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James E. Bradley

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MEDIA LAW

I. CAROLINA RESEARCH AND DEVELOPMENT FOUNDATION CONSIDERED PUBLIC BODY UNDER FREEDOM OF INFORMATION ACT

In *Weston v. Carolina Research & Development Foundation*¹ the South Carolina Supreme Court held that the Carolina Research and Development Foundation ("Foundation") is a public body under the South Carolina Freedom of Information Act (FOIA).² The court followed the language of the FOIA rather than common-law distinctions between private and public corporations and held that a private corporation may become a public body under the FOIA by receiving or controlling state funds.³

The Foundation, an eleemosynary corporation incorporated under the nonprofit corporation provisions of the South Carolina Code,⁴ operates solely for the benefit of the University of South Carolina ("University").⁵ During an investigation of the University's spending practices, reporters sought records from the Foundation.⁶ Alleging that the Foundation was a public body under the FOIA, *The Greenville News* and the Associated Press brought action to obtain the Foundation's financial records.⁷ The trial judge ruled that the Foundation was a public body within the meaning of the FOIA,⁸ and the supreme court affirmed that ruling.⁹

In holding the Foundation subject to the FOIA, the supreme court considered whether the Foundation fell within the FOIA's definition of "public body."¹⁰ Beyond specifically listed groups, the FOIA defines a public body as "any organization, corporation, or agency supported in

1. 303 S.C. 398, 401 S.E.2d 161 (1991).

2. *Id.* at 401, 401 S.E.2d at 163. The South Carolina Freedom of Information Act is codified at S.C. CODE ANN. §§ 30-4-10 to -110 (Law. Co-op. 1991).

3. *Weston*, 303 S.C. at 403-04, 401 S.E.2d at 164-65.

4. S.C. CODE ANN. §§ 33-31-10 to -450 (Law. Co-op. 1990).

5. *Weston*, 303 S.C. at 400, 401 S.E.2d at 162.

6. *Foundation Is "Public Body" Under FOIA; Data Destroyed*, NEWS MEDIA & L., Spring 1991, at 13.

7. Respondents Chris Weston and Multimedia, Inc., d/b/a The Greenville News-Piedmont Company, and respondents John C. Shurr and the Associated Press instituted two separate actions against the Foundation. Because the issues in the cases were the same, the court consolidated the cases for appeal. *Weston*, 303 S.C. at 400 n.2, 401 S.E.2d at 162 n.2.

8. *Id.* at 400, 401 S.E.2d at 163.

9. *Id.* at 405, 401 S.E.2d at 165.

10. *Id.* at 400, 401 S.E.2d at 163.

whole or in part by public funds or expending public funds.”¹¹ The court analyzed four specific Foundation transactions to reach the conclusion that the Foundation receives support from and spends public funds.¹² The court stated in dicta that any one of these four transactions alone would bring the Foundation within the FOIA’s definition of public body, but that taken together, the transactions lead to the “unavoidable conclusion that the Foundation is a ‘public body.’”¹³

The court rejected the Foundation’s contention that the common-law distinctions between private and public corporations override the language of the FOIA. Under common law, a corporation does not lose its private status by receiving the support of public funds.¹⁴ However, the *Weston* court found that the “unambiguous language of the FOIA

11. S.C. CODE ANN. § 30-4-20(a) (Law. Co-op. 1991).

12. *Weston*, 303 S.C. at 401, 401 S.E.2d at 163. The first transaction concerned the sale of the Wade Hampton Hotel, a student residence hall owned by the University. When the University sold the hotel, the Foundation received \$2,000,000 of the total consideration. The court held that, because the Foundation received these funds in consideration for the sale of public real estate, the Foundation accepted support from public funds. *Id.*

The second transaction concerned the development of the Swearingen Engineering Center. The Foundation, acting as an agent of the University, accepted and controlled the spending of \$16,300,000 in federal grants. The court held that, although the money may have gone solely to the Swearingen Engineering Center’s construction, the Foundation received partial support from public funds by using University personnel in constructing the center. The court also noted that the Foundation clearly directed the expenditure of public funds. *Id.* at 401-02, 401 S.E.2d at 163.

The third transaction concerned the development of the Koger Center. The Foundation accepted a conveyance of cash and real estate from the City of Columbia and a cash grant from Richland County. The court held that, by managing the expenditure of these grants and the development of the real estate, the Foundation received support from and spent public funds. *Id.* at 402, 401 S.E.2d at 164.

The last transaction the court considered concerned University research and development contracts. The University received these contracts from private third parties in exchange for research done by University employees. The University routed these contracts through the Foundation, which retained 15 to 25% of the total contract amount. The Foundation asserted that this sum was an administrative fee earned for handling the contracts. However, the court held that, because the Foundation did not show that its personnel performed any service to earn the fees, the money represented support from public funds. *Id.* at 403, 401 S.E.2d at 164.

