



ALAN WILSON
ATTORNEY GENERAL

September 12, 2014

The Honorable Dan Johnson
Fifth Circuit Solicitor
Post Office Box 192
Columbia, SC 29201

Dear Solicitor Johnson:

Attorney General Alan Wilson has referred your letter dated August 15, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue: May the Fifth Circuit Solicitor's Office create a nonprofit eleemosynary corporation as a foundation to provide first aid kits consisting of various supplies, devices and assistance to aid participants in the Veterans and treatment court programs?

Law/Analysis:

By way of background, let us review the authority given to a Solicitor. First and foremost the South Carolina Constitution grants a Solicitor his authority. Our State Constitution states:

There shall be elected in each county by the electors thereof a clerk of the circuit court, a sheriff, and a coroner; and in each judicial circuit a **solicitor** shall be elected by the electors thereof. All of these officers shall serve for terms of four years and until their successors are elected and qualify. The General Assembly shall provide by law for their duties and compensation.

S.C. Const. Art. V, § 24 (emphasis added). The Constitution clearly grants the General Assembly authority to establish laws concerning a Solicitor's duties and pay. Id. Moreover, the South Carolina Constitution also grants the General Assembly authority to establish laws governing corporations when it states:

The General Assembly shall provide by general law for the formation, organization, and regulation of corporations and shall prescribe their powers, rights, duties, and liabilities, including the powers, rights, duties, and liabilities of their officers and stockholders or members.

S.C. Const. Article IX, § 2. The General Assembly then outlines the duties of Solicitors and their funding in South Carolina Code § 1-7-310 et seq. A Solicitor is a creature of statute and therefore only has authority expressly conferred or necessarily implied from his enabling legislation for him to effectively fulfill the duties with which he is charged. Op. S.C. Atty. Gen., 2009 WL 276743 (January 7, 2009) (citing S.C. Coastal Conservation League v. South Carolina Dep't of Health & Env'tl. Control, 363 S.C. 67, 610 S.E.2d 482 (2005)). At this time there is no specific statute giving a Solicitor authority to create a

foundation that we are aware of. However, as the scope of a Solicitor's duties can be broad, there does not appear to be direct statutory prohibition against such a foundation either. As this Office has previously opined, authority to create a nonprofit corporation as a foundation can be implied through statutory authority. This Office recently answered a similar question concerning the ability of a public university in South Carolina to create a nonprofit foundation. In that opinion this Office stated:

This Office has issued numerous opinions concerning whether State agencies or universities may create an eleemosynary nonprofit corporation such as one Coastal Carolina University is hoping to create. In a 1997 opinion this Office opined that the South Carolina Department of Parks Recreation and Tourism ("PRT") could create a nonprofit foundation for the benefit of the State and for PRT. Op. S.C. Atty. Gen., 1997 WL 87934 (January 16, 1997). In a 1977 opinion this Office opined that the State Housing Authority had the power to establish a non-profit corporation based on its broad powers. Op. S.C. Atty. Gen., 1977 WL 24406 (February 28, 1977). A 2004 opinion opined that the Hunley Commission could create a nonprofit corporation based on prior opinions from this Office that concluded governmental entities are not prohibited from creating nonprofit corporations to further their statutory purposes. The opinion also cited an Indiana case upholding as private funds private donations received by a university foundation for the benefit of a state university. Op. S.C. Atty. Gen., 2004 WL 2451471 (October 22, 2004) (citing State Board of Accounts v. Indiana Univ. Foundation, 647 N.E.2d 342 (Ind. 1995)). In a 1994 opinion this Office opined the Patriot's Point Development Authority ("PPDA") could establish a nonprofit corporation to further its purposes given by statute. Op. S.C. Atty. Gen., 1994 WL 703275 (November 15, 1994). While that opinion acknowledged that such an entity was a creature of statute, it went on to state:

Having reviewed the enabling authority of the PPDA, we are unable to locate any specific authority allowing the PPDA to create a nonprofit corporation. However, in examining the statutorily authorized powers of the PPDA, it would appear that the statute gives PPDA very broad and general powers "to do and perform any act or function which may tend to or be useful toward the development and improvement of Patriot's Point." § 51-13-760(7). Further, the PPDA has the power "to do any and all other acts and things authorized or required to be done by the article, whether or not included in the general powers mentioned in § 51-13-770(9)."

Even though the State Legislature has not expressly delegated PPDA power to create a nonprofit corporation, the Legislature has, however, given PPDA the power "to do any and all things necessary to accomplish the purposes to the[e] article." § 51-13-770(10). The fact that the State has given this specific authority to PPDA is an indication that the power to create a nonprofit corporation would be consistent with the Legislature's intent of the Act.

The law of South Carolina generally does not prohibit the state agencies or authorities from establishing nonprofit corporations. [See Op. Atty. Gen., February 28, 1977, where the State Housing Authority was found to have the power to create a nonprofit organization as included among its "necessary, proper, incidental or useful" powers. Since the State Housing Authority could issue bonds to finance the construction of low cost housing, it could choose to

form a nonprofit organization that would carry out that task. See also South Carolina Nonprofit Corporation Act, Act No. 384, May 10, 1994.]

Here, the entrepreneurial character of the PPDA and the broad powers conferred upon it would seem to allow the PPDA to create a nonprofit corporation. The PPDA has the power "to sue and be sued, to make contracts and to adopt and use a common seal ... and to acquire, lease, mortgage, and dispose of personal and real property."

