

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Hon. DeAndrea Gist Benjamin, Circuit Court Judge

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C.A. No.: 2017-CP-40-06976  
Appellate Case No. 2019-001231

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**RECEIVED**  
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**SC Court of Appeals**

Jefferson Davis, Jr. ....Appellant,

v.

South Carolina Educational Credit for Exceptional Needs Children Fund, .....Respondent.

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FINAL BRIEF OF APPELLANT

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*Appellant*

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN RULING THAT THE RESPONDENT ECENC FUND WAS NOT A “PUBLIC BODY” FOR PURPOSES OF THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT WHERE RESPONDENT ECENC FUND IS AMONG OTHER THINGS **(1) A LEGISLATIVELY CREATED PUBLIC NON-PROFIT, (2) GOVERNED BY A FIVE PERSON LEGISLATIVELY APPOINTED BOARD, AND (3) ADMINISTERED BY LAW BY THE SOUTH CAROLINA DEPARTMENT OF REVENUE AT PUBLIC EXPENSE?**
2. DID THE TRIAL COURT ERR IN RULING **(ON A MOTION FOR SUMMARY JUDGMENT AND PRIOR TO DISCOVERY)** THAT NO PUBLIC FUNDS WERE EXPENDED WHEN APPELLANT DAVIS PROVIDED EVIDENCE TO THE EFFECT THAT PUBLIC FUNDS WERE BEING EXPENDED IN THE ADMINISTRATION OF THE RESPONDENT ECENC FUND PROGRAM AND RESPONDENT ECENC FUND PROVIDED NO CONFLICTING EVIDENCE?
3. DID THE TRIAL COURT ERR IN RULING THAT ALTHOUGH **RESPONDENT ECENC FUND HAS NO STATUTORY REPORTING REQUIREMENTS,** THE STATUTORY REPORTING REQUIREMENTS OF ANOTHER ORGANIZATION (THE SOUTH CAROLINA DEPARTMENT OF REVENUE) EXEMPTED RESPONDENT ECENC FUND (A PUBLIC BODY) FROM FOIA UNDER THE **DOMAINSNEWMEDIA.COM** SUPREME COURT CASE?
4. DID THE TRIAL COURT ERR IN RULING THAT THE SOUTH CAROLINA DEPARTMENT OF REVENUE REPORTING REQUIREMENTS OF PROVISIO 109.15 (EFFECTIVE 7/1/2016) WERE SUFFICIENTLY “NARROW AND TARGETED” TO COMPLY WITH THE REQUIREMENTS OF THE **DOMAINSNEWMEDIA.COM** SUPREME COURT CASE?
5. DID THE TRIAL COURT ERR IN RULING THAT THE SOUTH CAROLINA DEPARTMENT OF REVENUE REPORTING REQUIREMENTS OF PROVISIO 109.11 (EFFECTIVE 7/1/2017) WERE SUFFICIENTLY “NARROW AND TARGETED” TO COMPLY WITH THE REQUIREMENTS OF THE **DOMAINSNEWMEDIA.COM** SUPREME COURT CASE?
6. DID THE TRIAL COURT ERR IN USING A NEW FOIA PROVISION PASSED BY ACT 247 OF 2018 (EFFECTIVE MAY 18, 2018) TO INTERPRET LEGISLATIVE INTENT OF PROVISIO 109.15 (EFFECTIVE 7/1/2016 – 6/30/2017) AND PROVISIO 109.11 (EFFECTIVE 7/1/2017 – 6/30/2018) WHICH NEITHER CONTAINED SUCH FOIA PROVISION?

7. IF THE TRIAL COURT PROPERLY APPLIED ACT 247 OF 2018 (EFFECTIVE MAY 18, 2018), DO THE PROVISIONS OF SECTION 3790(B)(4) EXEMPT RESPONDENT ECENC FUND OR THE SOUTH CAROLINA DEPARTMENT OF REVENUE FROM FOIA, OR IS IT SIMPLY RESTATING (BELT & SUSPENDER) FOIA PROVISIONS FOR CONFIDENTIALITY OF MEDICAL AND FINANCIAL INFORMATION?

## STATEMENT OF THE CASE

This is an appeal from an order ruling that Respondent (hereinafter the “**ECENC Fund**”), a legislatively created, single purpose, public non-profit, administered by the **South Carolina Department of Revenue** (hereinafter the “**SCDOR**”) at taxpayer expense and governed by a five person legislatively appointed board, was not a “public body” for purposes of the South Carolina Freedom of Information Act, S.C. Code Ann. 30-4-10, *et seq.* (hereinafter “FOIA”). (R. pp. 16-20; Order.)

Beginning on July 1, 2016, the ECENC Fund has served as the sole scholarship provider under the Educational Credit for Exceptional Needs Scholarship Fund program. (R. pp. 310-313; Proviso 109.15 - Effective 7/1/2016 - 6/30/2017.) The ECENC Fund was “organized by the [SCDOR] as a public charity as defined by the Internal Revenue Code under sections 509(a)(1) through 509(a)(4)”. (R. p. 310; Proviso 109.15 (B)(1).) The ECENC Fund has a five person legislatively appointed board (R. p. 311; Proviso 109.15 (B)(3).) and by law is administered by the SCDOR. (R. p. 311; Proviso 109.15 (B)(4).) The ECENC Fund utilizes S.C. government only services and contracts through the **South Carolina Department of Administration** and furthermore utilizes, at taxpayer expense, SCDOR employees and equipment (telephone lines) to provide administrative services including donor tax credit fundraising. (R. pp. 66-69; Appellant’s Affidavit – with supporting attachments.) Furthermore, by law, the Executive Director of the ECENC Fund is hired by the Director of the SCDOR. (R. p. 310; Proviso 109.15 (B)(3).)

By all indications imaginable, by all statutory requirements of FOIA, and by all previous South Carolina case law, the ECENC Fund is clearly a “public body” subject to public disclosure

under FOIA and Appellant was completely justified in sending his FOIA requests to the ECENC Fund and expecting them to be answered.

Appellant sent his first FOIA request to the ECENC Fund on December 14, 2016 simply asking for notification of board meetings. (R. pp. 66-69; Appellant's Affidavit # 14, Attachment E, pp. 81-83.) Appellant received no response. (R. pp. 66-69; Appellant's Affidavit #15, #16, #17 & #18.)

Appellant sent a second FOIA request to the ECENC Fund on July 10, 2017 seeking certain documents related solely to the management of the organization. (R. pp. 66-69; Appellant's Affidavit #6, Attachment A, pp. 70-71.) The ECENC Fund did not respond to this second request within the required 10 business days. S.C. Code Ann. § 30-4-30(c) (effective 5/19/2017). (R. pp. 66-69; Appellant's Affidavit #7, #8, #9, #10 & #11, Attachment B, pp. 72-74.) As a result of the foregoing and other failures, both of Appellant's "request must be considered approved as to nonexempt records or information." *Id.* The ECENC Fund later and untimely denied Appellants second July 10, 2017 FOIA request stating that it was not subject to FOIA. (R. pp. 66-69; Appellant's Affidavit #7, #8, #9, #10 & #11, Attachment B, pp. 72-74.)

