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T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BLDG.
POST OFFICE BOX 1287
COLUMBIA, S.C. 29201
TELEPHONE 803/734-397

May 26, 1988

The Honorable Joe B. Davenport
Chairman
Appalachian Council of Governments
Post Office Drawer 6668
Greenville, South Carolina 29606

Dear Mr. Davenport:

You have advised this Office that the Appalachian Council of Governments maintains a data base of salaries paid to various city and county governmental employees. Occasionally the Council receives requests from the news media to provide salary survey information. You have asked to what extent the Council, as a "third party public agency," would have a legal obligation to release such salary information to the media or the public. You have asked whether our response would be different if the request were associated or not with a project for a specified jurisdiction, whether salary reports should be released prior to completion of a particular study and presentation to the client, and whether requirements of the Freedom of Information Act would apply to information from private sector firms in the hands of the Council.

At the outset, we would note that a council of governments such as Appalachian Council of Governments would be a public body and thus subject to the requirements of the Freedom of Information Act. The term "public body" is defined by Section 30-4-20(a), Code of Laws of South Carolina (1987 Cum. Supp.) 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

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supported in whole or in part by public funds or expending public funds ... and includes any quasi-governmental body of the State and its political subdivisions

This Office examined the entity denominated a "council of government" by an opinion dated January 8, 1986 (copy enclosed) and noted that the legislature has called the entity an "organization" and a "public agency." See also Article VII, Section 15 of the State Constitution and Section 6-7-190 of the Code. Councils are funded from public sources such as funds from member political subdivisions, Section 6-7-170 of the Code, and the state appropriations act, Act No. 540 of 1986 (Part I, Section 125). Because a council of governments is a public agency or organization supported by and expending public funds, we conclude that the requirements of the Freedom of Information Act apply to a council of governments.

Appalachian Council of Governments, as noted, maintains a data base of salary information of local governmental employees; this information is collected annually from various local governments. You had advised that your current policy requires that a requestor be referred to the appropriate jurisdiction for a copy of the completed study of salaries once it has been presented to the requesting local governmental agency. News media are aware of these studies and the data base; the press can acquire such information directly from the local governmental agency or indirectly from Council survey reports.

You have asked about the obligation which the Council would have, as a third party having this information, should the public or news media request this information from the Council rather than the appropriate local governmental agency. By an opinion dated July 16, 1987 (copy enclosed), this Office stated, quoting from previous opinions:

There is no provision in the Freedom of Information Act for exemption from disclosure of otherwise disclosable information by one agency merely because the identical information is available from another agency. ... If the individual requesting the information is unable to obtain it from [the agency housing the original record], then the [other agency having a record containing the identical information] should not rely upon any provision of the South Carolina Freedom of Information Act as a basis for denying the request.

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The opinion discusses further what actions a third party might take with respect to notifying an individual or his employer that a request for salary information has been made; the remarks therein would be applicable to your question, particularly since the Council might not know whether a particular individual would be classified, unclassified, a department head or agency head as those terms are used in Section 30-4-40(a)(6) of the Code.

Our response would be the same whether the request is associated with the salary survey of a particular jurisdiction or with the entire scope of your data base on salary survey information.

You have asked whether salary information must be released to the news media or public prior to completion of a particular study and presentation of the study to the client-jurisdiction. You have also advised that most of the salary information used in a job classification and compensation study is in the data base prior to the actual start of the study. The answer to your question will depend upon the nature of the request. If a draft of the actual study is being sought, such should not be released until such drafts are made available to the client jurisdiction (local governmental agency) or otherwise distributed. Cooper v. Bales, 268 S.C. 270, 233 S.E.2d 306 (1977); Op. Atty. Gen. No. 84-125, dated October 26, 1984 (copy enclosed). If the request is not for the actual study but is merely for information already in the data base, such information should most probably be released.

You have asked about releasing information gathered from private sector firms. Whether this information becomes public information once the Council, as a public agency, has obtained it is the issue. The definition of "public record" in Section 30-4-20(c) of the Code provides:

"Public record" includes 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. ...

Unquestionably, this definition is very broad and could conceivably cover salary information of firms in the private sector which is in the possession of a public body such as the Council. Indeed, courts in other jurisdictions have so construed

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public records acts as broad as this State's to include documents of private sector businesses in the possession of or used by a public body. Washington Post Company v. New York State Insurance Department, 61 N.Y.2d 557, 463 N.E.2d 604 (1984); Attorney General v. Board of Assessors of Woburn, 378 N.E.2d 45 (Mass. 1978); Xerox Corporation v. Town of Webster, 65 N.Y.2d 131, 480 N.E.2d 74 (1985). If any doubt exists as to whether a particular document or item of information should be disclosed, it is the policy of this Office to disclose the information in doubtful cases.

Because, however, the Council is dealing with salary information of a private employee as opposed to a public employee, an exercise of prudence may be warranted. It has been stated that an individual may well have a right to privacy with respect to his private financial affairs, though such a right is not fundamental. Hunter v. City of New York, 88 Misc.2d 562, 391 N.Y.S.2d 289 (1976); see also Attorney General v. Collector of Lynn, 385 N.E.2d 505 (Mass. 1979). A public employee has a much less expectation of privacy since his salary is derived from public funds. Hunter, supra. In addition to a right to privacy, such information may also be protected by an exemption under Section 30-4-40 of the Code (enclosed). In the event that a request is received for salary information on employees of a private sector firm, it would be advisable for the Council to consider whether the disclosure may constitute an invasion of privacy (see, Op. Atty. Gen dated July 16, 1987, footnote 1 on page 6) and whether it may be exempt from disclosure under Section 30-4-40 of the Code. Finally, the Council may wish to consult with the private sector firm prior to disclosure of such salary information. As stated earlier, if after considering all of the above factors any doubt remains as to disclosure, we advise resolving the doubt in favor of disclosure.

Your final question is whether salary information from private sector firms, in the possession of a public body such as the Council, would be subject to the same disclosure requirements as would public employee salary information. Section 30-4-40(a)(6) of the Code (copy enclosed) protects from disclosure "all compensation paid by public bodies" except as detailed in the statute. In some instances, exact compensation must be disclosed; in other cases, compensation must be disclosed within a specified range. Unless an entity is classified as a public body as defined above, the entity would not be subject to the compensation disclosure requirements of Section 30-4-40(a)(6).

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We trust that the foregoing has adequately responded to your inquiry. Please advise if clarification or additional assistance should be needed.

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