

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

George S. Glassmeyer,)

Plaintiff,)

v.)

City of Columbia,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2013-CP-40-01450

ORDER

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This matter came before the Court on June 6, 2013, upon cross motions for summary judgment and Plaintiff's Motion to Strike Defendant's Prayer for Attorneys' Fees. Appearing for Plaintiff were Kirby D. Shealy III and Lyndey Ritz Zwing of Adams and Reese, LLP. Defendant was represented by W. Alan Nickles, III, of Nickles Law Firm, LLC. After considering the pleadings, motions, memoranda and affidavits filed by the parties, together with the documentation provided by Defendant for an *in camera* review, the Court hereby GRANTS Plaintiff's motions for the reasons that follow.

This is a declaratory judgment action arising under the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10 *et seq.* On January 14, 2013, Plaintiff submitted a FOIA request to Defendant. In his request, Plaintiff asked for: "All materials relating to not fewer than the final three applicants for the most recent vacancy announcement for the position of City manager." In response, Defendant produced thirty-four pages of documents relating to the final five candidates for the position of city manager.

Defendant's response contained a list of the finalists' names, along with redacted copies of the finalists' applications and resumes. The redactions obscured from view the following information: (1) all home addresses of potential candidates; (2) some, but not all, telephone numbers of potential candidates and those persons listed as their references; (3) drivers' license numbers and restrictions; (4)

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the reasons given by the applicants for leaving prior employment; and (4) some, but not all, salary information from previous employment. Defendant provided no explanation for the redactions.¹

On January 24, 2013, Plaintiff requested that Defendant provide the records in unredacted form. Kenneth E. Gaines, Esquire, City Attorney, responded with a letter dated January 28, 2013, in which he refused Plaintiff's request. Gaines once again failed to cite any particular exemption that justified the redactions. Instead, he merely referred Plaintiff to S.C. Code Ann. § 30-4-40, which lists various exemptions to disclosure allowed by FOIA. He also cited S.C. Code Ann. § 30-4-40(b), which provides for the redaction of exempt material from otherwise public records.

DISCUSSION

South Carolina enacted its version of FOIA in 1978. S.C. Code Ann. § 30-4-10 *et seq.* The legislature clearly intended that once the shift to open government occurred, it would be a bold move:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens . . . to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (emphasis added). "The essential purpose of the FOIA is to protect the public from secret government activity." *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219, 221 (1991).

I. Defendant Failed to Provide its Reasons for Redaction Pursuant to S.C. Code Ann. § 30-4-30(c).

FOIA mandates that a public body that seeks to withhold public records from disclosure in response to a FOIA request provide its reason for doing so within fifteen (15) days. S.C. Code Ann. §30-4-30(c). Although timely in responding to Plaintiff's FOIA request, Defendant failed to provide its reasons for redacting the records it produced within the required fifteen day time period. In fact, it

¹ Plaintiff concedes that state law required Defendant to withhold the applicants' driver's license numbers and restrictions. See S.C. Code Ann. §§ 30-4-40(a)(4) and 30-4-165(B) (Rev. ed. 2007).



never gave its reasons prior to the initiation of litigation. Section 30-4-30(c) makes clear that Defendant's mere passing reference to § 30-4-40 without citation to a particular exemption is inadequate as a matter of law. Section 30-4-30(c) mandates that the public body "notify the person making such request of its determination and the reasons therefor." *Id.*

In *Litchfield Plantation Co., Inc. v. Georgetown County Water and Sewer District*, 314 S.C. 30, 443 S.E.2d 574 (1994), the Supreme Court took the position that a public body's failure to respond to a FOIA request within 15 days did not result in a waiver of the exemptions. In a footnote to the opinion, the Court held that while the exemptions were not waived, the public body would be subject to "appropriate equitable relief" and "assessed attorney fees and costs" for having failed to abide by the deadline. *Id.* at n. 1. Therefore, with regard to Defendant's failure to provide its reasons for redacting alone, Plaintiff is entitled to summary judgment on his request for declaratory relief.