## STANDARD OF REVIEW

"Declaratory judgments are neither legal nor equitable." *Bundy v. Shirley*, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). A declaratory judgment under FOIA is an action at law. *S.C. Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994); *Burton v. York Cty. Sheriffs Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

"The Court's primary function in interpreting a statute is to ascertain the intent of the legislature." *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." *Id.* "Generally, statutes are to be construed with reference to the whole system of law of which they form a part." *Id.* "In construing a statute, this Court is constrained to avoid an absurd result." *Id.*

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "When the circuit court grants summary judgment on a question of law, [the appellate

court] review[s] the ruling de nova." Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 634-35, 776 S.E.2d 434, 437 (Ct. App. 2015).

In the case at hand, the Court reviews the trial court's findings of fact and legal conclusions, *de nova*.

## **FACTS**

### **FOIA VIOLATION (12/14/2016) – Meeting Notifications**

Subject to FOIA, S.C. Code Ann. § 30-4-10, et seq. (pre 5/19/2017)

1. On or about **December 14, 2016**, Appellant served a FOIA request on the Respondent via U.S. Mail, which was received shortly thereafter. (R. p. 28; Complaint #12, Exhibit C, pp. 36-38.) ADMITTED. (R. p. 42; Respondent Answer #12.)
2. Also, on or about **December 14, 2016**, Appellant served the same FOIA request on the Respondent via Email, which was received shortly thereafter. (R. p. 29; Complaint #13, Exhibit D, pp. 39-40.) ADMITTED. (R. p. 42; Respondent Answer #13.)
3. The Respondent failed to respond to the December 14, 2016 request. (R. pp. 66-69; Appellant's Affidavit #15, #16, #17 & #18.)
4. FOIA requires "[a]ll public bodies shall notify persons or organizations, local news media, or such other news media as may request notification of the times, dates, places, and agenda of all public meetings, whether scheduled, rescheduled, or called, and the efforts made to comply

with this requirement must be noted in the minutes of the meetings.” S.C. Code Ann. § 30-4-80(e).

5. FOIA requires a “public body,” in response to a request, to “notify” the Appellant “of its determination and the reasons therefor” within 15 business days. S.C. Code Ann. § 30-4-30(c) (pre 5/19/2017).
6. Respondent’s failure to respond to the Appellant’s December 14, 2016 FOIA request is a violation of § 30-4-30(c) (pre 5/19/2017).
7. As a result of the foregoing failure, Appellant’s “request must be considered approved as to nonexempt records or information.” *Id.*
8. Appellant has received no notification from Respondent of any meetings. (R. pp. 29; Complaint #19.) ADMITTED. (R. p. 42; Respondent Answer #19.)
9. Meetings requiring notice to Appellant have in fact occurred. (R. pp. 66-69; Appellant’s Affidavit #17.)
10. Appellant contends that Respondent is acting in bad faith given it is clear Respondent is a “public body”. (R. pp. 66-69; Appellant’s Affidavit #18.)

**FOIA VIOLATION (7/10/2017) – Documents**

Subject to FOIA, S.C. Code Ann. § 30-4-10, et seq. (as amended, effective 5/19/2017)

11. On or about July 10, 2017, Appellant served a FOIA request on the Respondent via U.S. Mail, which was received shortly thereafter. (R. p. 28; Complaint #6, Exhibit A, pp. 31-33.) ADMITTED. (R. p. 41; Respondent Answer #6.)
  
12. Also on or about July 10, 2017, Appellant served the same FOIA request on the Respondent via Email, which was received shortly thereafter. (R. p. 28; Complaint #7, Exhibit B, pp. 34-35.) ADMITTED. (R. p. 41; Respondent Answer #7.)
  
13. FOIA requires a “public body,” in response to a request, to “notify” the Appellant “of its determination and the reasons for it” within 10 business days. S.C. Code Ann. § 30-4-30(c) (effective 5/19/2017).
  
14. As a result of the foregoing failures, Appellant’s “request must be considered approved as to nonexempt records or information.” *Id.*
  
15. The Respondent failed to respond to the July 10, 2017 FOIA request within the required 10 business days (or July 25, 2017). (R. pp. 66-69; Appellant’s Affidavit #9, #10 & #11.)
  
16. Respondent has failed to provide Appellant’s request in violation of § 30-4-30(c) (effective 5/19/2017). (R. pp. 66-69; Appellant’s Affidavit #11.)
  
17. Respondent has denied additional FOIA request for documents claiming to not be a “public body”. (R. pp. 66-69; Appellant’s Affidavit #12, Attachment C – August 31, 2017 FOIA request, pp. 75-77; and Appellant’s Affidavit #13, Attachment D – September 12, 2017 FOIA denial, pp. 78-80.)

## Facts Demonstrating ECENC Fund is a “public body”

Appellant claims that Respondent ECENC Fund has in **bad faith** denied being a “public body” in an effort to avoid transparency in its operations. There are certain indisputable facts that make it clear Respondent is a “public body” subject to FOIA. These facts include, but are not limited to, the following:

1. Respondent is a legislatively created entity pursuant to budget Proviso 109.15 of the 2016-17 General Appropriation Act as ratified by the General Assembly on June 2, 2016 (and renewed by Proviso 109.11 of the 2017-18 General Appropriation Act (H.3720)). (R. pp. 310-313; Proviso 109.15 - Effective 7/1/2016 - 6/30/2017; & R. pp. 314-318; Proviso 109.11 – Effective 7/1/2017 – 6/30/2018.)

“(B) (1) There is created the Educational Credit for Exceptional Needs Children Fund that is separate and distinct from the State general fund. The fund shall be organized by the department as a public charity as defined by the Internal Revenue Code under sections 509(a)(1) through 509(a)(4) and consist solely of contributions made to the fund. The fund may not receive an appropriation of public funds. The fund shall receive and hold all contributions intended for it as well as all earnings until disbursed as provided in this chapter. Monies received in the fund shall be used to provide scholarships to exceptional needs children attending eligible schools.” (R. pp. 310-311 & 315.)

2. By law, all of Respondent’s board members are appoint by elected government officials.

“(B) (3) The fund shall be governed by five directors, two appointed by the Chairman of the House Ways and Means Committee, one of which is based upon the recommendation of the South Carolina Association of Christian Schools and one which is based upon the recommendation of the Diocese of Charleston, two appointed by the Chairman of the Senate Finance Committee based upon the recommendations of the South Carolina Independent Schools Association and one appointed by the Governor based upon the recommendation of the Palmetto Association of Independent Schools. ...” (R. pp. 311 & 315.)

3. By law, and in conjunction with Respondent's government appointed board members, the SCDOR Director designates the executive director of Respondent.

