



ALAN WILSON
ATTORNEY GENERAL

March 12, 2014

The Honorable Dennis C. Moss
Member, House of Representatives
PO Box 11867
Columbia, SC 29211

Dear Representative Moss:

This Office received your request for an opinion regarding whether a governmental entity can donate money to a private religion-based educational institution. You explain that the Gaffney Board of Public Works donated \$150,000.00 to Limestone College's capital campaign and you question the authority of the Board to take this action. The information you provided seemed to indicate that Limestone College would use the donation to build a stadium and dorm facilities. See Our View, GAFFNEY LEDGER, January 6, 2014. We will discuss the applicable law herein, but the facts surrounding your questions can only be determined by a court. See Op. S.C. Att'y Gen., 2010 WL 3896162 (Sept. 29, 2010) ("This Office is not a fact-finding entity; investigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court"). Also, please be aware that "while we have issued numerous previous opinions on issues involving commissioners of public works, 'the law in this area is far from settled and has been the subject of heated litigation. Thus, it is impossible to reach absolutely definitive answers to your questions.'" Op. S.C. Att'y Gen., 2008 WL 2324818 (May 30, 2008) (quoting Ops. S.C. Atty. Gen., August 24, 2005 and May 23, 1973).

LAW/ANALYSIS:

I. Does the Gaffney Board of Public Works have the authority to make a donation? If so, can it donate to a private religion-based educational institution?

We have addressed the history of the Gaffney Board of Public Works ("BPW") in a prior opinion. See Op. S.C. Atty. Gen., December 17, 2007 (2007 WL 4686605). BPW was created by and its powers were defined by the Legislature. The enabling legislation granted BPW the following powers:

[T]he said Board of Public works shall take charge of and have the entire control of the electric light and waterworks plants of the town of Gaffney; shall fix rate to be charged for both water and lights, so as to make the said plant self-supporting; shall employ a Superintendent and fix his bonds, and such other help as may be necessary to successfully operate said electric lights and waterworks or to the extend the same, as may be necessary. The Board of Public Works may, at their discretion, contract for power to operate said electric light plant and waterworks

plant upon such terms as to them may seem best: Provided, No such contract shall exceed a term of five years. But nothing in this Act shall be construed to authorize the Board of Public Works herein provided to lease or sell the electric light plant or the waterworks plant of the town of Gaffney; such sale or lease can only be made upon recommendation of the Board of Public Works herein provided to lease or sell the electric light plant or the waterworks plant of the town of Gaffney; such sale or lease can only be made upon recommendation of the Board of Public Works, after due notice by the publication of such lease or sale and the terms thereof in one or more newspapers in the town of Gaffney, for a period of time not less than thirty days, immediately preceding the election to ratify or confirm such proposed lease or such proposed sale, of said light plant or waterworks plant, or both.

1908 Act Number 563.

Subsequent legislation granted all commissioners of public works the following:

The board of commissioners of public works of any city or town may purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them. It may supply and furnish water to citizens of the city or town and also electric, gas or other light and may require payment of such rates, tolls and charges as it may establish for the use of water and light.

S.C. Code Ann. § 5-31-250 (1976 Code, as amended).

Furthermore, the City of Gaffney granted BPW:

The waterworks system and the sewerage system of the city and all matters and things appertaining to their use, management and control shall be under the exclusive control and jurisdiction of the board of public works of the city.

Gaffney, S.C. Code § 36-1 (2010). The City of Gaffney also provided BPW with the power to provide service to the citizens of Cherokee County:

Any water and sewer service extended beyond the limits of the city shall be in accordance with the rules and regulations of the board of public works and upon such conditions and charges as the board may provide.

Gaffney, S.C. Code § 36-4 (2010).

In summary, BPW is given the authority by statute and by ordinance to provide power, water, and wastewater services to the residents of Gaffney and the surrounding areas of Cherokee County. The issue

is whether BPW has the power to make monetary contributions. In our prior opinion, we opined about BPW:

As a creature of statute, the Board [BPW] has no inherent power and derives its power from the Legislature. S. Ry. Co. v. South Carolina State Highway Dep't, 237 S.C. 75, 80, 115 S.E.2d 685, 688 (1960). Accordingly, the Board [BPW] “possesses only those powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to the powers expressly granted.” Brooks v. South Carolina State Bd. of Funeral Serv., 271 S.C. 457, 461, 247 S.E.2d 820, 822 (1978).

Op. S.C. Atty. Gen., December 17, 2007, supra. We have also explained that “[n]o governing body may spend public funds...beyond its corporate purpose.” Op. S.C. Atty. Gen., July 28, 2003 (2003 WL 21790882).

The corporate purpose of BPW is to provide power, water, and wastewater services to the residents of Gaffney and the surrounding areas of Cherokee County. Since BPW is not expressly authorized by statute or by ordinance to make monetary donations, any donation of money must be incidental to BPW’s power to provide electric, water, and sewer service to the citizens of Gaffney and Cherokee County or must be necessary for its operation.

