



2012-016

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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December 12, 2011

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Honorable Ryan Robertson
Cleburne County Judge of Probate
120 Vickery Street, Room 101
Heflin, Alabama 36264

Public Records – Competitive Bid Law –
Public Works Law – Volunteer Fire
Departments – Volunteer Fire Associations
– State Records Commission

A volunteer fire department is subject to
the Competitive Bid and Public Works
Laws.

The business records of a volunteer fire
department are subject to disclosure under
the Open Records Law, except when
specific records or portions thereof can be
demonstrated by the department to fall
within a recognized exception.

The records must be maintained according
to guidelines of the State Records
Commission.

A volunteer fire association is not subject
to the Competitive Bid, Public Works, or
Open Records Laws.

Dear Judge Robertson:

This opinion of the Attorney General is issued in response to your
request.

QUESTIONS

(1) Are Cleburne County volunteer fire departments subject to the Competitive Bid, Public Works, and Alabama Ethics Laws?

(2) Is the Cleburne County Volunteer Fire Department Association ("CCVFDA") subject to the same?

(3) Are the financial records of the departments and CCVFDA public records, and if so, what are the retention and public availability requirements?

(4) Is it constitutional for the departments and CCVFDA to receive direct distributions of tax proceeds that are not allocated by an elected or appointed representative body, authority, or board?

(5) If so, how would this satisfy the constitutional question of taxation without representation and ensure the ability for the voice of the people to be heard as to how their taxes are being applied towards the providing of a public service?

FACTS AND ANALYSIS

Your questions stem from the distribution of the funds from the two mill ad valorem tax in Cleburne County by the Cleburne County Volunteer Fire Department Association to volunteer fire departments authorized by section 2 of the Local Amendments for Cleburne County of the Recompiled Constitution of Alabama. ALA. CONST. LOCAL AMENDS., Cleburne County § 2 (amend. 586).

This Office has previously stated the following:

Section 9-3-17(a) of the Code of Alabama provides that a volunteer fire department organized as an incorporated nonprofit organization or as an authority of a legal subdivision may be certified by the Alabama Forestry Commission. ALA. CODE § 9-3-17(a)(1) (2001). . . . A volunteer fire department

sanctioned by a municipality is part of the municipality.

Opinion to Honorable Eugene Byrum, Mayor, Town of Powell, dated July 3, 2007, A.G. No. 2007-111, at 2, *citing* opinion to Honorable Stephen A. McMillan, Member, House of Representatives, dated September 23, 2005, A.G. No. 2005-198. Previous opinions of this Office addressing competitive bidding by volunteer fire departments have done so under the Competitive Bid Law for local agencies, including municipalities, in section 41-16-50 of the Code of Alabama. ALA. CODE § 41-16-50 (Supp. 2011). In an opinion to Honorable Seth Hammett, Member, House of Representatives, dated January 8, 1996, A.G. No. 96-00086, this Office concluded that the issue turns on how the department is created. The *Hammett* opinion states the following:

Funds received and collected by a volunteer fire department or rescue squad which is sanctioned by a municipality become municipal funds. Opinion to Honorable Henry R. Caton, *supra*. Therefore, pursuant to Code of Alabama 1975, § 41-16-50, purchases of equipment by a municipally sanctioned volunteer fire department or rescue squad must be by competitive bid.

If a volunteer fire department or rescue squad is not sanctioned by a municipality, it does not in effect become a municipal instrumentality and generally its funds do not become municipal funds. However, it is strongly urged that these volunteer fire departments or rescue squads follow the competitive bid law when purchasing equipment because of the use of public funds. ***If the volunteer fire department or rescue squad receives municipal, county or state funds, the purchases of equipment must be by competitive bid.*** Opinion of the Attorney General to Honorable Miles Prater, Mayor, Town of Millport, dated February 17, 1984, A.G. No. 84-00168.

Id. at 3 (emphasis added).