Therefore, based on the foregoing, it is the opinion of this Office that the PPDA should be permitted to create a nonprofit corporation. The power to establish such a corporation can be derived from the express power to regulate the manner in which the business of the PPDA is to be transacted and the express power to do any and all things necessary to accomplish the purpose of the Act. § 51-13-770(8) & (10). Further, the creation of such a corporation is apparently deemed a necessary tool to the improvement and development of the Patriot's Point area over which the PPDA has jurisdiction.

Id. Moreover, a 2009 opinion by this Office concluded that while there was no express authority in the enabling legislation for the Office on Aging to create a nonprofit corporation, as long as the nonprofit corporation furthers the purposes of the Office on Aging it could create a nonprofit corporation. Op. S.C. Atty. Gen., 2009 WL 276743 (January 7, 2009).

... Furthermore, a Virginia Attorney General opinion stated that nonprofit foundations that are organized on behalf of state universities "need only comply with the laws that govern such corporations." Op. Va. Atty. Gen., 1996 WL 658746 (September 3, 1996) (citing 1984-1985 Op. Va. Atty. Gen., 46, 47). ... The issues seem to be in the relationship the foundation has the university or state agency with which it is associated. While you did not ask, it should be noted that this Office has issued previous opinions concluding that public funds may not be issued to private foundations or other such corporations except payment for goods and services unless the university has specific statutory authority. Ops. S.C. Atty. Gen., 2000 WL 1205928 (May 1, 2000); 1993 WL 720111 (May 21, 1993); 1976 WL 23033 (August 3, 1976); 1973 WL 21052 (August 10, 1973). As a further aside note, our State Supreme Court has previously held such university foundations may be subject to the South Carolina Freedom of Information Act (FOIA). Weston v. Carolina Research & Development Foundation, 303 S.C. 398, 401 S.E.2d 161 (1991).

Op. S.C. Atty. Gen., 2014 WL 386692 (July 29, 2014). Moreover, it is this Office's understanding that there is already at least one Solicitor's office in South Carolina that has a foundation set up as a nonprofit corporation. See S.C. Secretary of State, available at <http://www.sos.sc.gov> (last visited September 9, 2014). Pursuant to the General Assembly's authority to provide for Solicitors' duties and compensation, we will presume that since there is already at least one such nonprofit eleemosynary corporation created over a decade ago as a foundation for a Solicitor's office that in the absence of legislative or judicial action, such a foundation could be presumed to be permissible as implied within the scope of a Solicitor's statutory authority.

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A few other Attorneys General have opined on similar questions. In a 2003 Louisiana Attorney General's opinion a District Attorney's Office wanted to create a 501(c)(3) nonprofit corporation separate from the District Attorney's Office. That opinion concluded that while the Louisiana Constitution prohibited the donation of public funds from a State agency, it did not prohibit the acceptance of donated funds. Op. La. Atty. Gen., 2003 WL 22683693 (October 27, 2003). An Alabama Attorney General's opinion addressed giving funds to a nonprofit corporation for law enforcement purposes that is used by the District Attorney's Office and other law enforcement. That opinion found the appropriation to a nonprofit children's advocacy center used by the District Attorney's Office was permissible. Op. Al. Atty. Gen., 1993 WL 764440 (November 24, 1993).

However, even if you have implied statutory authority to create a nonprofit eleemosynary corporation, it goes without saying that any such corporation would have to comply with all laws and regulations, including compliance with the Secretary of State, the Department of Revenue, the Internal Revenue Service and the prohibition of giving state funds to private corporations except in payment for goods or services. Op. S.C. Atty. Gen., 2014 WL 386692 (July 29, 2014). Moreover, while the court has recognized Eleventh Amendment immunity for a South Carolina Solicitor's office, we urge caution in creating a nonprofit foundation. Curry v. S.C., 518 F.Supp.2d 661, 668-669 (D.S.C. 2007). A court may not go so far as to grant a Solicitor's office's nonprofit foundation Eleventh Amendment immunity. We would also urge caution regarding indemnification agreements. As you are likely aware, State agencies cannot enter into indemnification agreements. Op. S.C. Atty. Gen., 2010 WL 1808721 (April 6, 2010), et al. Public universities have desired to start foundations specifically to sign contracts and other agreements that they would not otherwise be authorized to do so as a State agency but may do so as a private nonprofit corporation. See, e.g., Op. S.C. Atty. Gen., 2014 WL 3886692 (July 29, 2014). Furthermore, any ethical considerations would need to be addressed with the South Carolina Ethics Commission.

Conclusion: Noting all of the above caveats and presuming you comply with all other laws and rules concerning nonprofit corporations, charities and the use of public funds, this Office believes a court will likely find such a nonprofit organization created by a Solicitor's office may exist as long as it is within the implied scope of a Solicitor's statutory authority. Nevertheless, there are many other sources and authorities you may want to refer to for a further analysis. For a binding determination, this Office would recommend seeking a declaratory judgment from a court or specific legislative authorization. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only a legal opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

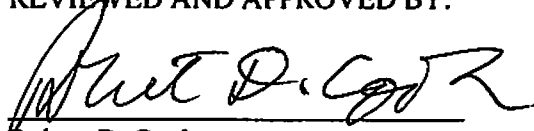
Sincerely,



Anita S. Fair
Assistant Attorney General

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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "Robert D. Cook", written over a horizontal line.

Robert D. Cook
Solicitor General