



ALAN WILSON  
ATTORNEY GENERAL

April 03, 2018

The Honorable Bart T. Blackwell, Member  
South Carolina House of Representatives  
District No. 81  
PO Box 6658  
Aiken, South Carolina 29804

Dear Representative Blackwell:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

I am asking that the Attorney General's office provide me with an opinion on the following constituent questions:

1. An interpretation of the State Code of Laws in reference to nonprofit organizations that are compelled under S.C. Code Ann. § 33-31-1602 to provide their members with documents within five business days as to whether that organization has the right to then implement an internal policy that extends the five days to 30 days?
2. Are SC non-profits that fall under IRS Code 501(c)(6) subject to these same disclosure and document review laws?
3. Do those documents of a SC nonprofit subject to inspection by members as indicated in SC 33-31 include: any and all corporate documents, service invoices, business receipts, vendor agreements, employee contracts, all documents supporting the IRS 990 filing, reimbursements to employees and members, etc. and other documentation associated with the establishment of an annual budget?

#### Law/Analysis

This Opinion will address each of your constituent's questions in turn.

1. **An interpretation of the State Code of Laws in reference to nonprofit organizations that are compelled under SC: 33-31-1602 to provide their members with documents within five business days as to whether that organization has the right to then implement an internal policy that extends the five days to 30 days?**

The South Carolina Nonprofit Corporation Act (the "Act") provides for the inspection of such a corporation's records by its members according to the following conditions:

(a) Subject to subsection (e) and Section 33-31-1603(c), a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in Section 33-31-1601(e) if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.

(b) Subject to subsection (e), a member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (c) and gives the corporation written notice at least five business days before the date on which the member wishes to inspect and copy:

- (1) excerpts from any records required to be maintained under Section 33-31-1601(a), to the extent not subject to inspection under Section 33-31-1602(a);
- (2) accounting records of the corporation; and
- (3) subject to Section 33-31-1605, the membership list.

(c) A member may inspect and copy the records identified in subsection (b) only if:

- (1) the member's demand is made in good faith and for a proper purpose;
- (2) the member describes with reasonable particularity the purpose and the records the member desires to inspect; and
- (3) the records are directly connected with this purpose.

(d) This section does not affect:

- (1) the right of a member to inspect records under Section 33-31-720 or, if the member is in litigation with the corporation, to the same extent as any other litigant; or

(2) the power of a court, independently of this chapter, to compel the production of corporate records for examination.

(e) The articles or bylaws of a religious corporation may limit or abolish the right of a member under this section to inspect and copy any corporate record.

S.C. Code Ann. § 33-31-1602 (emphasis added). This Office's December 21, 2011 opinion to Senator Tom Davis analyzed this statute in response to the very similar question of whether a nonprofit corporation's bylaws and covenants could supersede the Act's inspection provisions. Op. S.C. Atty. Gen., 2011 WL 6959369 (December 21, 2011). Therein, we stated:

South Carolina courts have recognized the general rule that the bylaws of a corporation are invalid to the extent they are inconsistent with State law. See King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936) ("All resolutions and by-laws must be conformable and subordinate to the general laws"); Davis v. S.C. Cotton Growers' Co-op. Ass'n, 127 S.C. 353, 121 S.E. 260, 261 (1924) ("Bylaws regulating in a reasonable manner, the method of voting at corporate elections will be sustained, if their provisions do not conflict with the charter or statute"); Lovering v. Seabrook Island Property Owners Ass'n, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986) *aff'd as modified*, 291 S.C. 201, 352 S.E.2d 707 (1987) ("A corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and any by-laws made pursuant thereto"); Ortega v. Kingfisher Homeowners Ass'n, Inc., 314 S.C. 180, 182-83, 442 S.E.2d 202, 204 (Ct. App. 1994) (provision in association's bylaws calling for up to five directors with staggered terms violated statute requiring at least nine directors in order to stagger terms); see also 18 C.J.S. Corporations § 163 ("by laws inconsistent with statutory law, the common law, or with public policy or good morals, are void").

The general rule that a corporation's bylaws must be consistent with State law has also been codified by the General Assembly. See § 33-3-102(3), (15) (every corporation generally has power to adopt bylaws or do any other act not inconsistent with State law). The Nonprofit Act describes the general powers of a corporation, in pertinent part, as follows:

Unless its articles of incorporation provide otherwise, **every corporation ...has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including, without limitation, power [to]:**

....

(3) **make and amend bylaws not inconsistent** with its articles of incorporation or **with the laws of this State** for regulating and managing the affairs of the corporation;

....

[(15) make payments or donations, or **do any other act, not inconsistent with law**, that furthers the business and affairs of the corporation.]

§ 33-31-302 (emphasis added); *see also* § 33-31-206(b) (“The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation”).

