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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2013-001880

City of Columbia.....Appellant,

v.

George S. Glassmeyer.....Respondent.

APPELLANT'S MOTION TO SUPPLEMENT RECORD ON APPEAL

Appellant moves to supplement the record in the above appeal pursuant to Rule 212(b), SCACR. Grounds for this motion are as follows:

1. Appellant's Initial Brief refers to two Attorney General opinions. Appellant identified the Attorney General Opinions in its Initial Brief as "Other" in the Table of Authorities and provided the opinions as attachments for the Court's convenience only.[1] See, Appellants Initial Brief filed November 5, 2013, Attachments A and B provided as Exhibit 1.

2. By letter dated November 12, 2013, the Clerk of this Court notified counsel for Appellant that the attachments could not be filed in the absence of a court order and suggested that the referenced Attorney General opinions would be better suited

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[1] Attachment A to Appellant's Initial Brief is an opinion issued July 16, 1987. The full copy of this opinion was obtained from the Office of the Attorney General.

for inclusion in the Record on Appeal, subject to Rules 209 and 210, SCACR provided as Exhibit 2.

3. Upon receipt of the Clerk's letter, counsel for Appellant consulted counsel for Respondent regarding inclusion of the Attorney General Opinions in the Record on Appeal. Counsel for Respondent objected on grounds that the opinions were not in the "record" submitted to the trial court and that this Court can locate the opinions if review is needed.

4. Appellant's attachments to the Initial Brief were based upon a desire to provide the Court ready access to the opinions. Appellant acknowledges that Attorney General Opinions are not binding. Nevertheless, this Court, and the Supreme Court have routinely considered the opinions of the Attorney General in rendering decisions on questions of statutory construction. Accordingly, this Court may take notice of the opinions issued by the South Carolina Attorney General's Office. See, Price v. Watt, 280 S.C. 510, 513, 313 S.E.2d 58, 60 (S.C. App. 1984) at fn. 1 *citing* Marchant, Adjutant General v. Hamilton, 309 S.E.2d 781 (S.C. App. 1983); Etiwan Fertilizer Co. v. South Carolina Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950)(although the court is not bound by an opinion of the Attorney General, it should not be disregarded without cogent reason)

CONCLUSION

For the reasons stated above, Appellant respectfully requests an opportunity to supplement its Designation of Matter in this appeal to include the Attorney General Opinions provided as Attachments A and B to its Initial Brief.

*****SIGNATURE PAGE FOLLOWS*****

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EXHIBIT 1

THE STATE OF SOUTH CAROLINA
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City of Columbia.....Appellant.

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APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Circuit Court erred in finding that FOIA compelled disclosure of home addresses, personal telephone numbers and personal email addresses for applicants to the position of City Manager.**

2. **Whether the Circuit Court erred in awarding attorney fees.**

STATEMENT OF THE CASE

This is an appeal from the Court of Common Pleas for the Fifth Judicial Circuit. The issue on appeal is whether the South Carolina Freedom of Information Act ("FOIA") compels the disclosure of home addresses, personal telephone numbers and personal email addresses for applicants to the position of City Manager for the City of Columbia.

STATEMENT OF THE FACTS

On January 14, 2013, Respondent George S. Glassmeyer ("Glassmeyer") submitted a FOIA request to Appellant City of Columbia ("City") seeking "all materials related to not fewer than the final three applicants for the most recent vacancy announcement for the position of City Manager . . ." (Complaint Exhibit A) Glassmeyer was one of several parties seeking records relating to the City Manager finalists. The City responded to Glassmeyer and all other requesting parties by providing available materials with the following redactions: (a) home addresses; (b) driver's license information; (c) personal telephone and emails of applicants and references; (d) salaries other than public employees in South Carolina of $50,000 or more; and (e) personal reasons for leaving other employment. (Aff. of Jared D. Glover dated May 13, 2013, provided as Attachment A to Defendant's Motion for Summary Judgment)

Of all requesting parties, only Glassmeyer objected to the City's response. By letter dated January 24, 2013, Glassmeyer demanded all redacted information including home and email addresses, telephone numbers and driver's license information. (Complaint Ex. C) The City responded to this request indicating that it would not release the redacted materials. (Complaint Ex. D)

On March 8, 2013, Glassmeyer filed a non-jury complaint seeking a declaration that he is entitled to all material redacted by the City, an injunction prohibiting the City from withholding

the redacted information, attorney fees and costs. (Complaint ¶¶ 15-17) The City filed an answer on April 1, 2013 denying any FOIA violation and requesting attorney fees and costs incurred in defense. (Answer) On April 25, 2013, Plaintiff filed a motion to strike the City's prayer for attorney fees.

