

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-001726
Trial Court Case No. 2016-CP-40-01651

Sisters of Charity Providence Hospitals, Respondent,

v.

Palmetto Health, Appellant.

**PETITION FOR REHEARING, AND IN THE ALTERNATIVE,
PETITION TO FILE SUPPLEMENTAL MEMORANDUM**

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The Respondent Sisters of Charity Providence Hospitals petitions the Court for Rehearing under SCACR 221(a). The Court's opinion is not yet filed. Accordingly, this Petition is filed "no **later** than fifteen (15) days after the filing of the opinion." SCACR 221(a).

In the alternative, Respondent petitions the Court under SCACR 240 for Permission to file this Supplemental Memorandum to address issues and questions raised at oral argument.

I. PALMETTO HEALTH IS A PUBLIC BENEFIT CORPORATION.

At oral argument, the Respondent asserted that all the Appellant's corporate papers, starting at page 220 of the Record, demonstrate that Appellant is a "public benefit corporation." Much of Respondent's argument was based upon this assertion. The Court questioned this assertion. In this memorandum, Respondent first proffers citations to the Record demonstrating that Appellant's organizational documents confirm that Palmetto Health is a public benefit corporation.

Palmetto Health's Certificate of Existence, states that it is a "nonprofit corporation for religious, educational, social, fraternal, charitable, or other eleemosynary purpose" (R. 220), which seems to indicate that it is a public benefit corporation. Palmetto Health's Articles of Incorporation state explicitly that this "nonprofit corporation is a **public benefit corporation**" (R. 221 par. 3.a.) (emphasis added). The Amended and Restated Articles of Incorporation for Palmetto Health also state, "The nonprofit corporation is a **public benefit corporation**" (R. 227, par. 4.a.) (emphasis added). The Amended and Restated Articles of Incorporation for Palmetto Health state, "The corporation is a **public benefit corporation**, which is organized exclusively for, and at all times will be operated **exclusively for, charitable, educational, or scientific** or such other purposes as may qualify as exempt from federal income tax." (R. 229 par. 10.C) (emphasis added). Likewise, the Certificate of Existence for Baptist Healthcare System of South Carolina, Inc., a component part of Palmetto Health, states that it is a "nonprofit corporation for the religious, educational, social, fraternal, charitable, or other

eleemosynary purpose” (R. 239). The notes to Consolidated Financial Statements of Palmetto Health and Subsidiaries for September 30, 2015 and 2014 state, “Palmetto Health is organized as a South Carolina nonprofit **public benefit corporation** exempt from federal and state income taxes” (R. 249) (emphasis added). The same notes state that one of the conditions of the Joint Operating Agreement and Certificate of Public Advantage, arising from Palmetto Health’s formation is that Palmetto Health must, “Generally **provide 10%** of revenue and gains greater than expenses and losses **to fund public health initiatives and community outreach programs**” (R. 255, n. 2) (emphasis added). Accordingly, all these founding and government documents of Palmetto Health demonstrate that Palmetto Health is a public benefit corporation and is required to perform public benefit works.

As a public benefit corporation, Palmetto Health does perform public benefit works. The Palmetto Health document called “Other Operating Revenue Breakout – **Governmental Funding** for the 12 Months Ending September 30, 2015” (emphasis added) lists 23 charitable or public benefit projects, the public funding source for each, a description of the funding purpose in a column entitled “Description of Restriction,” and the amounts of the public funding from the governmental sources for each project (R. 280). All these documents confirm that Palmetto Health is a public benefit corporation, performing public works. The Sisters of Charity agree that these projects are honorable and noble public works.

II. PALMETTO HEALTH APPLIES FOR AND RECEIVES PUBLIC FUNDING.

The Sisters of Charity also asserted in oral argument that Palmetto Health applied for and received grants of public funds to pay for these public benefit projects. Appellant stated in its Reply argument that the Record did not show that Palmetto Health had applied for public funds or grants to carry out these public benefit works. The second reason for filing this

Petition is to demonstrate that the Record shows that Palmetto Health has repeatedly applied for and received public funding.

