

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

SOUTH CAROLINA FREEDOM OF
INFORMATION ACT AND NONPROFIT
ED FUNDAMENTALS

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FOIA AND NONPROFIT ECONOMIC DEVELOPMENT ORGANIZATIONS

You work for an Alliance which is funded in part by 3 counties. It is a 501(c)(3). You get a FOIA from The Nerve asking for all emails in which you referred prospects to any attorney/engineer/bank that is an Investor in your alliance. The FOIA is cleverly worded – it excludes active projects that are subject to FOIA exemptions.

Do you have to respond?

FOIA AND NONPROFIT ECONOMIC DEVELOPMENT ORGANIZATIONS

And if you have to respond, does that mean you have to provide written notice to the media and the public of the times, places and agenda of all your meetings?

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GENERAL

All entities supported in whole or in part by public funds or expending public funds, regardless of what the group calls itself or is known as, are considered a public body and are subject to the FOIA.

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The Act applies to “public bodies.” As discussed below, the definition of “public bodies” may include “private” non-profits.

GENERAL

Entities subject to FOIA must comply with a variety of statutory requirements. These include:

1. Making available for public inspection and copying certain documents, including minutes of meetings, during regular office hours without any written request;
2. Making available for inspection and copying upon written request any “public record;”
3. Holding meetings which are open to the public;

GENERAL

4. Providing written notice of all public meetings not later than 24 hours before the meeting; and
5. Notifying persons or organizations, local news media or such other news media as may request notification of the times, places, and agenda of all public meetings.

DEFINITION OF “PUBLIC BODY”

The definition of “public body” is quite broad. Naturally it includes any department of the state, any state board, commission or agency as well as any political subdivision of the state, including counties, municipalities and school districts. The Act goes on however, to expressly include “any organization, *corporation*, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known...”

WESTON V. CAROLINE RESEARCH AND DEVELOPMENT FOUNDATION

In Weston, the South Carolina Supreme Court held that the USC Foundation, organized as a private non-profit, was subject to FOIA as it received Local, State and federal funds to assist USC in various transactions.

WHAT KIND AND HOW MUCH “PUBLIC SUPPORT” IS REQUIRED?

The South Carolina Attorney General has opined that while “the notion of ‘support’ is not defined in the FOIA, the South Carolina Supreme Court has constructed ‘support’ to mean ‘to maintain or aid and assist’ in the maintenance...or to ‘uphold or sustain.’” The kind or amount of support that is needed to bring an entity under FOIA is also not found in the Act.

WHAT KIND AND HOW MUCH “PUBLIC SUPPORT” IS REQUIRED?

In *Disabato v. South Carolina Association of School Administrators*, the Supreme Court of South Carolina reiterated that, with respect to private entities, the FOIA only applies if those entities received public funds “*en masse*,” ... and “would not apply to a private entity that receives public funds for a specific purpose” ... such as “to operate a child care center or healthcare clinic.”

WHAT KIND AND HOW MUCH “PUBLIC SUPPORT” IS REQUIRED?

In *Woods v. Boeing Company*, United States District Judge Patrick Michael Duffy issued an Order finding Boeing was not a public body because of its receipt of economic incentives.

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Woods argued that Boeing was a public body within the meaning of the Whistleblower Act, which includes the same definition of “public body” as set forth under FOIA.

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Boeing countered that the quid pro quo exception established by *Weston v. Carolina Research and Development Foundation* applied whereby a private company does not become a public body when it accepts public funding or support in exchange for goods or services. Boeing argued that it was not a “public body” within the meaning of the Act because the State received benefits in the form of new jobs and capital investment committed in a negotiated agreement in exchange for the incentives offered.

WHAT KIND AND HOW MUCH “PUBLIC SUPPORT” IS REQUIRED?

The District Court agreed finding that Boeing’s investment and job creation satisfied the quid pro quo requirements of *Weston* and holding that the Whistleblower Act “does not apply to a ‘situation where a business enterprise receives payment from public bodies in return for supplying specific goods or services on an arm’s length basis”.

PENALTIES FOR NON-COMPLIANCE

The FOIA explicitly provides that public bodies are subject to both declaratory and injunctive relief and if the person seeking such relief obtains it in whole or part, he may recover both attorney's fees and costs from the public body. Willful violation of the FOIA may also be a misdemeanor criminal offense.

FOIA AND NONPROFITS

ISSUES

1. How much public support is required to submit a private non-profit to FOIA?
2. What exactly is quid pro quo?
3. Does FOIA ever burn off? What if the NonProfit received a one-time funding three years ago?