Consistent with the general rule set forth in the case law and statutes discussed above, we have no difficulty concluding that a nonprofit corporation's bylaws concerning a member's inspection rights are valid only to the extent they are consistent with the provisions of section 33-31-1602. Further support for this conclusion is found in subsection (e) of this statute. See 33-31-1602(e) (“The articles or bylaws of a *religious corporation* may limit or abolish the right of a member under this section to inspect and copy any corporate record”) (emphasis added). It would have been unnecessary for the Legislature to expressly allow only religious corporations to adopt bylaws abolishing or limiting a member's statutory inspection rights if the general rule did not otherwise apply to all nonprofit corporation. Thus, it is our opinion that the bylaws of a nonreligious, nonprofit corporation such as a gated community concerning the inspection rights of members must be consistent with the provisions of § 33-31-1602.

Id. (emphasis in original).

This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or there has been a change in applicable law. Ops. S.C. Atty. Gen., 2017 WL 3438532 (July 27, 2017); 2013 WL 6516330 (November 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984). Your letter does not cite a change to S.C. Code Ann. § 33-31-1602 or other relevant legal authority since this Office issued our opinion, nor has our research uncovered such a change.<sup>1</sup> Therefore, this Office reaffirms our December 21, 2011 opinion's conclusion and finds

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<sup>1</sup> “The absence of any legislative amendment following the issuance of an opinion of the Attorney General strongly suggests that the views [ex]pressed therein were consistent with the legislative intent.” Op. S.C. Atty. Gen., 2005 WL 2250210 (September 8, 2005) (citing Scheff v. Township of Maple Shade, 149 N.J.Super. 448, 374 A.2d 43 (1977)).

it compels our response herein as well. It is this Office's opinion that a nonreligious nonprofit corporation has no authority to vary a member's right to inspect and copy the records of the corporation as set forth in Section 33-31-1602 of the South Carolina Code of Laws.

**2. Are SC non-profits that fall under IRS Code 501(c)(6) subject to these same disclosure and document review laws?**

26 U.S.C. § 501, I.R.C. § 501, is a federal statute which provides exemptions from certain federal taxes for specific categories of organizations. Your question references subsection (c)(6) which includes the following organizations:

(6) Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

26 U.S.C. § 501(c)(6). This Office is unaware of any provision within the South Carolina Nonprofit Corporation Act which exempts these organizations from complying with the inspection requirements discussed above. Religious corporations are expressly authorized to limit or abolish the right of a member to inspect and copy corporate records under S.C. Code Ann. § 33-31-1602(e). However, there is no equivalent authority in the Act to limit or abolish members' rights to inspect or copy records based solely on a nonprofit corporation's federal tax status.

**3. Do those documents of a SC nonprofit subject to inspection by members as indicated in SC 33-31 include: any and all corporate documents, service invoices, business receipts, vendor agreements, employee contracts, all documents supporting the IRS 990 filing, reimbursements to employees and members, etc. and other documentation associated with the establishment of an annual budget?**

As discussed in response to question one, S.C. Code Ann. § 33-31-1602(a) allows a member "to inspect and copy ... any of the records of the corporation described in Section 33-31-1601(e)." Section 33-31-1601(e) requires a corporation to keep the following records at its principle office:

- (1) its articles or restated articles of incorporation and all amendments to them currently in effect;
- (2) its bylaws or restated bylaws and all amendments to them currently in effect;
- (3) resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;

- (4) the minutes of all meetings of members and records of all actions approved by the members for the past three years;
- (5) all written communications to members generally within the past three years, including the financial statements furnished for the past three years under Section 33-31-1620;
- (6) a list of the names and business or home addresses of its current directors and officers; and
- (7) its most recent report of each type required to be filed by it with the Secretary of State under this chapter.

S.C. Code Ann. § 33-31-1601(e). The corporate records listed above clearly are included within those records which a member is entitled to inspect and copy under Section 33-31-1602.

Further, Section 33-31-1602(b) allows a member “inspect and copy, at a reasonable time and reasonable location specified by the corporation... (1) excerpts from any records required to be maintained under Section 33-31-1601(a), to the extent not subject to inspection under Section 33-31-1602(a); (2) accounting records of the corporation; and (3) ... the membership list.” Aside from “corporate documents,” the records listed in question three would likely be considered “accounting records of the corporation.” *Id.* The duty to “maintain appropriate accounting records” is found in S.C. Code Ann. § 33-31-1601(b). This Office’s January 26, 2016 opinion to Senator Tom Davis explained why it is difficult to categorically state which accounting records must be maintained and available for member inspection as follows:

We could not find a specific answer to your question. The South Carolina Reporters' Comments to the South Carolina Nonprofit Corporation Act of 1994 explains that the South Carolina law was based on the American Bar Association's Revised Model Nonprofit Corporation Act. It states:

[t]his act is derived from the Revised Model Nonprofit Corporation Act adopted in 1987 by the Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section of the American Bar Association. The Official Comments following each section were prepared by the Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section of the American Bar Association. They are reproduced with permission. These Official Comments describe the substantive decisions made in the drafting process and in many cases explain the meaning and purpose of the section.