“(B) (3) .... The directors of the fund, along with the Director of the Department of Revenue, shall designate an executive director of the fund.” (R. pp. 311& 315.)

4. By law, Respondent's operations and administration is performed by the SCDOR.

“(B) (4) In concert with the fund directors, the Department of Revenue shall administer the fund, including, but not limited to, the keeping of records, the management of accounts, and disbursement of the grants awarded pursuant to this proviso. The department may expend up to two percent of the fund for administration and related costs.” (R. pp. 311 & 315.)

5. Respondent was formed on June 16, 2016, by the then Director of the SCDOR using the SCDOR physical address as its principal office. (R. pp. 66-69; Appellant's Affidavit #19; Attachment F – SCDOR provided FOIA documents, pp. 84-95.)

6. Respondent utilizes SCDOR employees to process taxpayer donations. In fact, the taxpayer donation phone number listed on Respondent's website for “**Stocks, Bonds, and other Marketable Securities**” goes directly to an SCDOR phone number and employee. (803-896-1633 – SCDOR employee Lauranne Mays). (R. pp. 66-69; Appellant's Affidavit, #20, #21 & #22; Attachment G, pp. 96-97.)

7. SCDOR employees, on government time, at public expense, actively solicit taxpayer donations for Respondent. (R. pp. 66-69; Appellant's Affidavit, #23 & #24; Attachment H, pp. 98-100.)

8. SCDOR actively solicits taxpayer donations for Respondent on the homepage of its website as well as SCDOR's Facebook and Twitter pages. (R. pp. 66-69; Appellant's

Affidavit, #25, #26 & #27; Attachment I, pp. 101-103, Attachment J, pp. 104-105, & Attachment K, pp. 106-108.)

9. Respondent utilizes the sc.gov website and a contract administered by the **South Carolina Department of Administration** to process Respondent's online taxpayer donations. This service is unavailable to any organizations outside state government organizations. Specifically, the Respondent's taxpayer donor page states:

“This online service is provided by SC.GOV, a third party, working under a contract administered by the State of South Carolina Department of Administration. The online price of items or services purchased through SC.GOV, the state's official Web portal, includes funds used to develop, maintain, enhance and expand the service offerings of the state's portal.” (R. pp. 66-69; Appellant's affidavit, #28, Attachment L, pp. 109-110.)

10. According to Respondent's own website, Respondent's government appointed governing board does not have access to the names of their donors, likely because all processing of taxpayer donations is done by SCDOR. It is clear that SCDOR would only provide such services to a “public body”. (R. pp. 66-69; Appellant's Affidavit, #29, Attachment M, pp. 111-112.)

11. Respondent is publicly listed as a “**State Board and Commission**”. As required by state law, specifically § 1-5-40, the **South Carolina Secretary of State** has a duty to monitor state boards and commissions. The South Carolina Secretary of State does in fact list Respondent and its government appointed board members as part of the Secretary of States duties. Also as required by law, specifically § 1-1-1310, Respondent or its agent report said legally required information to the South Carolina Secretary of State. (R. pp. 66-69; Appellant's Affidavit, #30, Attachment N, pp. 113-118.)

As the above demonstrates, in conjunction with the following LAW & ANALYSIS, it is clear Respondent is a “public body” subject to the requirements of FOIA.

### **PROCEDURAL HISTORY**

**On July 31, 2017**, after Respondent refused to comply with certain FOIA requests and claimed it was not a “public body” subject to FOIA, Appellant filed his Summons and Complaint in Greenville County. (R. pp. 24-40; Appellant’s Complaint.)

**On August 31, 2017**, Respondent filed a 12(b)(3) Motion to Dismiss based on improper venue<sup>1</sup>.

**On November 6, 2017**, a hearing was held in Greenville on Respondent’s Motion to Dismiss and as a result venue was transferred to Richland County. (R. pp. 1-3; Form 4 Order filed November 7, 2017.)

**On November 20, 2017**, Respondent filed its Answer. (R. pp. 41-45; Respondent’s Answer.)

**On January 24, 2018**, Appellant filed this Motion for Summary Judgment. (R. pp. 46-65.)

**On January 24, 2018**, Appellant also filed a detailed Affidavit setting forth the facts in this case. (R. pp. 66-69; plus supporting Attachments, pp. 70-118.)

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<sup>1</sup> Respondent also included a 12(b)(6) motion to dismiss which it later withdrew.

**On April 17, 2018**, a hearing on Appellant’s Motion for Summary Judgment was held. Counsel for Respondent, although notified by the Court, failed to show up. (R. pp. 175-183; specifically transcript pages 176-177.)

**On May 15, 2018**, a second hearing on Appellant’s Motion for Summary Judgment was held, the trial court held that Appellant “may ultimately prevail but I do believe that a genuine issue of material fact exists here”. (R. pp. 184-207; transcript; specifically, page 205, lines 21-23.) Form 4 Order filed May 16, 2018. (R. pp. 4-6; Form 4 Order filed May 16, 2018.)

**On June 14, 2018**, Respondent’s counsel filed a 12(b)(6) Motion to Dismiss with a Memorandum (R. pp. 119-123), even though he had already filed an Answer on November 20, 2017. Respondent also filed a Motion for Protection from Discovery. (R. p. 124.)

**On August 9, 2018**, a hearing was held in whereby Respondent’s 12(b)(6) Motion to Dismiss was Denied, and Respondent was Ordered to provide responses to all discovery within 5 days. (R. pp. 7-9; Form 4 Order filed August 9, 2018.)

**On August 16, 2018**, Respondent first provided responses to Appellant’s discovery request, basically denying all of Appellant’s requests.

**On August 17, 2018**, Respondent filed a Motion for Summary Judgment & Judgment on the Pleadings. (R. pp. 125 & 131.)

**On August 22, 2018**, Appellant filed a Motion for Contempt and Sanctions. (R. pp. 137-140.)

**On September 10, 2018**, Appellant filed a Motion to Compel Discovery and Sanctions, as well as a Renewed Motion for Summary Judgment. (R. pp. 141-143 & 144-146.)

**On September 29, 2018**, Respondent filed a Revised Memo in Support of Motion for Judgment on the Pleadings. (R. pp. 147-156.)

**On October 3, 2018**, a hearing was held on the Motions for Summary Judgment and whereby Respondent's counsel stated "**we don't disagree really with (Appellant's) facts**". (R. pp. 244-309, transcript; specifically, page 248, lines 23-24.) The operative facts being in Appellant's detailed January 24, 2018, Affidavit and which showed Respondent was a public body using public resources at taxpayer expense. (R. pp. 66-69; Appellant's Affidavit.)

**On October 9, 2018**, the Court issued a Form 4 Order stating "Matter taken under advisement." (R. pp. 10-12.)

**On December 21, 2018**, the Court issued its Order denying Appellant's renewed Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment. (R. pp. 13-15 & 16-20.)

