

01-094

ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.

Town may appropriate public funds to support local business and civic association's annual Regatta, but may not contribute in-kind services of town employees to assist in setting up Regatta and loan of town-owned equipment. No statute requires town to obtain and examine governing documents of organizations to which it makes contributions. Association is not "public body" under Act; documents of Association are not subject to Act's public records disclosure requirements. Attorney General declines to comment regarding obligation of town manager to take action in response to citizen complaint regarding alleged improper action by town council or mayor. Authority of town to make cash contribution to Central Accomack Little League.

Mr. David W. Rowan
Town Attorney for the Town of Onancock
March 27, 2002

Issue Presented

You ask several questions regarding the authority of the Town of Onancock to contribute in-kind resources and monetary donations to nonprofit organizations.

Response

It is my opinion that the town may not contribute in-kind resources to a nonprofit organization. The town may, however, appropriate public funds, personal property or real estate to a nonprofit organization. You ask additional questions that are dependant upon this response. Those answers are outlined in the "Discussion" section below.

Facts

You relate that the Onancock Business and Civic Association ("Association") is incorporated as a Virginia non-stock, nonprofit corporation. The Association's bylaws explain that the purpose and object of the Association is to increase the success of the town

business community, both collectively and as individual businesses, in order to enhance the quality of life in the town.¹ You advise that the Association is not designated as an organization exempt from federal taxation.² The preamble to the Association's bylaws provides, in part:

Our agenda focuses on issues directly affecting the [town] community. This entails the development of structures to improve business owner communications, to work on retail promotions, to affect local legislative issues as a group, to network education and training of business owners and their employees, to affect group savings in benefits and advertising, and to provide accountability in association finances.

You advise further that membership in the Association is voluntary, open to both residents and non-residents of the town, and that the organization has no official connection with the town government. You relate that the mayor and two members of the town council either are or have been members of the Association.

You state that, prior to the 2000 mayoral and council elections, the Association held a candidates' forum. In addition, the treasurer of the Association held a gathering at her home for several electoral candidates and gave them bracelets as gifts. You advise that both the Association's treasurer and the Association deny that the gathering and gifts were sponsored or paid by the Association.

You also relate that the Association holds an annual "Regatta" at the town's wharf facilities and at other locations within the town. The Regatta is a festival designed to attract boaters and others to the town. Numerous activities, entertainment and informational displays are available to the public at the Regatta. You advise that, although the primary purpose of the Regatta is not to raise funds, the Association has donated excess income generated by the Regatta, after the payment of expenses, to a community, charitable or nonprofit organization chosen by the Association. You explain that the town has no formal role in the organization of the Regatta nor input into the Association's choice of a beneficiary.

You also advise that, at a regular meeting of the town council on August 28, 2000, the council voted to donate in-kind support to the Association's Regatta. Specifically, several town employees assisted in the setup of the Regatta and the loan of town-owned equipment to the Association. The mayor broke the council's tie

vote by voting in favor of the donation. The Association reimbursed the town for its in-kind services totaling \$431.64.

Finally, you advise that several town citizens challenge the propriety of the donation of in-kind support to the Association for the Regatta, and question whether the public has a right under The Virginia Freedom of Information Act to obtain copies of the Association's governing documents, minutes and other internal documents in light of the town's contributions. You relate that the citizens have inquired regarding whether the town is obligated to obtain and review the governing documents of any organization to which it makes a contribution.

Applicable Authorities and Discussion

1. You first ask whether the Town of Onancock may contribute in-kind support to the Association for the Regatta.

The Dillon Rule of strict construction provides that local governments "have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."³ Article IV, § 16 of the Constitution of Virginia provides that "the General Assembly ... may ... authorize counties, cities, or towns to make ... appropriations to any charitable institution or association." Section 15.2-953(A) of the *Code of Virginia* implements this constitutional provision and authorizes counties, cities and towns to

make appropriations of public funds, of personal property or of any real estate to ... any charitable institution or association, located within their respective limits or outside their limits if such institution or association provides services to residents of the locality; however, such institution or association shall not be controlled in whole or in part by any church or sectarian society. "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms."⁴ In addition, under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.⁵ It is further an accepted principle of statutory interpretation that the mention of one thing in a statute implies the exclusion of another.⁶ Both the constitutional and statutory provisions address the "appropriation" of public funds to a charitable institution or association. Budgets adopted by local governing bodies are for planning and informative purposes and are statutorily distinguished from appropriations.⁷ A local governing