Another of our prior opinions is pertinent. In Op. S.C. Atty. Gen., May 30, 2008 (2008 WL 2324818), the issue was the authority of the Commissioners of Public Works of the City of Greenwood to transfer property without compensation. We opined:

It is our opinion that the CPW [Commissioners of Public Works of the City of Greenwood] may not transfer the Property to the County or a private entity without receiving some benefit that serves a core function of the CPW [Commissioners of Public Works of the City of Greenwood]. An outright donation without some benefit received in return furthers no statutorily authorized purpose of the CPW [Commissioners of Public Works of the City of Greenwood].¹

Further, we determined that “[i]f public property is transferred to a private entity, some consideration of reasonably equivalent value must be received.” Id.

Since monetary contributions are most likely not a core function or corporate purpose of BPW, some form of compensation that furthers the corporate purpose of BPW must be received. Based on our prior opinions, we believe that an outright donation without anything received in return would not further the

¹ Please note that we determined in our May 30, 2008 opinion that the CPW could transfer physical property to the City of Greenwood without receiving compensation since it is an agency of the City which carries out the management, operation, and control of the electric, water, and gas systems for the City. Accordingly, the City is the true owner of the property. However, that is not the question that we are addressing in this opinion.

core function or corporate purpose of BPW. This is true whether the recipient of the transfer is a governmental agency or a private party.²

Since Limestone College is a private Christian non-denominational college, (see its website at <http://www.limestone.edu/about>), it should also be noted that this monetary contribution may be troublesome under S.C. Const. art. XI, § 4, which states: “No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.” (emphasis added). . .

II. If Limestone College accepts a donation from the Gaffney Board of Public Works, will it be considered a public body for purposes of the Freedom of Information Act?

In order to be subject to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 et seq. (1976 Code, as amended), Limestone College must fall within the Act’s definition of a “public body.”³ The Freedom of Information Act (“FOIA”) defines a “public body” as:

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. . .

S.C. Code Ann. § 30-4-20 (1976 Code, as amended) (emphasis added).

Since Limestone College (“Limestone”) is a private nonprofit corporation (see the website of the South Carolina Secretary of State at <https://www.scsos.com/>), it is clearly not a governmental entity. Thus, the issue is whether Limestone “is supported in whole or in part by public funds.” In Op. S.C. Atty. Gen., March 27, 1984 (1984 WL 249848), we explained:

² A transfer of property or donation from a political subdivision is permissible if the transfer satisfies both the donor’s corporate purpose and a public purpose. Since BPW’s monetary donation does not satisfy its corporate purpose, there is no need to address “public purpose” in this opinion.

³ In a prior opinion, we explained the significance of being a “public body:”

Of course, the determination of whether or not a particular entity is a “public body” for purposes of the FOIA is crucial because § 30-4-60 provides that “[e]very meeting of all public bodies shall be open to the public” Moreover, § 30-4-30(a) mandates that “[a]ny person has a right to inspect or copy any public record of a *public body*, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.” (emphasis added).

‘Public funds’ are, generally, funds belonging to a state or county or other political subdivision of a state, more especially taxes or other such moneys raised by the operation of some general law and appropriated by the government for the discharge of its obligations or for some public or governmental purpose. Beckner v. Commonwealth, 174 Va. 454, 5 S.E. 2d 525 (1939); State ex rel. St. Louis Police Relief Association v. Igoe, 340 Mo. 1166, 107 S.W. 2d 929 (1937). The notion of ‘support’ has been construed by the South Carolina Supreme Court 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).

BPW is a political subdivision which received the monies it donated to Limestone from charging the residents of Gaffney and Cherokee County for the provision of power, water, and wastewater services to them. These are clearly public funds. BPW aided or assisted Limestone by donating the money. Therefore, we believe that a court would conclude that Limestone is supported by public funds and that it is a “public body” for purposes of FOIA.

It is irrelevant to FOIA that Limestone College is a private nonprofit corporation. The South Carolina Supreme Court considered this argument in Weston v. Carolina Research and Development Foundation, 303 S.C. 398, 401 S.E.2d 161 (1991), and determined that a private corporation can be a “public body” for purposes of FOIA. The Court explained:

[T]he unambiguous language of 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).

Id.

In summary, “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.’” See Op. S.C. Atty. Gen., May 19, 2006, supra.

The type or amount of "support" is also irrelevant when determining whether an entity is supported in whole or in part by public funds under FOIA. We have priorly opined:

In determining whether a particular entity is supported in whole or in part by public funds, or is expending public funds, we have rejected any argument that there is a certain threshold level of support of an entity by public funds. Likewise, we have concluded that there exists no '*de minimis*' exception to the Act's applicability for public funding which is indirect or insignificant. . .What is important to keep in mind here is our statement in Op. No. 92-01 [*Op. S.C. Atty. Gen.*, Op. No. 92-01 (January 16, 1992)] 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"

Op. S.C. Atty. Gen., May 19, 2006, *supra*.

We therefore believe that a court would conclude that Limestone is supported by public funds and that it is a "public body" for purposes of FOIA.

CONCLUSION

In conclusion, it is the opinion of this Office that:

An outright donation without anything received in return does not appear to further the corporate purpose of BPW.

We believe that a court would conclude that Limestone is supported by public funds and that it is a "public body" for purposes of FOIA.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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