**On January 7, 2019**, Appellant filed his Motion (with Memorandum) to Reconsider. (R. pp. 157-163.)

**On July 8, 2019**, the trial Court denied Appellant's Motion to Reconsider. (R. pp. 21-23; Form 4 Order.)

**On August 1, 2019**, Appellant timely filed his Notice of Appeal.

## ARGUMENTS

- I. THE TRIAL COURT ERRED IN RULING THAT THE RESPONDENT ECENC FUND WAS NOT A “PUBLIC BODY” FOR PURPOSES OF THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT WHERE RESPONDENT ECENC FUND IS AMONG OTHER THINGS (1) A LEGISLATIVELY CREATED PUBLIC NON-PROFIT, (2) GOVERNED BY A FIVE PERSON LEGISLATIVELY APPOINTED BOARD, AND (3) ADMINISTERED BY LAW BY THE SOUTH CAROLINA DEPARTMENT OF REVENUE AT PUBLIC EXPENSE.

**Intent & Public Policy of FOIA.** The FOIA preamble best expresses both the General Assembly’s intent in enacting the statute, as well as the vital public policy underlying it. The preamble, set forth in § 30-4-15, provides as follows:

“[t]he 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 fully report the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.” (Emphasis added.)

**FOIA Should Be Applied Broadly.** On numerous occasions, in construing FOIA, the South Carolina Attorney General has emphasized the General Assembly’s expression of public policy as articulated in § 30-4-15. In *Op. S.C. Atty. Gen.*, Op. No. 88-31 (April 11, 1988), for example, they summarized the rules of statutory construction which the Attorney General’s Office follows in interpreting FOIA as follows:

“[a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to ascertain and give effect to the legislature's intent. *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. *Martin v. Ellisor*, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed

to carry out the purpose mandated by the General Assembly. *South Carolina Department of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. *News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976).”

See also, *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005) (FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government).

**“Public Body” – FOIA Statute Specifically Applies to Respondent.** A “public body” is subject the FOAI. Section 30-4-20(a) broadly defines what a “public body” as follows:

“(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.” (Emphasis added.)

**“Public Body” – FOIA Case Law Specifically Applies to Respondent.** With respect to application of the definition of "public body" as contained in § 30-4-20(a), the seminal case is our South Carolina Supreme Court's decision in **Weston v. Carolina Research and Development Foundation**, 303 S.C. 398, 401 S.E.2d 161 (1991). In *Weston*, the Court concluded that the Carolina Research and Development Foundation (hereinafter “CR&D Foundation”), an eleemosynary corporation like Respondent ECENC Fund, was indeed a "public body" for purposes of FOIA. *Weston* rejected any argument that a "private" corporation could not constitute a "public

body" under FOIA. CR&D Foundation argued that the common law distinguished "between 'public' and 'private' corporations [and that such a distinction] overrides the clear language of the FOIA." 303 S.C. at 403. It is expected that Respondent ECENC Fund will make the same flawed and previously rejected argument. Notwithstanding the fact that under the common law a "private" corporation does not lose its private identity by virtue of the receipt of public support, the Weston Court concluded that such analysis was inapplicable to FOIA. Our South Carolina Supreme Court in Weston reasoned:

“... the unambiguous language of the FOIA mandates that the receipt of support in whole or in part from public funds brings a corporation within the definition of a public body. The common law concept of "public" versus "private" corporations is inconsistent with the FOIA's definition of "public body" and thus cannot be superimposed on the FOIA. It is "well settled that a legislative body has the power within reasonable limits to prescribe legal definitions of its own language, and when an Act passed by it embodies the definition, it is generally binding upon the Courts." Windham v. Pace, 192 S.C. 271, 283, 6 S.E.2d 270, 275 (1939). See also, Bell Finance v. South Carolina Dept. of Consumer Affairs, 297 S.C. 111, 374 S.E.2d 918 (Ct. App. 1988) (statutory definitions should be followed in interpreting the statute); Fruehauf Trailer Co. v. South Carolina Electric Gas Co., 223 S.C. 320, 75 S.E.2d 688 (1953) (lawmaking body's construction of its language by means of definitions of the terms employed should be followed in the interpretation of the act to which it relates and is intended to apply).”

303 S.C. at 404. Accordingly, the Weston Court made it clear that for purposes of whether or not an entity is a "public body" under FOIA, the fact that the entity or organization may be characterized as "private" is not controlling. Instead, the question is simply one of whether or not the entity or organization is "supported in whole or in part by public funds or [is] expending public funds."

As to that issue, the Weston Court determined that the CR&D Foundation had met the definition of a "public body" under FOIA in a number of ways. First, the CR&D Foundation accepted funds from the sale of the Wade Hampton Hotel by the University of South Carolina.

Secondly, the Foundation accepted \$16,300,000 in federal grant money on behalf of the University and managed the expenditure of these funds for the development of the Swearingen Engineering Center. Thirdly, the Foundation accepted a conveyance of land and a cash grant from the City of Columbia and a cash grant from Richland County, all for the development of the Koger Center. Finally, the Foundation accepted funds paid by private third parties in exchange for research performed by University employees. Examining these, the Court concluded:

*“[e]ach of the above transactions alone would bring the Foundation within the FOIA’s definition of “public body”. Taken together, they lead to the unavoidable conclusion that the Foundation is a “public body”. This conclusion is mandated by the clear language of the FOIA. The Foundation’s argument that the FOIA only applies to governmental and quasi-governmental bodies would rewrite the statutory definition of “public body” by deleting the phrase, “**or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds.**” According to the Foundation’s position, a corporation that cannot be labeled governmental or quasi-governmental would be exempt from the FOIA, regardless of whether it received support from public funds or expended public funds. **Such a construction would obliterate both the intent and the clear meaning of the statutory definition.**”*

*Id.* at 403. (emphasis added).

*Weston*’s comments concerning the grant obtained for the Swearingen Engineering Center are especially instructive. The CR&D Foundation argued that the "grant did not support the Foundation, but that the money went towards the cost of constructing the Swearingen Engineering Center at the University." Thus, the CR&D Foundation contended that it did not "directly" benefit from the public funds. Notwithstanding this fact, however, the Supreme Court concluded that the CR&D Foundation did benefit indirectly because " ... the Foundation used University personnel on University payroll in conjunction with the construction project. In addition, the Foundation clearly directed the expenditure of the funds it received." 305 S.C. at 402. Thus, *Weston* makes clear that the definition of a "public body" contained in FOIA - requiring an organization to be "supported in whole or in part by public funds or expending public funds" - does not necessitate a

direct transmittal of public funds for the benefit of an entity. Indeed, Weston concludes that indirect support of the organization such as through the organization's use or the assistance of government resources (e.g. use of public employees on the governmental payroll whose primary task is their government responsibility) is sufficient to meet the "public body" requirement of FOIA.

Numerous other South Carolina cases apply FOIA to otherwise private nonprofits such as Respondent ECENC Fund. See Sloan v. Friends of The Hunley Inc., 393 S.C. 152, 711 S.E.2d 895 (S.C., 2011); Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 746 S.E.2d 329 (S.C., 2013).