body may disburse money only pursuant to an appropriation for a contemplated expenditure.⁸ Thus, adoption of a budget that contemplates certain expenditures does not automatically result in the expenditure of money for that purpose. "[W]here a statute is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."⁹ Both the constitutional and statutory provisions are clear in permitting appropriations of public funds by local governing bodies to charitable institutions or associations "located within their respective limits or outside their limits if such institution or association provides services to residents of the locality."¹⁰ Consequently, the General Assembly clearly permits the town to appropriate public funds in support of the Association's annual Regatta. The General Assembly, however, has not clearly authorized localities to provide the type of in-kind support that you describe. Section 15.2-953(A) authorizes only the appropriation of "public funds, of personal property or of any real estate," which does not include the in-kind services you describe. Accordingly, I must conclude that the express language of § 15.2-953(A) does not contemplate the contribution of the in-kind services described. I am of the opinion, therefore, that the town is permitted only to appropriate public funds, personal property or real estate for such purpose.

Section 15.2-940 provides that a locality "may, in its discretion, expend funds from the locally derived revenues of the locality for the purpose of promoting the resources and advantages of the locality." Clearly, the described Regatta attracts persons to the town's wharf and surrounding facilities, thus promoting the wharf and area businesses. The clear language of § 15.2-940, however, permits a locality to expend funds from locally derived revenues for the promotion of the locality's resources and advantages. The provision of the type of in-kind services you describe is not contemplated by the General Assembly in this regard. Consequently, it is not possible for me to conclude that the town is permitted to contribute in-kind services to the Association for the holding of the annual Regatta.

2. Because the Town of Onancock may appropriate public funds, you ask whether the town is required to obtain and examine the governing documents of organizations to which it makes contributions pursuant to § 15.2-953.

The power of a governing body to expend funds is limited to those granted in express words, and those necessarily or fairly implied in

the powers expressly granted.¹¹ I am unaware of any legislative requirement that a locality review the governing documents and internal papers of a charitable organization prior to appropriating public funds pursuant to § 15.2-953. I am, likewise, unaware of any legislative requirement that localities concern themselves with the daily affairs of private foundations prior to such appropriation.¹² This is not to suggest, however, that contributions by localities to foundations may legally be spent irresponsibly.¹³ Such contributions by a locality exist because of public-spirited donations and publicly enacted appropriations.¹⁴ The fiduciary responsibilities of undivided loyalty and prudent management are imposed by law on the trustees and custodians of such funds so as to safeguard the public interest at stake.¹⁵ I can, however, find no statute that requires the town to obtain and examine the governing documents of organizations to which it makes contributions pursuant to § 15.2-953.

3. Once an organization receives public funds from a locality, you ask whether the documents of the charitable organization are subject to the disclosure requirements of The Virginia Freedom of Information Act¹⁶ (the "Act").

A 1995 opinion of the Attorney General considers whether a private corporation receiving public funds for the provision of property, goods or services is a "public body" subject to the Act.¹⁷ The opinion concludes that the Act does not apply to such private corporations that are not supported wholly or principally by public funds.¹⁸ Several prior opinions of the Attorney General also conclude that a variety of organizations that are not governmental agencies in the traditional sense, but which receive primary support for their activities from public funds, fall within the Act's definition of "public body."¹⁹ It is not clear from the facts that the Association is supported wholly or principally by public funds. Therefore, I must conclude that the Association is not a "public body" as that term is defined in the Act.

Section 2.2-3701 of the Act broadly defines "public records" to mean

all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or

characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

"Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."²⁰ All public records are open for inspection and copying during regular office hours, unless otherwise specifically provided by law.²¹ The Act's definition of "public records" includes "all writings ... that consist of letters, words or numbers, or their equivalent, set down ..., regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body."²² Since I cannot conclude that an organization such as the Association is a "public body" as defined in the Act, I must also conclude that records generated by the Association are not "public records" prepared, owned or possessed by a public body. Consequently, I must also conclude, based entirely on the facts provided, that the documents of the Association are not subject to the disclosure requirements of the Act.

4. You next ask whether the town manager is obligated to take action in response to a citizen complaint regarding alleged improper action by the town council or mayor.