Both parties filed motions for summary judgment. The City provided the trial judge all unredacted materials for *in camera* review. The motions were heard on June 6, 2013 by the Honorable G. Thomas Cooper, Jr. By order filed June 19, 2013, Judge Cooper granted Glassmeyer's motions to strike and for summary judgment.[1] (Summary Judgment Order)

On July 16, 2013, the City filed a motion for new hearing and reconsideration based, in part, upon the United States Supreme Court decision in Maracich v. Spears, 570 U.S. ___ , 133 S.Ct. 2191 (2013)(Motion and Memorandum in Support of New Hearing and Reconsideration) On July 19, 2013, Judge Cooper denied the City's motion to reconsider. (Order Denying Reconsideration) On August 5, 2013 Glassmeyer submitted an affidavit and proposed order in support of attorney fees and costs in the amount of $12,655.01. (Letter dated August 5, 2013) On August 14, 2013 the City filed a memorandum opposing the requested attorney fees. (Defendant's Memorandum in Response to Plaintiff's Request for Attorney Fees) On August 15, 2013, Glassmeyer submitted a supplemental affidavit in support of attorney fees. (Letter dated August 15, 2013) On August 27, 2013, Judge Cooper issued an order awarding Glassmeyer attorney fees and costs in the amount of $11,185.01. (Order Awarding Attorney Fees)

On September 4, 2013, the City filed a modified response to Glassmeyer's FOIA request. This modified response contained all materials provided for *in camera* review redacting only personal addresses, personal telephone numbers and personal email addresses of finalists to the

[1] Glassmeyer conceded that state law required withholding of driver's license numbers and restrictions. (Summary Judgment Order p. 2, fn. 1)

City Manager position. (Modified response to Plaintiff's FOIA request with attachments) This appeal followed.

STANDARD OF REVIEW

Glassmeyer's complaint seeks declaratory and injunctive relief under FOIA. Both claims are non-jury. In an action at law tried without a jury, the appellate standard of review extends only to the correction of errors of law. An order awarding attorney fees is examined for abuse of discretion. Burton v. York County Sheriff's Dept., 358 S.C. 339, 346, 594 S.E.2d 888, 892 (Ct. App. 2004)

LEGAL ARGUMENT

I. The trial judge erred in finding that FOIA compelled disclosure of home addresses, personal telephone numbers and personal email addresses for applicants to the position of City Manager.

FOIA was enacted to ensure public access to information regarding the "activities of their public officials." S.C. Code Ann. § 30-4-15. To serve this purpose, FOIA is liberally construed and exemptions to disclosure of public records narrowly applied. Quality Towing, Inc v. City of Myrtle Beach, 345 S.C. 156, 161-62, 547 S.E.2d 862, 864-65 (2001) Where, as here, information is withheld from disclosure, the propriety of each exemption must be examined on a case by case basis. City of Columbia v. ACLU of South Carolina, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996)

The information requested by Glassmeyer includes "personal information" subject to protection by established common law principles and designated by the General Assembly in the Family and Personal Identifying Information Privacy Protection Act, S.C. Code Ann. § 30-2-30.[2]

[2] "Personal information" is defined by this Act to include "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,

Such information is exempt from disclosure by S.C. Code Ann. § 30-4-40(2) and (4). These FOIA provisions exempt from mandatory disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy" and "[m]atters specifically exempted from disclosure by statute or law."