Given that Respondent ECENC Fund's administration is carried out by a government agency, SCDOR, by public employees, on the governmental payroll, clearly demonstrates Respondent ECENC Fund is supported by public funds and meets the "public body" requirement of FOIA. The Court in Weston was clear and any other interpretation of its application to Respondent ECENC Fund would obliterate both the intent and the clear meaning of the statutory definition.

**Public Funds Being Distributed by Public Officials Subject to FOIA.** In a recent January 18, 2018 South Carolina Attorney General Opinion it was confirmed that the fund being distributed by Respondent are in fact public funds, specifically stating:

“With the increased level of State involvement, including how the directors of the Fund are appointed and that these directors administer the Fund in concert with the Department of Revenue, it is this Office's opinion that a court would likely find the grant ... authorized by the ECENC proviso likewise constitute “public funds.” See Elliott v. McNair, 250 S.C. 75, 90, 156 S.E.2d 421, 429 (1967) ("It does not matter whether the money is derived by ad valorem taxes, by gift or Otherwise."); State v. Mecham, 173 Ariz. 474, 481, 844 P.2d 641, 648 (Ct. App. 1992) ("We conclude that the term 'public money' includes not only state-owned funds but also private money held by State officials in their official capacity."); S.C. Code Ann. § 13-1-25 (defining "public moneys" to be a

fund of any kind used by the Department of Commerce "notwithstanding their public or private source, and must be treated like public monies for all purposes."); 63C Am. Jur. 2d Public Funds § 1 ("It is sometimes held that the term public money includes not only state-owned funds, but also private money held by state officials in their official capacity.")”

*Op. S.C. Atty. Gen.*, dated January 18, 2018, page 8. It should be clear that **state officials** at the SCDOR and government appointed directors distributing **public funds** should be subject to FOIA, otherwise the entire law could easily be circumvented.

**Attorney General Opinions.** South Carolina Attorney General Opinions have also consistently noted, "if the entity in question comes within the definition of 'public body,' the Freedom of Information Act is applicable." *Op. S.C. Atty. Gen.*, Op. No. 93-63 (September 10, 1993). In determining whether a particular entity is supported in whole or in part by public funds, or is expending public funds, the South Carolina Attorney General’s Office has rejected any argument that there is a certain threshold level of support of an entity by public funds specifically concluding that there exists no "*de minimis*" exception to the Act's applicability for public funding which is indirect or insignificant. In the view of the South Carolina Attorney General’s Office,

“[w]hile the notion of "support" is not defined in the FOIA, the South Carolina Supreme Court has construed "support" to mean "to maintain or aid and assist in the maintenance," *Harris v. Leslie*, 195 S.C. 526, 12 S.E.2d 538, 542 (1940), or to "uphold or sustain." *State v. Stoker*, 133 S.C. 67, 130 S.E. 337, 339 (1925). What kind of support, or how much, is needed to bring an entity under the FOIA is likewise not found in the FOIA. Payment of incidental expenses of a committee established by a county legislative delegation to oversee an audit of the county school system from public funds, was arguably enough to bring that committee under the FOIA. *Op. Atty. Gen.* dated July 11, 1983. An ad hoc citizens' committee apparently totally supported (actually or "in kind") by public funds of some kind was felt to be subject to the FOIA. *Op. Atty. Gen.* dated September 21, 1989 .... See also *Op. Atty. Gen.* dated March 27, 1984 as to additional comments on "support" by public funds.”

*Op. S.C. Atty. Gen.*, Op. No. 92-01 (January 16, 1992) (emphasis added). In that same Opinion, the South Carolina Attorney General also commented that "[p]ublic funds provided 'in kind' or via grants may well be sufficient to bring the entity under the FOIA."

On March 17, 1995, in another Opinion, the South Carolina Attorney General's Office stated that "[d]ue to the broad definition of 'public body' contained in the [Freedom of Information] Act, it is entirely possible that an entity could be subject to the Act without its members being public officers." What is important to keep in mind here is the South Carolina Attorney General's statement in Op. No. 92-01 that FOIA simply does not attempt to delineate "[w]hat kind of support or how much, is needed to bring an entity under the FOIA .... "

It is expected that Respondent ECENC Fund will claim that its board members are not public officers, however it is undeniable that Respondent's board member are appointed by elected government officials. Proviso 109.15, Section (B)(3). Whether Respondent's board members are public officers or not, they are certainly controlled by elected public officers and thus subject Respondent to the "public body" requirements of FOIA.

SC Attorney General Opinion No. 89-96 (September 21, 1989) is particularly instructive with respect to application of FOIA's "public body" definition. Such Opinion employs the same kind of broad reading of the "public body" definition as does *Weston*, and illustrates how so-called indirect or "in kind" use or provision of governmental resources can trigger the "public body" definition. There, the South Carolina Attorney General's Office addressed the question of the applicability of FOIA to the Charleston Harbor Estuary Citizens Committee, "an ad hoc group of individuals including representatives of state regulatory agencies, private businesses, municipal and county governments, and private citizens." Such organization was originally convened under

the auspices of the South Carolina Sea Grant Consortium and Congressman Ravenel, using one-time federal grant funds "to identify priority issues and concerns related to the Charleston Harbor Estuary." The Consortium provided meeting space and assisted with organizational aspects of the Committee's meetings. *A staff member of the Consortium worked with the group.* As noted above, SCDOR provides substantial employee and administrative support to Respondent. Expenses related to postage, printing, transportation, and accommodation were provided by the federal funds. The South Carolina Attorney General's Office concluded that the Committee was supported in whole or in part by public funds, stating as follows:

"... the Committee does not have a treasury, receives no direct monetary support, and does not expend funds. ***"In kind" support is being furnished by means of the time of a staff member of the Sea Grant Consortium,*** which entity also provides meeting space. Funds from EPA/NOAA are being used on behalf of the Committee by the Sea Grant Consortium to pay for postage, printing, and transportation and accommodations for speakers for Committee meetings. These expenditures of grant (i.e. public) funds on behalf of the Committee, while not expended by the Committee itself, do aid in the support of the Committee. Indeed, no other funds of which we are aware are expended by or on behalf of the Committee. It thus appears to this Office that the Committee is probably totally supported (actually or "in kind") by public funds of same kind. *Thus, the Committee probably would be subject to the terms of the Freedom of Information Act, though only a court could determine this issue conclusively.*"

(emphasis added).

**Other Jurisdictional Case Law.** Other cases elsewhere are supportive of the conclusion reached in the 1989 Opinion. For example, in *Associated Press v. Sebelius*, 31 Kan.2d 1107, 78 P.3d 486 (2003), the Kansas Court of Appeals concluded that the use of state employees assigned to the Governor-Elect's Transition Office (GETO) was sufficient to trigger the "supported in whole or in part by public funds" requirement. The Court stated that

"[t]he stipulated facts indicate that BEST [Budget Efficiency Savings Team] volunteers received no compensation or reimbursement for their time, mileage, or anything else, other

than minor refreshments. However, there were 12 state employees assigned to BEST pursuant to K.S.A. 75-134. The state employees continued to receive their salary while assisting BEST. This evidence is sufficient to establish the public funding requirements of ... [the Kansas Open Meetings Act] ....”