Palmetto Health has conducted the Palmetto Healthy Start program (PHS) annually since 1997. In an abstract related to this project, Palmetto Health is listed as the “applicant” (R. 319). This is a charitable or public benefit service to minority communities, providing free or low cost prenatal and early postnatal services to attempt to increase the viability and good health of minority babies. The Maternal and Child Health Bureau of the Health Resource and Services Administration has funded PHS since 1997 (R. 319). Palmetto Health operates PHS pursuant to its mission to serve the community. The Notice of Award states that this grant provides \$1.2 million a year in public funds for this public benefit project (R. 320). The Notice of Award states, “THIS AWARD IS BASED ON AN APPLICATION SUBMITTED” (R. 322, par. 16).

Palmetto Health received a letter awarding a grant of \$99,711 for the Regional Forensic Nurse Examiner program under the Violence Against Women Act (R. 289). The Department of Public Safety awarded the grant to Palmetto Health Richland “on the basis of the application submitted” (R. 290) (emphasis added). Accordingly, Palmetto Health had applied for public funds to carry out this public benefit project. Palmetto Health’s application is at pages 294-300 of the Record.

Similarly, Palmetto Health received another grant under the Regional Forensic Nurse Examiner program. The grant award states, “This grant is subject to the terms and conditions set forth in the application” (R. 291) (emphasis added). Accordingly, Palmetto Health Richland had filed an application for the grant to receive public funds to do its public benefit work. That award was \$83,092 (R. 291).

Palmetto Health applied for another grant under the S.T.O.P. Violence Against Women Act grant. The grantor funds 70% program, and the agency match, by Palmetto Health,

amounts to 30% (R. 295). The agency match is granted in kind. The grantor funds this public benefit project partly by with public funds, and Palmetto Health funds this project in part, pursuant to its mission as a public benefit corporation. The Budget Narrative for this grant states, “Explain exactly how each item in your budget (both grantor and match) will be utilized” (R. 299). The joint funding of this project demonstrates that this project is a Palmetto Health project supported in part by public funds.

A similar project was funded by a grant under the Victims of Crime Act grant (R. 311). The Grantor, the source of the public funds, is paying \$52,580, and the agency (Palmetto Health) matches the grant with \$13,144 (R. 312). The “project summary” states that the application is to “**request continuation funding** for the coordinator position in order to be able **to continue to operate** a mobile team of forensic nurses who perform medical/forensic evaluations on victims of sexual assault and intimate partner violence at medical facilities and judicial circuits 5 & 11” (R. 311) (emphasis added).

Palmetto Health has initiated and operated these public benefit programs for years. The Program Narrative for the Sexual Assault Nurse Examiner (SANE) states:

In 1999, the Sexual Assault Nurse Examiner (SANE) program was established at Palmetto Health Richland due to the problem facing many victims of sexual assault: inadequate medical care and lack of proper forensic examinations. Since its inception, the SANE program has examined and/or assisted over 2,000 victims of sexual assault or intimate partner violence.

Since 2005 the SANE program has had a full-time coordinator.

Id. (R. 301). Palmetto Health established this public benefit project and sought public funding. Palmetto Health’s efforts in this public benefit project are “supported in whole or in part by public funds.” S.C. Code Ann. § 30-4-20.

The South Carolina Department of Public Safety awarded Palmetto Health a grant for the Sexual Assault Nurse Examiner program (R. 306). The South Carolina Department of

Public Safety extended the grant for three months (R. 308-309). This demonstrates ongoing public funding of these public benefit projects.

