

The State of South Carolina



Office of the Attorney General

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January 16, 1992

The Honorable Nick A. Theodore
Lieutenant Governor
State of South Carolina
Post Office Box 142
Columbia, South Carolina 29202

Dear Lieutenant Governor Theodore:

You have requested an opinion of this Office as to whether the Family Counseling Center of Greenville, Inc., would be considered a public body under the Freedom of Information Act. After a brief review of the background provided with your letter, the relevant law will be discussed.

Background

The Family Counseling Center of Greenville, Inc. (hereinafter "FCC") is a private, nonprofit human service delivery organization. As outlined to this Office, FCC has a variety of funding sources which may vary from year to year. Approximately 83 percent of FCC's funding is from United Way funding, program fees from clients generated for services rendered, community contributions, and other investments. The remainder of funding for FCC comes from public monies, through contracts and otherwise.

The South Carolina Department of Social Services administers state funds to FCC for its Women's Shelter through a contract for spouse abuse program services. FCC is reimbursed for services rendered under the DSS contract as are all recipient shelters in the state which are under similar contract. Victims of Crime Act (VOCA) grants are available and have been accessed for special service delivery projects; these are applicable for a one to five year period and require matching funds or in-kind match to qualify. Expenses related to service delivery on the project are billed monthly to VOCA for reimbursement. In various years, FCC has received FEMA funds (which have apparently not exceeded two percent of FCC's operating budget).

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Another example of funding from the public sector involved a special project request funded by the Greenville County Redevelopment Authority (GCRA), which contributed one-third of the total cost of a renovation project at the shelter in 1990. The funds were not turned over to FCC; instead, the total construction project was managed by GCRA and payments for the costs of the project were administered through GCRA rather than FCC.

"Public Body"

To be subject to the requirements of the Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10 et seq. (revised 1991), an entity must fall within the definition of "public body." That term is defined in § 30-4-20(a) as:

any department of the State, 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, [Emphasis added.]

Discussion

While the key issue seems to be whether the FCC is being supported in whole or in part by public funds or is expending public funds, it should also be noted that the FOIA is not limited, in its application, to governmental bodies, for to do so would render meaningless the phrase emphasized above. Weston v. Carolina Research and Development Foundation, 401 S.E. 2d 161 (S.C. 1991). 1/ The

1/ In Weston, the South Carolina Supreme Court agreed with the circuit court's holding that the Carolina Research and Development Foundation would be a public body for FOIA purposes. The foundation accepted part of the purchase price paid for real estate owned by the University of South Carolina; the foundation acted as the University's agent for grant purposes, using University personnel on the University payroll for a construction project; it received public funds to manage and develop real estate (for the Koger Center) and for other research and development contracts with various parties. Due to the support by and expenditures of public funds by the foundation, a private, eleemosynary corporation, the court found the foundation to be a public body.

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court in Weston also rejected the argument that the FOIA is not applicable to private corporations, stating that

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.

401 S.E.2d at 164. The court in Weston also considered federal grant funds to be public funds for purposes of the state FOIA, even though federal grant recipients are not subject to the federal FOIA. Id.

On the other hand, the court stated that the decision in Weston

does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length basis. In that situation, there is an exchange of money for identifiable goods or services and access to the public body's records would show how the money was spent.

401 S.E.2d at 165.

While 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. Stokes, 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 support 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.

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dated September 21, 1989. 2/ See also Op. Atty. Gen.
dated March 27, 1984 as to additional comments on "support"
by public funds. Copies of these three opinions are en-
closed herewith.

Conclusion

Whether the Family Counseling Center of Greenville, Inc., would be deemed to be "supported in whole or in part by public funds" remains a question of fact which may require resolution by the judicial system. Public funds received under contract for the provision of specific services, i.e., as a result of an arms length transaction, may be exempt from consideration under the dicta in Weston; access to records of DSS would show how that money was spent. Weston, 401 S.E.2d at 165. Public funds provided "in-kind" or via grants may well be sufficient to bring the entity under the FOIA. We would suggest that the Board of Directors of the Family Counseling Center, working with its attorney, review the information contained herein and make its determination as to whether the extent of public funding would, in its view, constitute "support," and, if so, then decide how to handle a request made of it under the FOIA. As always, this Office advises that doubt as to applicability of the FOIA be resolved in favor of openness and disclosure.

With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions

2/ The opinion dealt with the Charleston Harbor Estuary Citizens' Committee, for which the South Carolina Sea Grant Consortium provided meeting space, staff assistance, expenses related to postage, printing, and so forth. The committee did not receive or expend these funds itself. Certain federal funds (EPA/NOAA) were used by the Consortium for these purposes.