78 P.3d at 492. Thus, employing the same analysis as *Weston* and the 1989 Opinion, the Court in *Sebelius* found that "indirect" support, through the use of government resources, was sufficient to trigger the "supported in whole or in part by public funds" requirement.

Moreover, in *Delaware Solid Waste Authority v. News Journal Company*, 480 A.2d 628 (Del. 1984), the Delaware Supreme Court concluded that the language "supported in whole or in part by public funds" contained no "*de minimis*" exception. There, the Court responded to the Solid Waste Authority's argument that the FOIA excused from coverage entities with *de minimis* public funding as follows:

“[t]he Authority's argument, that the appropriations received were *de minimis*, ignores the plain language of the Act. Section 10002(a)(1) specifically states "'public body' means any ... entity ... which: (1) is supported in whole or in part by public funds" .... This is an express provision conceived by the legislature to promote the policy interests underlying the Act and precludes specious *de minimis* arguments.”

480 A.2d at 633. See also, *Op. S.C. Atty. Gen.*, November 3, 1980 ("If an organization is determined to be a 'public body' within the meaning of the act, then **any meeting held by that body so long as it is a convening of a quorum of the constituent membership must be opened to the public** unless the topic of the meeting fits within one of the statutory exceptions as defined in Section 30-4-70 .... "; members of Drug Formulary Advisory Committee are reimbursed for mileage and are paid a per diem and the Committee is thus a "public body" under the Act.) (emphasis added); *Op. S.C. Atty. Gen.*, No. 91-42 (June 28, 1991) (" ... we find it inescapable that

a search committee screening candidates to fill a 'public figure' type of a position of a university would be supported by or expending public funds and thus subject to the Act."); *Del. Op. Atty. Gen.*, 02-18-19, 2002 WL 31867895 (August 19, 2002) ("The host school district pays for the costs of the hotel conference room and food with public funds. It does not matter if these costs are *de minimis*. FOIA applies if the public body is supported 'in whole or in part by public funds.'").

**Quality Towing.** Our SC Supreme Court's decision in *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) also represents a good example of the Court's broad reading of the "public body" requirement of FOIA and is in keeping with the requirement that the Act must be liberally construed to effectuate the legislative purpose. In *Quality Towing*, the City Manager of Myrtle Beach created a review committee, consisting of City employees, but not City Council members, having prior experience with the local towing companies and knowledge of the procurement process. The Committee's purpose was to evaluate and assist the City Manager in determining which towing company should be awarded the bid to provide towing services to the City.

One of the questions before the Court in *Quality Towing* was whether the Committee was a "public body" and thereby subject to FOIA. It was argued that the fact that the City Manager, rather than City Council, formed the Committee and that no member of City Council served on the Committee was controlling and that the Committee thus was not a "public body." The Court rejected this distinction, however. In the words of the Court,

“[t]he fact that the City Manager, and not the City Council, created the Committee, and no council member served on the Committee, is not enough to remove the Committee from the definition of "public body" as stated in FOIA. First, it does not matter that members of the Committee are not members of the parent body. See 1984 S.C. Op. Atty. Gen. No. 84-281. Second, the Committee was set up to give advice to the City Manager, and ultimately the City Council. It is clear from the minutes of the City Council meeting and the testimony

of Thomas Leath, City Manager, the Committee's selection process and recommendation went directly to the City Council. ...

Furthermore, the legislature amended the definition of "public body" in 1987 by adding the phrase "including committees, subcommittees, advisory committees, and the like of any such body by whatever name known.;" Clearly, the legislature intended for "advisory" bodies, such as the Committee set up by the City Manager to advise him and the City Council, to be covered by the definition.

Finally, the Committee was formed to help determine the award of a City contract. This contract entailed the expenditure of public funds. Because the Committee was not open to the public, Quality was unable to learn its bid had been termed non-responsive and to respond to the Committee's concerns. The Committee made its decision to recommend Auto Body Works to the City in secret. FOIA was enacted to prevent the government from acting in secret. *South Carolina Tax Comm n. v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994). In addition, the City has advanced no valid reason to hold the meetings and discussions of the Committee concerning a public contract in private. This kind of secret determination is exactly what FOIA was designed to prevent.

The City also argues the Committee was not performing a "government function," but rather a proprietary or business function", and therefore is not subject to FOIA. See 1984 S.C. Op. Atty. Gen. No. 84-64 (only a committee performing a governmental function [is] subject to FOIA). The special referee agreed with the City, finding the function performed by the Committee was proprietary in nature. We find a committee formed to give advice to a public body or official is performing a government function. See *MFY Legal Services, Inc. v. Toia*, 93 Misc.2d 147, 402 N.Y.S.2d 510 (N.Y. Sup. Ct. 1977) (the giving of advice to a public body or official is a government function).

We hold the plain language of section 30-1-20(a) clearly includes an "advisory committee" such as the one set up in the instant case."

345 S.C. at 162-163.

- II. THE TRIAL COURT ERRED IN RULING (**ON A MOTION FOR SUMMARY JUDGMENT AND PRIOR TO DISCOVERY**) THAT NO PUBLIC FUNDS WERE EXPENDED WHEN APPELLANT DAVIS PROVIDED EVIDENCE TO THE EFFECT THAT PUBLIC FUNDS WERE BEING EXPENDED IN THE ADMINISTRATION OF THE RESPONDENT ECENC FUND PROGRAM AND RESPONDENT ECENC FUND PROVIDED NO CONFLICTING EVIDENCE.

**DomainsNewMedia.com is highly distinguishable.** The facts and circumstances in the DomainsNewMedia.com case are completely distinguishable from the case at hand. The Chamber of Commerce is a private entity. Respondent ECENC Fund was legislatively created. (R. pp. 310-313; Proviso 109.15 (B)(1).) The Chamber has members who select their board of directors. Respondent ECENC Fund's governing board is appointed by the Chairman of House Ways & Means, Chairman of Senate Finance and the Governor. (R. pp. 310-313; Proviso 109.15 (B)(3).) The Chamber manages its own operations. Respondent by law has its operations managed by the SC Department of Revenue, specifically **"the Department of Revenue shall administer the fund, including, but not limited to, the keeping of records, the management of accounts, and disbursement of grant awards"**. (R. p. 311, Proviso 109.15 (B)(4).) Evidence was presented that Respondent was formed by employees of the SC Department of Revenue, on public time and at public expense. (R. pp. 66-69; Appellant's Affidavit #19; Attachment F – SCDOR provided FOIA documents, pp. 84-95.) Evidence was even presented that the Secretary of State filing fee to actually create Respondent was paid by the SC Department of Revenue, at public expense. (R. pp. 66-69; Appellant's Affidavit #19; Attachment F – SCDOR provided FOIA documents, pp. 84-95, specifically \$50 receipt on page 95.) This use of public funds, among other examples, demonstrate actual cash outlay of public funds. **Respondent presented no evidence to dispute this use of public funds, nor any evidence that the Department was reimbursed for its expenses.**