Defendant urges the Court to read its thirty-four pages of production together with Mr. Gaines' January 28, 2013 letter and assume that Defendant's basis for redaction was the personal privacy exemption under S.C. Code Ann. § 30-4-40(a)(2). Defendant asks the Court to assume too much. Neither Defendant's thirty-four pages of responsive documents, nor Mr. Gaines' letter necessarily implicate the personal privacy exemption under FOIA. Defendant first raised the personal privacy exemption only after this lawsuit had been filed, in Defendant's counsel's dated March 27, 2013. That letter is untimely under S.C. Code Ann. § 30-4-30(c). Plaintiff is entitled to summary judgment as to its request for declaratory relief on the basis that Defendant failed to timely provide its bases for redactions as required by S.C. Code Ann. § 30-4-30(c).

II. There is no Applicable FOIA Exemption to Disclosure of the Requested Documents.



Even if Defendant had timely stated its reasons for redacting the public records, none of the exemption categories set forth in S.C. Code Ann. § 30-4-40 or elsewhere in FOIA apply. To legally withhold public records under FOIA, Defendant must prove that the information falls into one of the fifteen exemption categories in § 30-4-40, or be otherwise exempt from disclosure under other FOIA provisions. The presumption is for disclosure, and the government has the burden of proving that an exemption applies. *Evening Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011). "The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003) (citing *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001)).

"Any person has a right to inspect or copy any public record of a public body, *except as otherwise provided by Section 30-4-40*, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a) (emphasis added). This policy ensures that public business is performed in an open and public manner, and that citizens are informed of the activities of their public officials. See S.C. Code Ann. § 30-4-15. FOIA exemptions are construed narrowly to conform to the public purposes of the Act. *Evening Post Pub. Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005). If a document does not fall within one of the enumerated exemptions, then the document and/or information cannot be withheld. *Id.* Whether an exemption applies is necessarily a case-by-case determination. *Id.*; *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996).


Defendant withheld some, but not all, phone numbers and addresses of the applicants and those persons listed as references; the applicants' stated reasons for leaving prior employment; the duties of one applicant's prior employment position; and compensation information, all of which is subject to

disclosure. Defendant's counsel argued that it made "surgical redactions based on legitimate privacy concerns" and that its redactions are proper under FOIA. For the following reasons, Defendant's arguments fail.

The personal privacy exemption, S.C. Code Ann. § 30-40-40(a)(2), "does not specifically list or define the types of records, reports, or other information that should be classified as personal or private information . . ." *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004). Rather, a trial court "must resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual privacy on one hand against the interest of the public's need to know on the other." *Id.*² The South Carolina Supreme Court has stated that "one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest." *Burton* at 352, 594 S.E.2d at 895 (citations omitted). "Indeed, the Court has held that, as a matter of law, if a person, whether willingly or not, becomes an actor in an event of public or general interest, then the publication of his connection with such an occurrence is not an invasion of his right to privacy." *Id.* at 352, 594 S.E.2d at 895 (citations omitted).

This case is a perfect example of a situation where a person ordinarily entitled to privacy with regard to particular information places him or herself in the public eye. The information Plaintiff requests pertains to five individuals who voluntarily applied for the position of city manager. When the applicants applied for such a high-level governmental position, they reasonably placed their personal privacy interests below that of the public or general interest. *See Burton* at 352, 594 S.E.2d at 895.

² Case law cited by Defendant regarding a burden shift relies on federal law that is not applicable in this case. *See Casa de Maryland, Inc. v. U.S. Dep't of Homeland Sec.*, 409 Fed. Appx. 697, 700 (4th Cir. 2011) (construing the federal Freedom of Information Act); and *National Archives and Records Admin v. Favish*, 541 U.S. 157, 170 (2003). Moreover, even if the federal burden shifting analysis was applicable in this case, the burden would not shift here because the Court finds that Defendant has not in fact implicated a legitimate privacy interest which is a prerequisite to the federal analysis and corresponding burden shift.



A. The South Carolina Family Privacy Protection Act, S.C. Code Ann. § 30-2-30 is not applicable.

Defendant gratuitously referenced the South Carolina Family Privacy Protection Act, S.C. Code Ann. § 30-2-30, during its argument that the redacted information was properly withheld from disclosure. It argued that the Privacy Protection Act was brought within the scope of FOIA through 30-4-40(a)(4) (matters exempted by other statute or law) and that the definition of "personal information" under the Privacy Protection Act "clearly" applied to exclude those matters redacted from disclosure without citing any express statutory provision allowing for redaction. The Court disagrees that the Family Privacy Protection Act authorized Defendant's redactions.

