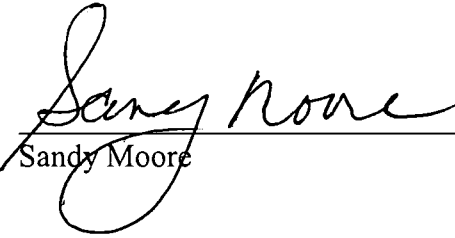
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I certify that I have served a copy of South Carolina Press Association's Motion of Leave to File Brief as Amicus Curiae with proposed Brief on October 16, 2017, by causing a copy of same to be deposited in the United States Mail, proper postage prepaid, addressed as follows:

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