The grant application for the Sexual Assault Nurse Examiner (SANE) Coordinator is at pages 311-317 of the Record. Under the grant application, the “agency name” is Palmetto Health Richland (R. 312). The grantor, the South Carolina Department of Public Safety, provided \$50,580, and the agency match, by Palmetto Health Richland, was \$13,144 (R. 309). This joint funding between the Grantor and Palmetto Health again demonstrates that Palmetto Health was carrying out this public benefit project as part of its mission as a public benefit corporation, an eleemosynary corporation, a charitable organization, and a nonprofit hospital. The Grant Application “summary” states that Palmetto Health “request[s] continuation funding” for this charitable project that Palmetto Health Richland had been conducting for many years (R. 311).

At oral argument, Respondent cited the trial testimony of Paul Duane, CFO for Palmetto Health that Palmetto Health considers part of its mission to be carrying out these public benefit activities, for which they seek public funding. At trial, Counsel for Palmetto Health had asked him, whether Palmetto Health would stop doing those programs if the public funding for the grants were cut off. He responded:

That would be a decision would have to make at that point in time. **If we determine** – people that makes the determinations of our organization felt **they were imperative to the community to continue them**, we would have to **find a way to fund them**. But if – if not, we would terminate the services.

(R. 125, ll. 20-25).

That testimony confirms that Palmetto Health is carrying out public benefit activities that are “imperative to the community” as part of its mission.

Palmetto Health has routinely sought public funding from government sources to help them carry out their public benefit mission. Accordingly, Palmetto Health is “supported . . . in part by public funds [and] is expending public funds.” S.C. Code Ann. § 30-4-20.

The FOIA statutory definition states that if a corporation is **either** supported in whole or in part by public funds **or** expending public funds, it is a “public body.” *Id.* Palmetto Health meets both parts of the definition and is overwhelmingly a “public body” under the statutory definition. The Respondent’s Brief demonstrates that Palmetto Health was expending public funds and managing the expenditure of public funds.

There is not a *de minimus* exception in the statute. The only criterion is whether the alleged “public body” is **supported** in whole or **in part** by public funds **or expending public funds**. The Circuit Court properly ruled that Palmetto Health was a “public body” under FOIA. In addition, the Circuit Court properly found that the records sought were “public records” under the FOIA statutory definition.

III. ANY PERSON CAN MAKE AND ENFORCE A FOIA REQUEST.

At oral argument, the Appellant emphasized that Respondent was a competitor and an adversarial litigant in another case, as though either status would affect the application of FOIA. Neither status does. FOIA states that any **“person”** can make a request under FOIA. “A **person has a right** to inspect, copy, or receive an electronic transmission of any public record of a public body.” S.C. Code Ann. § 30-4-30(A)(1). Any person who is “a citizen of the state” may enforce FOIA in court. S.C. Code Ann. § 30-4-100(A). The citizen enforcing FOIA can be “a person or entity.” S.C. Code Ann. § 30-4-100(B). The focus of FOIA is not on the person making the request. There is no exclusion for a competitor. There is no exception for someone in litigation against the “public body.” The focus is not on who is asking for the public record. The proper focus is whether the entity being requested is a “public body.” If it is a “public body,” every document that that “public body” maintains or generates is a “public record.” S.C. Code Ann. § 30-4-20(c).

Recently this Court made that rule very plain in a case involving the James Brown Estate. *Pope v. Wilson*, 427 S.C. 377, 831 S.E.2d 442 (Ct. App. 2019). The Attorney General

had removed the Estate's attorneys from their representation. The attorneys sued the Attorney General and sought certain documents through document requests. The Attorney General refused to provide them. The lawyers sought the same documents under FOIA. The Circuit Court granted judgment on the pleadings to the Attorney General in the FOIA case.

Upon appeal, this Court reversed. It ruled that the lawyers' active litigation with the Attorney General did not affect the application of FOIA. This Court held that the Attorney General must cite a specific FOIA exception, if he sought protection under FOIA, or a specific exemption under the discovery rules, if he sought protection under them.