"Personal information" is defined under the Family Privacy Protection Act as follows:

information that identifies or describes an individual including, but not limited to, an individual's photograph or digitized image, social security number, date of birth, driver's identification number, name, home address, home telephone number, medical or disability information, education level, financial status, bank account numbers, account or identification number issued by or used, or both, by any federal or state governmental agency or private financial institution, employment history, height, weight, race, other physical details, signature, biometric identifiers, and any credit records or reports.

S.C. Code Ann. § 30-2-30(1). The Family Privacy Protection Act contains no provision requiring or even allowing a governmental agency to withhold "[p]ersonal information" as defined in § 30-2-30(1) from disclosure in response to a FOIA request. Rather, the Act merely proscribes the obtaining of personal information from a state agency for commercial solicitation purposes. See S.C. Code Ann. § 30-2-50 (Rev. ed. 2007).

In order to withhold documents on the basis of § 30-4-40(a)(4), a party must have a statutory or legal basis to *withhold* the requested documents or information. Defendant's mere reference to the definition of "personal information" under the Family Privacy Protection Act does not provide such authorization.

B. Defendant improperly redacted addresses and phone numbers of applicants and persons listed as referrals.

As admitted by Defendant at the hearing, addresses and phone numbers are the kind of information that typically appears in public phone directories. Therefore, the Court agrees with Plaintiff that such information is not reasonably characterized as "information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of privacy." See S.C. Code Ann. § 30-4-40(a)(2). The public has a right to know whether the applicants live in the City of Columbia, the area over which the city manager has authority.

Additionally, the public has a legitimate interest in knowing whether the persons listed as references by the applicants truly recommend the applicant. Persons who agree to be listed as references for applicants for a position with a public body do not have a reasonable expectation that their identities will remain anonymous. See *Burton* at 352, 594 S.E.2d at 895 ("[I]f a person, whether willingly or not, becomes an actor in an event of public or general interest, then the publication of his connection with such an occurrence is not an invasion of his right to privacy.").

Defendant's argument that the public could simply refer to a telephone book to find the contact information for the persons listed as referrals is likewise not persuasive. FOIA does not permit public bodies to redact information on the basis that such information is accessible in other places. Moreover, even if the public could locate the persons' addresses in a phone directory, the public has a right to know whether the information submitted in the applications is accurate. The public's ability to find contact information for the persons listed as referrals is not the only issue at stake here. The public has a right to ensure applicants for a public position have included accurate information. Defendant's redaction of addresses for applicants and the persons listed as referrals for the position was improper.

C. Defendant improperly redacted the applicants' stated reasons for leaving previous employment.

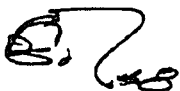
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The personal privacy exemption does not apply to the applicants' stated reasons for leaving prior employment. Members of the public have a right to know why an applicant for a position with a public body left previous employment and additionally have a right to know if one or more of the applicants left his or her previous employment for reasons that might affect their eligibility or candidacy for the city manager position.

Defendant's redaction of reasons for leaving former employment was improper, especially considering the circumstances of its ultimate decision to hire an applicant from among the pool of its current employees. Defendant's argument that Plaintiff could call each of the listed former employers to determine the actual reasons for leaving employment is not persuasive, nor is it particularly genuine. Even if Plaintiff did call each of the former employers and obtain such information, the information given by the employers for the applicants' leaving might differ markedly from the applicants' stated reason on the applications, and Plaintiff would never know of the difference because of the redaction. Therefore, Defendant's withholding of this information was improper.

D. Defendant improperly redacted the applicants' representations regarding compensation for former employment.

Neither § 30-4-40(a)(2) nor § 30-4-40(6) apply to the representations made by the applicants regarding compensation they received from former employers. Section 30-4-40(6) exempts from disclosure "[a]ll compensation paid by public bodies," with certain exceptions. Defendant appears to rely on the personal privacy exemption in conjunction with § 30-4-40(6) to withhold any salary figure that falls below \$50,000. However, some of the redactions obscure salary information regarding prior employment positions outside of South Carolina, which was improper because FOIA only applies to public bodies in this state. See S.C. Code Ann. § 30-4-20(a). The compensation exemption under FOIA does not apply to prior employment positions and should not apply to positions which were held



by applicants outside of South Carolina. See S.C. Code Ann. § 30-4-20(a) ("public body" defined as a department of the State of South Carolina).