Our Supreme Court has defined the right to privacy as the right of a person to be left alone and free from unwarranted publicity. Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 7 S.E.2d 169 (1940) When a privacy interest is asserted, a balancing test is used to determine whether the public's need to know outweighs the individual's interest in nondisclosure. Burton, *supra*, 358 S.C. at 352, 594 S.E.2d at 895 (affirming the trial court's decision to disclose records relating to public duties and withhold information relating to private conduct). In this context, privacy interests existing at common law and designated by statute must be reconciled with the public's interest in reasonable access to governmental activity served by FOIA. See, Seago v. Horry County, 378 S.C. 414, 663 S.E.2d 38 (2008)(harmonizing FOIA and copyright law)

Unlike the cases relied upon by the trial judge, the City has not withheld records on a categorical or source basis. See, City of Columbia v. ACLU of South Carolina, *supra*; Evening Post Publishing Co. v. Berkeley County School District, 392 S.C. 76, 708 S.E.2d 745 (2011) Additionally, the City's redactions do not shield from scrutiny governmental actions such as investigation of public conduct addressed in Burton and City of Columbia or evaluation of a public employee addressed in Evening Post Publishing Co. Instead, the applications requested and produced were generated by individuals seeking consideration for public employment. Therefore, the question to be resolved is whether a legitimate public interest outweighs an applicant's privacy interest in the information redacted.

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driver's identification number, name, home address, home telephone number [and] medical or disability information. . ."

Absent controlling precedent, this Court may look for guidance to the South Carolina Attorney General ("SCAG") and opinions of other jurisdictions, including federal courts. On July 16, 1987 the SCAG issued a comprehensive examination of FOIA, including whether disclosure of "residence addresses or telephone numbers" could constitute an unreasonable invasion of privacy. Recommending caution, the SCAG indicated that disclosure of such information should be determined on a case by case basis. Looking to decisions in Michigan and West Virginia, the SCAG noted that "if an individual has an unlisted or unpublished telephone number or there are reasons such as the need for security which mandate personal privacy, such a release could constitute an unreasonable invasion of personal privacy." The SCAG suggested the following factors considered by West Virginia courts in evaluating privacy concerns:

1. Whether disclosure would result in a substantial invasion of privacy and, if so, how serious?

2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.

3. Whether the information is available from other sources.

4. Whether the information was given with an expectation of confidentiality.

5. Whether it is possible to mould relief so as to limit the invasion of individual privacy.

SCAG Op. No. 87-69 (July 16, 1987), provided as Attachment A, at p. 176, *citing* Child Protection Group v. Cline, 350 S.E.2d 541 (W. Va. 1986)

In 2005, the SCAG examined federal case law interpreting privacy interests under the federal FOIA. (SCAG Op. 5/18/2005 issued to Honorable Thomas L. Moore provided as Attachment B) There, the SCAG advised that names of individuals receiving federal emergency assistance may be released to allow for discovery of fraudulent duplication. In a detailed analysis of private and public interests at play in FOIA, however, the SCAG cautioned against disclosure

of addresses and other personal identifiers unless necessary to assist in analysis of government action, citing *inter alia,* National Association of Retired Federal Employees v. Horner, 879 F.2d. 873, 875 (D.C. Cir. 1989), cert. denied 494 U.S. 1078 (1990) (disclosure of names and addresses of retirees unwarranted)

Under federal law, once a legitimate privacy interest is implicated, the burden shifts to the FOIA requester to (1) "show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and (2) "show the information is likely to advance that interest." Casa de Maryland, Inc. v. U.S. Department of Homeland Sec., 409 Fed. Appx. 697, 700 (4th Cir. 2011) Like the federal system, our courts have recognized both statutory and common law privacy interests. Similarly, in our State, as in the federal system, statutes supplement constitutional and common law privacy interests. See, Burton, *supra* 338 at 352, 594 at 895; National Archives and Records Admin. v. Favish, 541 U.S. 157, 170 (2003) Indeed, our constitution goes beyond the federal model in providing specific protection against "unreasonable invasions of privacy..." S.C. Const. art. I, § 10. The right to privacy recognized by common law, statues and the constitution should require a FOIA requester to articulate a public interest in obtaining "personal information" about other citizens from the government.[3] In this case, however, despite widespread media interest in the selection of the City Manager, Glassmeyer alone seeks to compel disclosure of applicants' home addresses, personal telephone numbers and personal email addresses. As observed by the West

[3] State and federal FOIAs serve the same purpose of providing access to public information while protecting privacy interests. To date, no published opinion has been issued in this state regarding the obligation to demonstrate a public interest when privacy issues are implicated. Nevertheless, as addressed herein, it is established that FOIA only compels disclosure of information relating to public activity and public conduct. Accordingly, private "personal information" is exempt from disclosure under FOIA.