13. *Id.*

14. *Id.* (citing *Trustees of Columbia Academy v. Board of Trustees*, 262 S.C.

mandates that the receipt of support in whole or in part from public funds brings a corporation within the definition of a public body.”¹⁵

The court noted that the FOIA does not apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services in an arms-length transaction. However, when a public body diverts a block of funds to a related organization, or when a related organization manages the expenditure of public funds, “the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.”¹⁶

Under the court’s interpretation of the statutory definition of public body, an organization may be subject to the FOIA by: (1) taking money from the sale of public real estate; (2) using public personnel;¹⁷ (3) directing the expenditure of public funds; (4) accepting real estate from public bodies; or (5) charging a fee for handling public money without producing evidence of service performed.¹⁸ Because the supreme court’s interpretation of the FOIA focuses on support from or expenditure of public funds, entities that had previously been exempt from FOIA’s requirements may now come within the parameters of the Act. Any organization “supported in whole or in part by public funds or expending public funds” is a public body subject to the FOIA unless the organization fits within a narrow statutory exemption.¹⁹

Questions concerning application of the FOIA should be resolved in favor of coverage because the FOIA’s broad definition of “public body” exempts only certain public health-care facility committees.²⁰ The broad definition of public body under the FOIA reaches both local governmental and nongovernmental organizations. Organizations such as school boards,²¹ building commissions,²² airport commissions,²³ police departments,²⁴ and subcommittees of such bodies²⁵ are subject to the

15. *Id.*

16. *Id.* at 404, 401 S.E.2d at 165.

17. *Id.* at 401-02, 401 S.E.2d at 163.

18. *Id.* at 402-03, 401 S.E.2d at 164.

19. S.C. CODE ANN. § 30-4-20(a) (Law. Co-op. 1991).

20. DAVID E. SHIPLEY, *SOUTH CAROLINA ADMINISTRATIVE LAW* 8-4 (2d ed. 1989).

21. *Cooper v. Bales*, 268 S.C. 270, 233 S.E.2d 306 (1977).

22. *Florence Morning News, Inc. v. Building Comm’n*, 265 S.C. 389, 218 S.E.2d 881 (1975).

23. *Multimedia, Inc. v. Greenville Airport Comm’n*, 287 S.C. 521, 339 S.E.2d 884 (Ct. App. 1986).

24. *Turner v. North Charleston Police Dep’t*, 290 S.C. 511, 351 S.E.2d 583 (Ct. App. 1986).

FOIA's requirements. If subcommittees and advisory committees of public bodies are included in the FOIA's definition, organizations such as the USC basketball coach search committee,²⁶ the USC Faculty Senate,²⁷ the USC Research Advisory Committee,²⁸ and the Law School Steering Committee are subject to disclosing their records.²⁹ Other organizations that may be subject to the FOIA's requirements because of partial public funding include parent-teacher associations, local band and athletic booster clubs, and local chambers of commerce. Any private entity that receives and expends public funds, no matter how small the amount, may be subject to the FOIA's requirements.

Given the supreme court's interpretation of the term "public body," the FOIA's definition of public records appears unusually broad. The FOIA covers all records of private organizations that expend public funds;³⁰ therefore, all records in the possession of a public body, regardless of their origin or the reason for their creation or acquisition, are public unless they fall under one of the specific statutory exemptions.³¹ Taken at face value, the combination of a liberal definition of public record and a broad definition of public body requires disclosure of almost every record held by an organization that receives any public funding. Any organization falling within the FOIA's definition of public body is wholly subject to the record-keeping,³² notification,³³ public meeting,³⁴ and disclosure requirements of the FOIA,³⁵ even though the organization depends chiefly on private actors and private funds.

Some states' freedom of information laws require that an organization receive a particular percentage of public funding before being subject to the requirements of the statute.³⁶ These threshold requirements also exempt some nongovernmental organizations. However, the

25. S.C. CODE ANN. § 30-4-20(a) (Law. Co-op. 1991).

26. 1991 Op. S.C. Att'y Gen. No. 91-42.

27. SHIPLEY, *supra* note 20, at 8-5.

28. *Id.*

29. *Id.*

30. S.C. CODE ANN. § 30-4-20(a) (Law. Co-op. 1991).

31. *Id.* § 30-4-20(c).

32. *Id.* § 30-4-90.

33. *Id.* § 30-4-80.

34. *Id.* § 30-4-60.

35. *Id.* § 30-4-30.

36. *See, e.g.,* KY. REV. STAT. ANN. § 61.870 (Michie/Bobbs-Merrill 1986). Kentucky's freedom of information law includes any body "which is created by state or local authority in any branch of government or which derives at least twenty-five percent (25%) of its funds from state or local authority." *Id.*

threshold requirement does not apply the freedom of information laws to an organization that falls below the funding threshold.

Neither the South Carolina statute nor those of other states provide for bifurcation of funds for agencies partially supported by public funds.³⁷ Such a provision would allow private organizations to enjoy some public funding while enabling citizens to monitor the expenditure of state funds. However, strict separation of funds would be necessary in order to avoid the mixing of private and public funds. Additionally, a bifurcation provision would have to specify which meetings and documents would be open to the public.

In *Weston* the court applied the FOIA to a private organization that sheltered the expenditure of public funds from public scrutiny.³⁸ The FOIA, as interpreted by *Weston*, can subject essentially private organizations and private records to the FOIA's requirements. If an organization is a public body, all records and meetings that do not fall within a specific exception are public. If an organization is private, none of its records or meetings fall within the FOIA. In the future, it may be appropriate to seek a balance between expansive coverage and no coverage through either a minimum funding standard or application of the FOIA to only records and meetings that deal with public funds.

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37. See Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720 (1981).

38. *Weston v. Carolina Res. & Dev. Found.*, 303 S.C. 398, 404, 401 S.E.2d 161, 165 (1991).