[W]hen a citizen in litigation with a governmental agency directs a FOIA request to that agency, the agency must show the applicability of a specific FOIA exemption to each requested public record. If the government invokes the exemption in section 30-4-40(a)(4), "[m]atters *specifically exempted* from disclosure by statute or law," to seek protection under discovery rules, it must point to the specific language of a discovery rule that expressly prohibits disclosure of a particular type of record rather than vaguely referencing "discovery rules" or the "South Carolina Rules of Civil Procedure."

Id., 427 S.C. 377, 388-89, 831 S.E.2d 442, 448 (Ct. App. 2019) (footnotes omitted; italics in original; bold and underline added).

This Court also ruled:

"This is *not* to suggest that respondent's rights are in any way *diminished* by its being a private litigant, but neither are they enhanced by respondent's particular, litigation-generated need for these materials." [*NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978)] n. 23 (emphases added).

Id., 427 S.C. 377, 387, 831 S.E.2d 442, 447 (Ct. App. 2019).

FOIA makes no statutory exception for adversarial litigants or competitors. It makes no statutory exception for whoever is asking for public records. This Court concluded:

In sum, we decline to depart from precedent by imposing a blanket prohibition on disclosure whenever the person seeking public records is simultaneously being sued by the public body in possession of those records.

Id., 427 S.C. 377, 389, 831 S.E.2d 442, 448 (Ct. App. 2019).

The Attorney General was admittedly a “public body.” The issue was whether the other litigation affected the application of FOIA. This Court ruled the litigation had no effect.

IV. **DOMAINSNEWMEDIA REAFFIRMED THE BROAD STATUTORY DEFINITIONS OF FOIA.**

At oral argument, the Court requested commentary on the effect of *DomainsNewMedia.com, LLC v. Hilton Head Island Bluffton Chamber of Commerce*, 423 S.C. 295, 814 S.E.2d 513 (2018). The Court asked whether *DomainsNewMedia* should impact the legal analysis of FOIA cases.

DomainsNewMedia confirms FOIA’s statutory definitions. The Supreme Court discussed and analyzed FOIA. Its analysis is critical for this case.

We begin with an analysis of FOIA. To further its purpose of a transparent government, “FOIA subjects a ‘public body’ to record disclosure.” *Disabato, v. S.C. Ass’n of Sch. Adm’rs*, 404 S.C. 433, 442, 746 S.E.2d 329, 333 (2013). As this Court has recognized, “[i]f public bodies were not subject to the FOIA, governmental bodies could subvert the FOIA by funneling State funds to nonprofit corporations so that those corporations could act, outside the public’s view, as proxies for the State.” *Id.* at 455, 746 S.E.2d at 340. “Among those entities defined as **a public body** subject to the statute are **‘any organization, corporation, or agency supported in whole or in part by public funds or expending public funds ...’**” *Id.* at 442, 746 S.E.2d at 333 (emphasis added) (quoting S.C. Code Ann. § 30-4-20(a)). FOIA’s record disclosure requirement provides that **a “person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body”** subject to certain exceptions. S.C. Code Ann. § 30-4-30(a) (emphasis added). A “public record” is defined to include **“all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body”** with certain exclusions. S.C. Code Ann. § 30-4-20(c) (emphasis added).

Moreover, FOIA imposes additional disclosure requirements on public bodies, such as **all meetings must be open to the public**, subject to limited exceptions. S.C. Code Ann. § 30-4-60. Also, a public body must provide advance notice of all meetings and keep written minutes, which include statutorily specified information. S.C. Code Ann. §§ 30-4-80, -90. In addition, FOIA provides that **a citizen of the State may seek a declaratory judgment and injunctive relief to enforce the provisions of FOIA.** S.C. Code Ann. § 30-4-100.

Id., 423 S.C. 295, 301, 814 S.E.2d 513, 516 (2018) (*italics in original; bold and underlining added*). Accordingly, the Supreme Court reaffirmed the statutory definitions of FOIA, even though some entities defined as “public bodies” may considered them burdensome.