Additionally, the Chamber of Commerce does its own fundraising. Appellant presented evidence that Respondent's fundraising was done by employees of the South Carolina Department of Revenue, at public expense. Evidence was presented that in order for a member of the public to make a stock donation to Respondent, you had to call an employee at the SC Department of Revenue. Evidence was also presented that employees of the SC Department of Revenue picked up the mail for Respondent at Respondent's P.O. Box, a round trip of 6 miles from DOR's offices. The Chamber of Commerce negotiates and engages its own credit card vendor. Appellant presented evidence that Respondent's use (and enjoy the cost benefits of) the SC.gov South Carolina state government credit card system.<sup>2</sup> The Chamber of Commerce, nor any other private entity enjoys these government perks. There is no other legislatively created, government administered and government governed entity that enjoys these perks and is exempt from FOIA. Board member of the Chamber of Commerce, as a private entity, are not listed on the SC Secretary of State's Office website under State Boards & Commissions online search page. Pursuant to S.C. Code of Laws §1-5-40, the Secretary of State's Office has a duty to monitor positions on state boards and commissions. The Secretary has correctly listed Respondent, as a public entity, in their online database of State Boards & Commissions. This evidence was presented by Appellant. All of these items and more point directly to the fact Respondent is public body subject to FOIA.

**Public Support - Funding via Tax Credits is irrelevant and moot.** Regardless of whether we believe tax credits are public funds or not, the fact remains that Respondent is "administered" by the SC Department of Revenue and as such receives public support. Respondent clearly fits the statutory definition of a "public body" due to the fact it is a "corporation

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<sup>2</sup> This is a strict violation of the terms of the vendor contract which states that only government entities are allowed to use the system. Respondent would not be entitled to this perk if it were not a public entity and governed by the State of South Carolina.

... supported in whole or in part by public funds or expending public funds”. S.C. Code Ann. § 30-4-20(a) (emphasis added). Even if the bulk of Respondent’s funds come from legislatively appropriated private funds, there is not debate, and Respondents did not contest or present any evidence to the contrary that public funds are being expended to administer Respondent’s operations.

III. THE TRIAL COURT ERRED IN RULING THAT ALTHOUGH RESPONDENT ECENC FUND HAS NO STATUTORY REPORTING REQUIREMENTS, THE STATUTORY REPORTING REQUIREMENTS OF ANOTHER ORGANIZATION (THE SOUTH CAROLINA DEPARTMENT OF REVENUE) EXEMPTED RESPONDENT ECENC FUND (A PUBLIC BODY) FROM FOIA UNDER THE DOMAINSNEWMEDIA.COM SUPREME COURT CASE.

Nowhere in Proviso 109.15 (effective 7/1/2016 – 6/30/2017), Proviso 109.11 (effective 7/1/2017 – 6/30/2018), or even in the permanent law of Act 247 (signed by the Governor on May 18, 2018) provides for ANY reporting from Respondent ECENC Fund. ZERO reporting whatsoever.

All reporting is done by SCDOR. (R. p. 311; Proviso 109.15 (B)(5).) The DomainsNewMedia.com case exempts the Chamber of Commerce from FOIA because the Chamber is subject to other more “narrow and targeted” legislative reporting requirements.

There is no basis for exempting an organization such as Respondent ECENC Fund because of an SCDOR reporting requirement under the DomainsNewMedica.com case.

**Public policy - setting the path for a “shadow government”.** Finally, the Court must consider the demands of public policy. The Freedom of Information Act is the basis of a free society. If DomainsNewMedia.com is allowed to be expanded, we are only a short step to a system

wide shadow government. The roadmap will be clear. Simply establish a government non-profit, allow legislators to appoint the governing board, administer it with the accountants and lawyers at their SC Department of Revenue, fund it with tax credits and require them do some minor “reporting” ... and all of a sudden, the government can do ANYTHING it wants with zero transparency or accountability. FOIA has been a cornerstone of our Country and a tool of citizens to root out waste and corruption in government. Public policy demands we not allow FOIA to be so easily gutted and circumvented in this manner. Today it is \$14 million scholarship program, tomorrow it is (fill in the blank) . The sky is the limit and the potential for corruption is limitless.

IV. THE TRIAL COURT ERRED IN RULING THAT THE SOUTH CAROLINA DEPARTMENT OF REVENUE REPORTING REQUIREMENTS OF PROVISIO 109.15 (EFFECTIVE 7/1/2016) WERE SUFFICIENTLY “NARROW AND TARGETED” TO COMPLY WITH THE REQUIREMENTS OF THE DOMAINSNEWMEDIA.COM SUPREME COURT CASE.

As discussed immediately above, the **DomainsNewMedia.com** case does not apply. On Page 3 of the December 21, 2018 Order, the trial court references the SC Supreme Court’s ruling in DomainsNewMedia.com, LLC, v. Hilton Head Island-Bluffton Chamber of Commerce, 423 S.C. 295, 814 S.E.2D 513 (2018). (R. p. 18.) The initial trial court in the DomainsNewMedia.com case ruled in favor of DomainsNewMedia.com holding that the Chamber of Commerce was subject to FOIA. This was due to the fact that the Chamber of Commerce had comingled public funds and its operations with those of their contract to manage the hospitality tax. It was a bad result and no one (including the legislature) ever intended the private operations of the Chamber of Commerce to be subject to FOIA. Private entities are not, nor should they, be subject to FOIA. It was a result that could have easily been avoided “if” the Chamber had managed the operations of the hospitality tax in a separate entity, but they did not. The Chamber made a mistake by

comingling the funds and operations and if the trial court ruling was allowed to stand it would have opened up a huge can of worms subjecting ALL of the operations (public and private) of the Chamber to public scrutiny. But, most legal observers, as well as the dissent of Justice Few, all agree it was a correct ruling by the trial court per the letter of the law.

So, in what has been a heavily criticized (in the legal community) 4 - 1 ruling by our Supreme Court, that bad result was corrected. Even if the DomainsNewMedia.com case was applicable to the matter at hand, that case is a one-time anomaly, not a rule to be built on and expanded as the trial courts December 21, 2018 Order would do. Even if it were, the reporting requirements of another government entity, SCDOR, would not exempt Respondent ECENC Fund from being subject to FOIA.

Respondent ECENC Fund cannot have a “narrow and targeted” reporting requirement if it has NO reporting requirement whatsoever.