This Office has also opined, however, that the bid law applies to instrumentalities of the state. Opinion to Honorable Robert Strickland, Executive Director, Alabama Housing Finance Authority, dated December 16, 1987, A.G. No. 88-00078. The *Strickland* opinion addressed the issue under the Competitive Bid Law for state agencies in section 41-16-20 of the Code of

Alabama. ALA. CODE § 41-16-20(a) (Supp. 2011). The entities to which the bid law applies are enumerated in the statute as “any state department, board, bureau, commission, committee, institution, corporation, authority, or office.” *Id.*

Since the *Hammett* opinion and the *Prater* opinion on which it relies, this Office has stated, as you correctly indicate, that in the context of the Open Meetings Act, a volunteer fire department certified by the Forestry Commission is an instrumentality of the state. Opinion to Honorable Timothy C. Boyce, State Forester, Alabama Forestry Commission, dated June 20, 2006, A.G. No. 2006-108. Therefore, consistent with the *Strickland* opinion, such a department is subject to the bid law. The *Hammett* and *Prater* opinions are overruled to the extent that they conflict with this opinion.

There is a second competitive bidding statute in Alabama. Section 39-2-2(a) of the Code of Alabama requires that, “[b]efore entering into any contract for a public works involving an amount in excess of fifty thousand dollars (\$50,000), the awarding authority shall advertise for sealed bids.” ALA. CODE § 39-2-2(a) (Supp. 2011). The definition of “awarding authority” specifically includes “[a]ny governmental board, commission, agency, body, authority, *instrumentality*, department, or subdivision *of the state*, its counties and municipalities.” ALA. CODE § 39-2-1(1) (Supp. 2011). Accordingly, a volunteer fire department is subject to the Public Works Law as well.

Section 36-12-40 of the Code of Alabama is the Open Records Law, and it provides that “[e]very citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute.” ALA. CODE § 36-12-40 (Supp. 2011). “Public records” are defined in section 41-13-1 of the Code as follows:

As used in this article, the term “public records” shall include all written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the *state, counties, municipalities and other subdivisions of government* in the transactions of public business and shall also include any record authorized to be made by any law of this state belonging or pertaining to any court of record or any other public record authorized by law or any paper, pleading, exhibit or other writing filed with, in or by any such court, office or officer.

ALA. CODE § 41-13-1 (2000) (emphasis added).

The leading Alabama open records case is *Stone v. Consolidated Pub. Co.*, 404 So. 2d 678 (Ala. 1981). In *Stone*, the Supreme Court of Alabama considered privacy interests under the Open Records Law, choosing to “balance the interest of the citizens in knowing what their public offices are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference.” *Id.* at 681. The Court stated the following exceptions to the general rule of disclosure: (1) recorded information received by a public officer in confidence; (2) sensitive personnel records; (3) pending criminal investigations; and (4) records the disclosure of which would be detrimental to the best interests of the public. *Id.* at 680.

This Office has stated that the Open Records Law is applicable to an instrumentality of government. Opinions to Honorable Mary F. Gunter, Attorney, Henry County Health Care Authority, Inc., dated October 2, 2007, A.G. No. 2008-004; opinion to Honorable Douglas S. Hamlin, Judge of Probate, dated December 4, 1989, A.G. No. 90-00058. The *Gunter* opinion relied on *Water Works & Sewer Board of City of Talladega v. Consolidated Publ’g, Inc.*, 892 So. 2d 859 (Ala. 2004). The Alabama Supreme Court approved the *Gunter* opinion in *Tennessee Valley Printing Co. v. Health Care Auth. of Lauderdale County*, 61 So. 2d 1027 (Ala. 2010). The *Gunter* and *Hamlin* opinions specifically concluded that the business records of a health care authority are public records. As an instrumentality of the state, the business records of a volunteer fire department should likewise be disclosed.

