

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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RECEIVED

JUN 15 2018

S.C. SUPREME COURT

DomainsNewMedia.com, LLC,

Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce,

Appellant.

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**RETURN TO PETITION FOR REHEARING**

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*Attorneys for Appellant*

Appellant Hilton Head Island-Bluffton Chamber of Commerce (“Appellant” or “Chamber”) hereby responds to the petition for rehearing filed by Respondent DomainsNewMedia.com, LLC (“Respondent” or “Domains”) on June 7, 2018. Because the Court correctly decided the issue presented and did not overlook or misapprehend any fact or principle of law in doing so, the petition should be denied.

**1. The Court correctly construed FOIA and the A-Tax statute.**

In holding that the Chamber is not a public body for purposes the Freedom of Information Act (“FOIA”), the Court did what courts are required to do: It interpreted and applied the law. The Court was “firmly persuaded that the General Assembly did not intend the Chamber to be considered a public body for FOIA purposes based upon its receipt and expenditure of accommodation tax funds.” *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, No. 2016-000460, 2018 WL 2325622, at \*3 (S.C. S. Ct. May 23, 2018) (hereinafter “*DomainsNewMedia.com*”).

This Court has never interpreted and applied the FOIA statute to mean that the receipt of one public dollar means an entity is a public body for purposes of FOIA. Instead, this Court has “rejected the suggestion that the mere receipt or expenditure of public funds automatically and categorically transformed an otherwise private entity into a public body triggering the full panoply of FOIA requirements.” *Id.* at \*5; *see Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 404, 401 S.E.2d 161, 165 (1991) (providing mere receipt of public funds did not mean “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.”); *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).

Contrary to what Domains contends, the Court properly applied the rules of statutory construction, starting with the plain language of the statute itself. (Petition at 3-4.) Domains simply disagrees with the Court's conclusion. Domains has argued all along that the statute means the receipt of any public funds makes one a public body. But that is contrary to the well-established precedent of this Court. Additionally, this simplistic analysis does not make practical sense and does not advance the purpose of FOIA.

Domains is also incorrect in arguing that the A-Tax statute somehow impliedly repealed FOIA when the Court concluded that the FOIA statute is a general statute, and the subsequently enacted A-Tax statute is a specific statute. (Petition at 4-10.) In construing the statutes, the Court found that FOIA is a general statute, and the A-Tax is a specific statute.

*DomainsNewMedia.com* at \*5. But this finding does not drive the Court's analysis and ultimate conclusion in the case. Indeed, the Court specifically states "*even in the absence of a specific statute*, this Court has recognized that the applicability of FOIA to a non-governmental entity is more involved than classification as a public body due to the receipt of public funds." *Id.* (emphasis added).

The Court's analysis continues with a review of applicable precedent, including *Weston*, which leads the Court to conclude that the Chamber is not a public body. *Id.* at \*5-6. The Court states that the Chamber is unlike the Foundation in *Weston* where public funds "were diverted to a private organization to be spent without oversight." *Id.* at \*6. Unlike *Weston's* Foundation, the Chamber has "accountability measures in place and the public has access to information regarding how the funds are spent." *Id.* The General Assembly created oversight and reporting requirements in the A-Tax statute and the Proviso. As noted by this Court:

Following the passage of FOIA, the General Assembly enacted the more narrow and targeted A-Tax statute (and Proviso 39.2) to provide what it determined were the necessary accountability safeguards with regard to the expenditure of these specific funds while simultaneously protecting the private nature of the organizations selected to perform this marketing function.

*Id.*

The Court did not, as Domains contends, conclude that the A-Tax statute repealed FOIA. In construing the statutes, the Court recognized that FOIA was more general in nature and the A-Tax statute more specific. The Court read the statutes together, without excluding one or the other, and properly concluded that “[t]he presence of the specific A-Tax statute and Provision 39.2 play the lead role in [the Court’s] disposition of this case.” *DomainsNewMedia.com* at \*5. Although Domains argues that the Court must have held that the statutes were inconsistent, the Court’s opinion contains no such holding, either explicitly or implicitly. To the contrary, the Court read the statutes together and was able to harmonize them, giving each statute its due regard and respect.