- V. THE TRIAL COURT ERRED IN RULING THAT THE SOUTH CAROLINA DEPARTMENT OF REVENUE REPORTING REQUIREMENTS OF PROVISIO 109.11 (EFFECTIVE 7/1/2017) WERE SUFFICIENTLY “NARROW AND TARGETED” TO COMPLY WITH THE REQUIREMENTS OF THE DOMAINSNEWMEDIA.COM SUPREME COURT CASE.

As stated immediately above in relation to Proviso 109.15 (effective 7/1/2016 – 6/30/2017), the application of the DomainsNewMedia.com case to Proviso 109.11 is inapplicable.

- VI. THE TRIAL COURT ERRED IN USING A NEW FOIA PROVISION PASSED BY ACT 247 OF 2018 (EFFECTIVE MAY 18, 2018) TO INTERPRET LEGISLATIVE INTENT OF PROVISO 109.15 (EFFECTIVE 7/1/2016 – 6/30/2017) AND PROVISO 109.11 (EFFECTIVE 7/1/2017 – 6/30/2018) WHICH NEITHER CONTAINED SUCH FOIA PROVISION.

**There is no reference to FOIA exemption in the two applicable annual budget provisos.** The trial court however refers to the FOIA language under the current permanent law of Act 247 of 2018 (signed into law after the filing of this case). (R. pp. 310-313; Proviso 109.15 & pp. 314-318, Proviso 109.11.) Appellant’s FOIA request at issue were under previous annual budget provisos 109.15 and 109.11. There was no reference whatsoever to FOIA in either budget proviso, or even under the original H. 4077. The now ratified H. 4077 permanent law (Act 247, signed May 18, 2018) has nothing to do with compliance under the previous annual budget provisos.<sup>3</sup> Appellant presented evidence that the legislative intent was never to exempt the entire administrative operations from FOIA, Respondent ECENC Fund agreed to that fact, and provided no evidence to the contrary. (R. pp. 244-309; October 3, 2018 hearing transcript; specifically, page 248, lines 23-24, “**we don't disagree really with (Appellant's) facts**”). If the legislature had intended for a blanket exemption, including an exemption of Respondent’s OPERATIONS, they would have specifically stated such, not mentioned tax return and health data. There was no basis, nor any proof provided by Respondent ECENC Fund, that the legislature would have passed a blanket exemption of all OPERATIONS.

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<sup>3</sup> It should be noted that no personal or confidential information has ever been sought by Appellant via FOIA or otherwise. The FOIA requests submitted exclusively dealt with the administrative operations of the Respondent. As a rule we do not exempt government agencies completely from FOIA simple because they handle confidential and exempt information. The OPERATIONS of said government entities are always subject to FOIA as should be the OPERATIONS of Respondent.

**FOIA provides for “executive session”.** The trial court in its Order refers to Respondents need to make specific *individual* scholarship decisions in private. (R. p. 18.) Appellant has not requested individual scholarship decisions in his FOIA requests, nor would he. FOIA clearly provides for executive session of public entity board meetings for such private and confidential discussions and actions. However, evidence was presented by Appellant that Respondent ECENC Fund “claims” to award scholarship grants based on a formula. (R. p. 205, lines 14-19.) There is no reason that a discussion of a general funding formula and other administrative matters should be private and a behind closed door discussions – nor did Respondent ECENC Fund provide any evidence to that effect.

VII. IF THE TRIAL COURT PROPERLY APPLIED ACT 247 OF 2018 (EFFECTIVE MAY 18, 2018), THE PROVISIONS OF SECTION 3790(B)(4) EXEMPT RESPONDENT ECENC FUND OR THE SOUTH CAROLINA DEPARTMENT OF REVENUE FROM FOIA AND/OR IT IS SIMPLY RESTATING (BELT & SUSPENDER) FOIA PROVISIONS FOR CONFIDENTIALITY OF MEDICAL AND FINANCIAL INFORMATION.

If the Court determines that applying FOIA provisions is a subsequently passed law are applicable to the legislative intent of exempting Respondent ECENC Fund’s operations under the prior two budget provisos which contained such FOIA exemptions, the FOIA exemptions in Act 247 of 2018 are nothing more than a restatement of FOIA exemptions – no an expansion of FOIA exemptions.

Evidence was presented to the trial court that the only reason the FOIA language was added to Act 247 was to provide a “belt & suspender” assurance to parents as well as donors that already confidential information was in fact confidential. It is more than just common knowledge that FOIA as well as numerous other state and federal laws clearly exempt children’s

medical information and donor financial information from public disclosure. Legislators simply wished to provide clear reassurance given extensive rumor and innuendo being spread by opponents of this program that such information would be subject to public disclosure.

Respondent ECENC Fund accepted this fact and failed to provide any evidence to the contrary – because there is none. Furthermore, Respondent ECENC Fund provided no explanation whatsoever as to why the legislature would wish to exempt the business operations of the entity from public disclosure under FOIA.

### **CONCLUSION**

For the foregoing reasons, Respondent ECENC Fund is a “public body” and subject to the Freedom of Information Act. The Chamber of Commerce under the DomainsNewMedia.com case is an independent body. Respondent ECENC Fund is a legislatively created entity administered by the SC Department of Revenue. Public funds ARE BEING EXPENDED by the SC Department of Revenue to run Respondent ECENC Fund and in fulfilment of SCDORs statutory responsibilities to administer the entity as outlined in the respective annual budget provisos and now under the permanent law. No similar government entity is running the Chamber of Commerce under the DomainsNewMedia.com case, and the case is not applicable. As such Respondent ECENC Fund is a “public body” as defined by S.C. Code Ann. § 30-4-20(a) and thus subject to FOIA.

Due to the substantial governmental entanglements, financial and in-kind support Respondent ECENC Fund receives from state government agencies, and because Respondent ECENC Fund has agreed to Appellant’s facts as presented in his January 24, 2018 detailed Affidavit, Appellant asks this Honorable Court to reverse the judgment of the circuit court order,

declare that the Respondent is a § 30-4-20(a) “public body”, declare that the Respondent must comply with FOIA, declare that the Respondent has violated FOIA, declare that Appellant’s unanswered requests are deemed approved, enjoin Respondent to provide Appellant a copy of all requested documents, enjoin Respondent to provide Appellant notice of all future meetings as well as meeting minutes, notes, and board actions from all previous meetings, and remand for the determination and award to the Appellant his cost of litigation pursuant to S.C. Code Ann. § 30-4-100(b) and/or 15-53-100, and grant Appellant such other and further relief as the Court deems just and proper.

Respectfully submitted,



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*Appellant*

Date: September 1, 2020

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

**SC Court of Appeals**

Hon. DeAndrea Gist Benjamin, Circuit Court Judge

C.A. No.: 2017-CP-40-06976  
Appellate Case No. 2019-001231

Jefferson Davis, Jr. ....Appellant,

v.

South Carolina Educational Credit for Exceptional Needs Children Fund, .....Respondent.

CERTIFICATE OF COMPLIANCE

I certify that **APPELLANT'S FINAL BRIEF & FINAL REPLY BRIEF** comply with  
Rule 211(b), SCACR.



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