Typically, the town manager is under the control of the town council, and is generally charged with managing the administrative affairs and work of the town and performing such other duties as may be required of him. The duties of the position of town manager must be examined in the context of the town charter and general statute. I, however, find no statute that governs the duties of a town manager. Furthermore, the charter for the Town of Onancock is silent as to the duties and responsibilities of the town manager.²³ Accordingly, I am unable to comment regarding the obligation, if any, of the town manager to take action in response to a citizens' complaint regarding alleged improper action by the town council or mayor.

5. Your final inquiry is whether the Town of Onancock has the statutory authority to make a contribution to the Central Accomack Little League.

You advise that the Central Accomack Little League is a Little League baseball organization that operates largely on the baseball fields located within the town. Furthermore, you explain that children from both within and without the town participate in the activities of the Little League. You relate that there are no facts

suggesting that a church or sectarian society controls the Little League.

Section 15.2-953(B) provides:

Any locality may make gifts and donations of property, real or personal, or money, to ... nonprofit recreational associations or organizations; provided the nonprofit recreational association or organization is not controlled in whole or in part by any church or sectarian society.

"The manifest intention of the legislature, clearly disclosed by its language, must be applied."²⁴ For the purposes of responding to this inquiry, I shall assume that the Central Accomack Little League is a nonprofit recreational association. You advise that there is no evidence indicating that the Little League is controlled in whole or in part by any church or sectarian society. Accordingly, it is my opinion that the town may make a cash contribution to the Little League pursuant to the authority granted in § 15.2-953(B).

¹ See Onancock Business and Civic Association Bylaws pmb. (1997).

² The Internal Revenue Code provides an exemption for "corporations ... organized and operated exclusively for ... charitable ... purposes." I.R.C. § 501(c)(3) (West Supp. 2001).

³ *City of Chesapeake v. Gardner Enterprises*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997).

⁴ See *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976).

⁵ See 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:23 (6th ed. 2000); *Op. Va. Att'y Gen.*: 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 209-10.

⁶ See *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); *Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A Singer, *supra* § 47:23 (*expressio unius est exclusio alterius*).

⁷ See Va. Code Ann. § 15.2-2506 (providing that annual budget prepared and approved by local governing body under § 15.2-1503 shall not "be deemed to be an appropriation") (*Michie Repl. Vol.* 1997); see *generally* *Op. Va. Att'y Gen.*: 1986-1987 at 141, 144; 1982-1983 at 16, 16; 1980-1981 at 9, 10.

⁸ Section 15.2-2506 provides that "[n]o money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there

has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body."

⁹Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).

¹⁰Va. Code Ann. § 15.2-953(A) (Michie Supp. 2001).

¹¹See City of Richmond v. County Board, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958).

¹²See, e.g., 1986-1987 Op. Va. Att'y Gen. 54, 54-55 (questioning authority of state to audit or supervise private foundations established to support educational activities of state institutions of higher education).¹³*Id.* at 55.

¹⁴See *id.*

¹⁵See *id.*

¹⁶Va. Code Ann. §§ 2.2-3700 to 2.2-3714 (LexisNexis Repl. Vol. 2001).

¹⁷1995 Op. Va. Att'y Gen. 4.

¹⁸*Id.* at 6.

¹⁹See, e.g., Op. Va. Att'y Gen.: 1984-1985 at 431 (Student Senate of Old Dominion University); 1983-1984 at 447, 448 (meetings of Governor's Advisory Board of Economists and Governor's Advisory Board on Revenue Estimates must be public meetings); 1982-1983 at 719 (Fairfax Hospital Association); *id.* at 726 (volunteer fire department); 1977-1978 at 482 (university honor committee); 1974-1975 at 584 (General Professional Advisory Committee, composed of university presidents, established by State Council of Higher Education to serve Council in advisory capacity). *But see* Op. Va. Att'y Gen.: 1978-1979 at 316 (city mayor's citizens' advisory committee is not subject to Act, because committee is not created by public body, does not perform delegated functions of and does not advise public body, and receives no public funding); 1974-1975, *supra*, at 584-85 (voluntary association of college presidents, with no official status as creature of State Council of Higher Education and receiving no public funds, is excluded from Act).

²⁰Last v. Virginia State Bd. of Medicine, 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992).

²¹Section 2.2-3704(A).

²²Section 2.2-3701.

²³See 1998 Va. Acts ch. 136, at 230; 1976 Va. Acts ch. 480, at 561.

²⁴Barr v. Town & Country Properties, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

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