Additionally, S.C. Code Ann. § 30-4-40(6) does not apply to an applicant's *own representations* as to his or her salary at a prior place of employment. It merely applies to exempt from disclosure the compensation currently paid to employees of entities within South Carolina that are supported in whole or in part by public funds. *Id.*; *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004). The exemption does not apply here. Additionally, an applicant's statement regarding past compensation is not information reasonably considered "information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of privacy," such that disclosure under the personal privacy exemption would be proper. See S.C. Code Ann. § 30-4-40(a)(2).

III. Plaintiff is entitled to an Order awarding Attorneys' Fees Against Defendant.

FOIA provides for attorneys' fees to the prevailing party seeking relief under the Act. S.C. Code Ann. § 30-4-100(b). "Under this section, the only prerequisite to an award of attorneys' fees and costs is that the party seeking relief must prevail, in whole or in part." *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 289, 580 S.E.2d 163, 170 (Ct. App. 2003). In this case, Plaintiff has prevailed on its Motion for Summary Judgment with regard to (1) home addresses of applicants; (2) telephone numbers of potential candidates and persons listed as references; (3) applicants' stated reasons for leaving prior employment; and (4) salary information of applicants' former employment.

Defendant argued at the hearing that it should not be ordered to pay Plaintiff's attorneys' fees because it acted reasonably under the circumstances. Defendant referenced a letter sent by Defendant's counsel to Plaintiff's counsel on March 27, 2013, after this action was filed, attempting to provide

unredacted documents in a “confidential ‘*in camera*’ fashion,”³ and stating to Plaintiff’s counsel that there was no “smoking gun” in the file. Plaintiff’s counsel argued that this proposed resolution was not in keeping with the FOIA’s precepts and additionally placed him in an awkward position with respect to his client. The Court agrees.

In *Sloan v. Friends of the Hunley, Inc.* 393 S.C. 152, 711 S.E.2d 895 (2011), the South Carolina Supreme Court addressed this very issue: “When a public body frustrates a citizen’s FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed.” *Id.* (citing *Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994)). This is precisely what Defendant has attempted to do in this case. Plaintiff is the prevailing party in this action because: (1) Defendant failed to provide any basis for its redactions when it produced responsive documents, as required by S.C. Code Ann. § 30-4-30(c) and (2) Defendant improperly redacted information for which no FOIA exemption applied. See S.C. Code Ann. § 30-4-30. Defendant’s attempt to provide unredacted materials after the case was filed provides it no legitimate excuse for avoiding Plaintiff’s available statutory remedy of attorneys’ fees and costs. Furthermore, FOIA’s express purpose is not just to provide an avenue to expose corruption or misconduct by public officials. Rather, it is intended to afford the citizenry reasonable access to public information, whether that information contains a “smoking gun” or not.

In light of the discussion above, Plaintiff’s Motion to Strike Defendant’s Prayer for Attorneys’ Fees is also GRANTED. Although the Court’s resolution of Plaintiff’s Motion for Summary Judgment certainly moots this motion, the Court agrees with Plaintiff that there is no basis under FOIA for an award of attorneys’ fees in favor of a public body. Defendant’s prayer for attorney’s fees runs counter to the General Assembly’s intent in enacting FOIA, and the Court is not persuaded that its inherent

³ With this language, Defendant suggested that the documents be only revealed to Plaintiff’s counsel.

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authority to grant an award of attorney's fees as a sanction for improper conduct gives Defendant any support for a prayer for such relief in its pleadings.

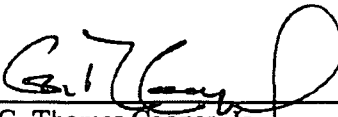
CONCLUSION

For the reasons stated above, it is therefore **ORDERED** that

- (1) Defendant's Motion for Summary Judgment is **DENIED**;
- (2) Plaintiff's Motion for Summary Judgment is **GRANTED**; and
- (3) Plaintiff's Motion to Strike Defendant's Prayer for Attorney's Fees is **GRANTED**.

The record shall be held open so that Plaintiff may submit an affidavit of attorney's fees and costs to be considered by the Court before a final judgment is entered.

IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

Columbia, South Carolina
June 19, 2013.