South Carolina Reporters' Comments, S.C. Code Ann. § 33-31-101 (1976 Code, as amended).

Based upon the Reporters' Comments, we reviewed the Official Comment to section 33-31-1601 for an explanation of the meaning and purpose of the section. While helpful, it is not dispositive, and it provides:

[t]he question of what accounting records are “appropriate” depends on the nature, size and other characteristics of the corporation. Numerous nonprofit corporations have a relatively small amount of money and operate with volunteer staffs. In such cases, “appropriate accounting records” may be composed of checkbooks, canceled checks and receipts. In the case of entities with significant funds, more detailed accounting records are appropriate.

“Appropriate” records should allow the financial statements to be prepared in a fashion that fairly presents the financial condition and results of operations of the corporation.

Official Comments, S.C. Code Ann. § 33-31-1601 (1976 Code, as amended).

In our December 21, 2011 opinion mentioned above, we opined that

[t]he provisions of the South Carolina Business Corporation Act of 1988, which encompasses Chapters 1 through 20 of Title 33 of the S.C. Code, are applicable to nonprofit corporations to the extent such provisions are not inconsistent with those of the Nonprofit Act. § 33-20-103.

A review of the South Carolina Business Corporation Act of 1988, S.C. Code Ann. § 33-1-101 et seq. (1976 Code, as amended) shows that the language of section 33-16-101 is similar to that of section 33-31-1601 in that it provides for a corporation maintaining “appropriate accounting records.” S.C. Code Ann. § 33-16-101 (1976 Code, as amended). Section 33-16-102 succinctly states that “[t]he [South Carolina Business Corporation] Act does not attempt to define what accounting records must be kept.” S.C. Code Ann. § 33-16-102 (1976 Code, as amended).

Both the Nonprofit Corporation Act and the Business Corporation Act indicate that what books and records are “appropriate” varies from corporation to corporation, based on factors such as type of operations and financial situations. The best method of determining what records are “appropriate” for a medium to large members plus director(s) nonprofit corporation is to seek a ruling from a court.

Op. S.C. Atty. Gen., 2016 WL 963698, at 2–3 (January 26, 2016) (footnote omitted).

Because there has been no change in the statutory authority cited above nor clarifying state court precedent subsequent to publication of the opinion, this Office reaffirms our January 26, 2016 opinion’s analysis. While many of the items listed may well be considered appropriate accounting records for a nonprofit corporation to maintain in a given situation, this Office cannot categorically state that all domestic nonprofit corporations possess the resources to adequately maintain them. The determination of which accounting records a specific domestic nonprofit corporation has a duty to maintain under Section 33-31-1601(b) and to make available for inspection under Section 33-31-1602(b)(2) is a factual determination which this Office is not empowered to make. See Op. S.C. Atty. Gen., 2015 WL 4497734 (July 2, 2015) (“[A]s we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts.”). However, a member of a nonprofit corporation may petition our state courts for a declaratory judgment, as only a court of law can make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended).

### **Conclusion**

As discussed more fully above, it is this Office’s opinion that a court would likely find the following:

- (1) A nonreligious nonprofit corporation has no authority to vary a member’s right to inspect and copy the records of the corporation as set forth in S.C. Code Ann. § 33-31-1602.
- (2) There is no authority in the South Carolina Nonprofit Corporation Act to limit or abolish members’ rights to inspect or copy records based solely on a nonprofit corporation’s federal tax status under 26 U.S.C. § 501(c)(6).
- (3) The corporate records required to be maintained under S.C. Code Ann. § 33-31-1601(e) are expressly listed as records available for inspection and copying by a member of a nonprofit corporation in S.C. Code Ann. § 33-31-1602(a). The remaining document types listed in question three would likely be considered “accounting records of the corporation.” S.C. Code Ann. § 33-31-1602(b). The determination of which accounting records a specific domestic nonprofit corporation has a duty to maintain under Section 33-31-1601(b) and to make available for inspection under Section 33-31-1602(b)(2) is a factual determination which this Office is not empowered to make. See Op. S.C. Atty. Gen., 2015 WL 4497734 (July 2, 2015) (“[A]s we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts.”). However, a member of a nonprofit corporation may petition our state courts for a



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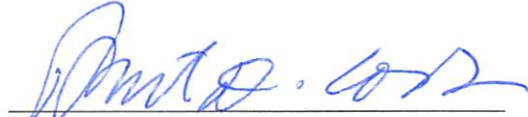
declaratory judgment, as only a court of law can make such determinations. See S.C.  
Code § 15-53-20.

Sincerely,



Matthew Houck  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
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