Because the Court properly construed FOIA and the A-Tax statute, the petition for rehearing should be denied.

**2. The Court’s holding is consistent with FOIA’s purposes.**

Contrary to what Domains argues, the Court’s opinion does not have any far-reaching or negative consequences that are incongruous with FOIA. Domains relies on section 30-4-15 to argue that the Court has somehow placed a heavy burden on the local governments to respond to FOIA requests regarding the expenditure of A-Tax dollars. Section 30-4-15 provides as follows:

The General Assembly finds that it is vital in a democratic society that public business be performed 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*. Toward this end, provisions of this

chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the *activities of their public officials* at a minimum cost of delay to the persons seeking access *to public documents or meetings*.

(Emphasis added.)

The Chamber is not a public entity with public officials. Nor is it formulating public policy. Rather, the Chamber is a private, non-profit organization. It is not expending the public funds for purposes of FOIA; the local governments are. If a citizen has a concern about how the A-Tax funds are being spent, he or she can consult with the local governments who have selected the Chamber as its DMO. After all, the local governments are responsible for ensuring that the A-Tax funds are “used only for advertising and promotion of tourism.” S.C. Code Ann. § 6-4-10(3).

Domains suggests that “already stretched-thin” and “few” government officials must carry the FOIA burden. (Petition at 12.) First, there is nothing in the record to support a finding that there are only a “few” government officials to respond to FOIA requests. Second, a possible burden imposed on a governmental body is no reason to impose that same burden on a private, non-profit entity. FOIA’s legislative mandate does not contemplate this result.

Domains asks the question “who watches the watchmen?” (Petition at 12.) As discussed in the opinion, there are three levels of oversight by the governmental officials.

*DomainsNewMedia.com* at \*4. Furthermore, Domains acknowledges that citizens can obtain the information they seek through their public officials. The Court’s opinion does not threaten or diminish the goals of FOIA.

### **3. All issues were preserved for review.**

The Court did not, as Domains argues, reverse the trial court on an issue that was not preserved for review. (Petition at 12-13.) The issue presented to the trial court was whether the

Chamber is a public body. The trial court ruled on this issue. The Chamber did not need to pursue a Rule 59(e) motion because the trial court squarely addressed and ruled on the issue. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”). The Chamber then briefed and argued the issue to this Court.

In reversing the trial court, this Court is free to analyze the issue through a different lens than the appellant or the respondents. But here, the Court’s analysis and the Chamber’s analysis are virtually the same: The mere receipt of public funds does not transform a private organization into a public body for purposes of FOIA. The A-Tax statute and the PRT grant both contain detailed reporting and accountability requirements with respect to the public funds. Three levels of oversight exist. Consequently, “the General Assembly did not intend the Chamber to be considered a public body for FOIA purposes based upon its receipt and expenditure of accommodation tax funds.” *DomainsNewMedia.com* at \*3. This issue – and argument – was not presented for the first time on appeal. The issue was raised to and ruled upon by the trial court and was preserved for review.

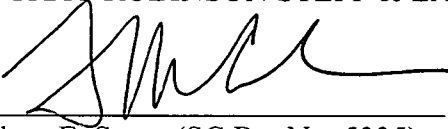
### **CONCLUSION**

The Court correctly construed all applicable statutes and case law in concluding the Chamber is not a public body. Transparency is still being championed through the accounting and reporting requirements under both the A-Tax statute and the PRT grant. If Domains’ position were adopted, entities that receive any public money whatsoever would be converted into public bodies. This position is contrary to South Carolina law and the purpose and intent of FOIA, which is to shine a light on the decisions and performance of public officials with respect

to public activity. S.C. Code Ann. § 30-4-15. It would erode important public-private partnerships like the ones at play here. In holding that the Chamber is not a public body for purposes of FOIA, the Court did not curtail any rights under FOIA or diminish the impact and importance of the law. The Court correctly decided the issue presented and did not misapprehend or overlook any principle of law in doing so. The petition for rehearing should be denied.

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**PROOF OF SERVICE**

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I certify that I have served a copy of the Return to Petition for Rehearing on Respondent and the individuals listed below by electronic mail and by depositing a copy in the United States Mail, postage prepaid, on June 15, 2018, addressed to the following:

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