This Office has stated that, “[u]nder section 41-13-21 of the Code of Alabama[.]. . . the State Records Commission is charged with the responsibility of determining which state records shall be permanently preserved because of historical value and which may be destroyed either with or without microfilming. ALA. CODE § 41-13-21 (1995).” Opinion to Honorable Mark D. Berson, Director, Bureau of Tourism and Travel, dated April 8, 2002, A.G. No. 2002-205, at 3. Therefore, the business records of a volunteer fire department must be maintained according to the guidelines of the State Records Commission.

Regarding volunteer fire *associations*, the *Boyce* opinion additionally concluded that such an association is a “governmental body” subject to the Open Meetings Act (“OMA”). As this Office has recognized, however, “[a] governmental entity can be considered part of another governmental entity for one reason but not for another.” Opinion to Honorable Stephen B. Porterfield,

Attorney, Graysville City Council, dated July 19, 2004, A.G. No. 2004-179, at 3 (water board part of city for purposes of OMA but separate entity for restrictions on political activities by city employees).

The *Boyce* opinion construed the following definition in the OMA, which is found in section 36-25A-2(4) of the Code:

(4) GOVERNMENTAL BODY. All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties, or municipalities
.....

ALA. CODE § 36-25A-2(4) (Supp. 2011).

The *Boyce* opinion explained that “the boards of county volunteer fire associations are composed of representatives from each volunteer fire department in the county.” *Boyce*, at 3. That opinion reached its decision “[b]ecause the majority of the board of such an association is appointed or elected by the volunteer fire departments, which as already discussed, are instrumentalities of the state.” *Id.* Thus, the *Boyce* opinion determined that an association is an instrumentality of an instrumentality of the state.

This Office has emphasized that the OMA was passed “[t]o remedy Alabama’s vague Sunshine Law.” Opinion to Honorable William T. Musgrove, III, Attorney, City of Florence, dated April 17, 2006, A.G. No. 2006-088, at 3; *Boyce*, at 2. The scope of the OMA is much broader than that of the bid laws or Open Records Law. The Legislature intended to cover every possible governmental entity or quasi-governmental entity. After providing for instrumentalities of the state, counties, and municipalities, the definition of “governmental body” in the OMA goes on to state, “including, without limitation, all . . . other instrumentalities.”

In contrast, the list of covered entities in the former laws, while comprehensive, does not include instrumentalities of instrumentalities. Under the well-established rules of statutory construction, where a statute enumerates certain things on which it is to operate, the statute must be construed to exclude all things not expressly mentioned. *Ex parte Holladay*, 466 So. 2d 956, 960 (Ala. 1985). Moreover, regarding the Open Records Law, the Alabama Supreme Court has not extended its holdings in *Water Works & Sewer Bd. of City of Talladega* and *Tennessee Valley Printing Co.* to more remote instrumentalities. Therefore, volunteer fire associations are not subject to the Competitive Bid, Public Works, or Open Records Laws.

As to any ethical concerns, this Office does not opine on ethical issues and advises you to seek an opinion from the Alabama Ethics Commission. Finally, regarding your fourth and fifth questions, "it is the longstanding policy of this Office to decline to give opinions on the constitutionality of a statute, rule, regulation, policy, or practice. Constitutional questions are best addressed by a court of competent jurisdiction." Opinion to Honorable John F. Porter, III, Attorney, Jackson County Commission, dated March 25, 2011, A.G. No. 2011-048, at 4. It should be noted, however, that the fire protection tax in question and the distribution of the funds were authorized pursuant to a local constitutional amendment approved by the voters of Cleburne County. ALA. CONST. LOCAL AMENDS., Cleburne County § 2 (amend. 586).

CONCLUSION

A volunteer fire department is subject to the Competitive Bid and Public Works Laws.

The business records of a volunteer fire department are subject to disclosure under the Open Records Law, except when specific records or portions thereof can be demonstrated by the department to fall within a recognized exception.

The records must be maintained according to guidelines of the State Records Commission.

A volunteer fire association is not subject to the Competitive Bid, Public Works, or Open Records Laws.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Honorable Ryan Robertson
Page 8

Sincerely,

LUTHER STRANGE
Attorney General

By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

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