The Supreme Court did nothing to modify or narrow the statutory definitions. Instead, they found legislative intent in a later statute, more specifically directed towards public accountability for the A-Tax funds. The Supreme Court ruled that the latter, more specific statute governed over the earlier, more general one.

The Chamber’s receipt and expenditure of **these funds** is pursuant to, and governed by, **the Accommodations Tax (A-Tax) statute and Proviso 39.2** of the Appropriation Act for Budget Year 2012–2013.

Respondent DomainsNewMedia.com, LLC (Domains) filed a declaratory judgment action, seeking a declaration and corresponding injunctive relief on the basis that the Chamber’s **receipt of these funds** renders the Chamber a “public body” pursuant to FOIA, **thus subjecting the Chamber to all of FOIA’s requirements. The Chamber countered** that FOIA did not apply, for the receipt, expenditure, and reporting requirements concerning **these funds are governed by the more specific A-Tax statute and Proviso 39.2.**

The trial court held that the Chamber was a public body and, thus, was subject to FOIA’s provisions. We reverse. **We hold**, as a matter of discerning legislative intent, **that the General Assembly did not intend the Chamber to be considered a public body** for purposes of FOIA as a result of its receipt and expenditure of **these specific funds.**

Id., 423 S.C. 295, 297, 814 S.E.2d 513, 514 (2018) (emphasis added). The Court explained:

FOIA is a general statute; the A-Tax statute is a specific statute. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, **the more specific statute** will be considered **an exception to**, or a qualifier of, **the general statute** and given such effect.” *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted).

According to FOIA, **any organization** that is “**supported** in whole or **in part by public funds or expending public funds**” is a **public body**. S.C. Code Ann. 30-4-20(a) (emphasis added). Accommodation tax funds are, of course, public funds. Therefore, **if we look only to FOIA** as Domains suggests and go no further, it would appear that **the Chamber is** subject to FOIA as a **public body**. The subsequently enacted **A-Tax statute and Proviso 39.2, however, provide a specific and comprehensive approach** for the receipt, expenditure, and oversight of **these funds.** The presence of **the specific A-Tax statute and**

Proviso 39.2 play the lead role in our disposition of this case.

Id., 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018) (*italics in original; bold and underlining added*).

The Court repeated its conclusion and holding several times.

Here, **the General Assembly has specified** a detailed process for the expenditure and accountability of **these tourism funds** and that determination is controlling.

* * *

We fully appreciate the need for some measure of transparency and public accountability in the expenditure of public funds. Yet, in this case, **the A-Tax statute and Proviso 39.2 set forth the General Assembly's determination of the required level of oversight, transparency, and accountability.**

FOIA, of course, remains vibrant as it provides the General Assembly's determination for the optimum transparency in connection with the general expenditure of public funds. 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. **The General Assembly deemed these provisions sufficient to ensure that the funds are being properly expended,** and Domains has presented no valid legal basis to contravene this legislative determination. Accordingly, the judgment of the trial court is reversed.

Id., 423 S.C. 295, 306-07, 814 S.E.2d 513, 519 (2018) (emphasis added).

The dissent, likewise, reiterated the statutory definitions of FOIA. “The Freedom of Information Act (FOIA) applies to any “public body,” which is defined as “any organization ... expending public funds.” S.C. Code Ann. § 30-4-20(a) (2007).” *Id.*, 423 S.C. 295, 307, 814 S.E.2d 513, 520 (2018).

The dissent's dispute with the majority was whether the A-Tax statute actually **governed the same issue** and conduct as the FOIA statute.

The majority states the accommodations tax statute and Proviso 39.2 “play the lead role in our disposition of this case” because they “provide a comprehensive approach for the receipt, expenditure, and oversight of these [public] funds.” In other words, **the majority finds the policy of the FOIA is fulfilled through the accommodations tax statute and Proviso 39.2. This conclusion is wrong.** Although the accommodations tax statute does have specific provisions relating to the “receipt” and “expenditure” of public funds, **its provisions**

concerning “oversight” of spending public funds fall far short of meeting the policy goals of the FOIA.

Id., 423 S.C. 295, 309, 814 S.E.2d 513, 520 (2018) (emphasis added). That is the heart of the dispute between the majority and the dissent. The majority relied on the subsequent, more narrowly tailored statute, specifically governing the A-Tax. Both opinions acknowledged the breadth of FOIA, and both opinions acknowledged and confirmed FOIA’s statutory definitions. The dispute was whether the A-Tax statute superseded the FOIA.

In the case at bar, there is no applicable, subsequent, more narrowly tailored statute. Accordingly, under *DomainsNewMedia*, FOIA’s statutory definitions govern this case.

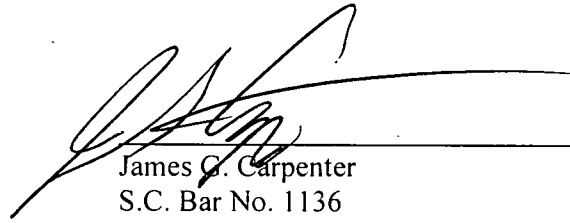
CONCLUSION

Trial testimony and exhibits showed that for many years Palmetto Health had received, expended, and managed the expenditure of millions of dollars of public funds. The Circuit Court properly found that under FOIA’s statutory definitions, Appellant is a “public body” and the requested records meet the statutory definition of “public records.” Appellant violated FOIA by failure to produce the requested “public records.” This Court should affirm the judgment of the Circuit Court.

WHEREFORE, Respondent prays the Court to:

1. Affirm that Appellant is a “public body” under FOIA;
2. Affirm that the requested records are “public records” under FOIA;
3. Affirm that Respondent’s requests are deemed approved;
4. Enjoin Appellant to provide Respondent copies of all requested “public records;”
5. Grant Respondent its attorneys’ fees and costs pursuant to S.C. Code Ann. Section 30-4-100(b); and
6. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read 'J. Carpenter', is written over a horizontal line. The signature is stylized and cursive.

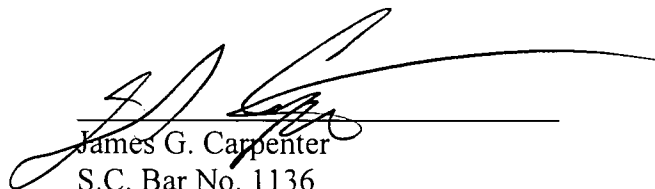
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that he served a copy of the foregoing Petition for Rehearing upon counsel for the Appellants by first class mail, postage prepaid, this November 19, 2019, addressed as follows:

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Respectfully submitted,
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WHEN IT'S WORTH FIGHTING FOR

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November 19, 2019

The Honorable Jenny Abbott Kitchings
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Re: *Sisters of Charity v. Palmetto Health*,
Appellate Case No. 2017-001726.

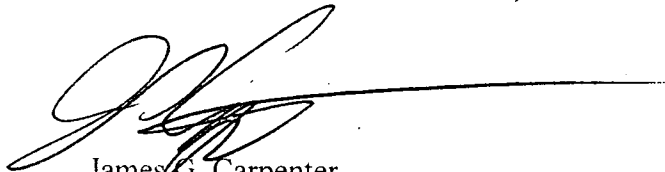
Dear Ms. Kitchings:

I enclose an unbound original and six copies of Respondents' Petition for Rehearing, and in the alternative, Petition to File Supplemental Memorandum. I also enclose a check for the filing fee.

Finally, I enclose an extra copy of the Petition, to be file-stamped and returned to me in the postage paid envelope.

If you need anything else, please telephone me.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter

Enclosure
CC w/ enclosure: Robert Widener