Virginia courts, FOIA is not a proper vehicle for satisfying private curiosity. Child Protection Group v. Cline, *supra*, 350 S.E.2d at 544 (W. Va. 1986)

The recent decision of the United States Supreme Court in Maracich v. Spears, 570 U.S. ___, 133 S. Ct. 2191 (2013) establishes that "personal information" maintained by the government such as name, home address and telephone number is not subject to general disclosure upon request even if otherwise accessible. The federal Driver's Privacy Protection Act of 1994 ("DPPA") was enacted to protect privacy interests of individuals registering for a driver's license. The DPPA is designed to protect citizens "from a growing threat from stalkers and criminals who could acquire personal information from state DMVs" and to prohibit sale of personal information. Id. at 2198. Accordingly, the DPPA prohibits governmental disclosure "personal information" such as home addresses and telephone numbers, even if available from other sources. Id. at 2207 ("Attorneys are free to solicit plaintiffs through traditional and permitted advertising without obtaining personal information from a state DMV.")

In this instance, the City has withheld home addresses, personal telephone number and personal email addresses of applicants while providing employment histories, including job duties and supervisors. The only question before this Court is whether FOIA **required the City** to release home addresses, personal telephone numbers and personal email addresses not voluntarily disclosed to the general public. While some withheld information may be obtainable from other sources (like the phone book or the internet), access by other means mitigates **against** compelling disclosure. Child Protection Group v. Cline, *supra*.

A prospective employer has legitimate reasons for asking applicants to provide contact information, including home address, personal telephone and personal email. This interest does not, however, convert information maintained as private into potential billboard or social media

fodder. Rather than balance competing public/private interests as required, the trial judge accepted Glassmeyer's argument that merely seeking the position of City Manager placed the applicants "in the public eye" in a way that abandoned any claim to privacy. (Summary Judgment Order, p. 5, *citing* Burton) If upheld, this order will undermine legitimate privacy interests recognized by state and federal law, expand this Court's carefully crafted Burton decision beyond recognition, and chill interest in seeking, not to speak of accepting public employment. In addition, a holding that such personal information must be disclosed upon request will expose those who wish to serve the public to unknowable mischief and perhaps menace.[4] For all of these reasons, the order on appeal should be reversed and guidance provided regarding response to FOIA requests for private information made available by applicants to positions of public employment.

II. The order awarding attorney fees should be reversed and remanded.

The trial court awarded Glassmeyer's requested attorney fees and costs with the exception of $1,407.00. Attorney fees available under FOIA and may be awarded within the sound discretion of the trial judge. S.C. Code Ann. § 30-4-100(b) However, Glassmeyer conceded at the summary judgment hearing that his repeated demand for driver's license information was not supportable under FOIA. (Summary Judgment Order of June 19, 2013, p.2 fn.1). Additionally, the order awarding attorney fees does not provide a basis for determining "how" the trial judge exercised discretion as required by Burton. (Attorney Fee Order of August 27, 2013) Finally, should this Court find that Glassmeyer has no statutory right to withheld personal information any attorney fee award must be reassessed in light of that determination.

[4]The applicant selected as City Manager is a single parent with a young child at home. Publishing her address, personal telephone number and email will potentially expose her family to the criminals and schemers the government attempts to thwart.

CONCLUSION

Review of the records provided to Glassmeyer in the Modified Response of September 4, 2013 demonstrates that the City has acted within the requirements of FOIA in balancing privacy interests while offering access to public information regarding selection of its City Manager. See generally, City of Columbia v. ACLU of South Carolina, *supra* (exemptions to disclosure under FOIA reviewed on a case by case basis); Seago v. Horry County, *supra* (the purpose of FOIA is to protect citizens from secret government activity) For these reasons, the decision of the trial court should be modified to deny access to the home addresses, personal telephone numbers and personal email addresses of applicants to the position of City Manager for the City of Columbia. Additionally, this Court should reverse and remand the award of attorney fees for reconsideration in keeping with the decision on appeal.

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November 5, 2013
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ATTACHMENT A

(1) The Comptroller General may refer requests for information to the agency housing the original record or information; if that agency refuses to honor the request for material deemed to be disclosable under the Freedom of Information Act, the Comptroller should then make the information available.

While such referral does not relieve the Comptroller of responsibility for responding to the request, neither would the referral have the effect of tolling the fifteen-day response period.

(2) The Freedom of Information Act itself does not appear to contemplate an exchange of information among or between state agencies.

(3) The Freedom of Information Act does not address whether or not individuals should be notified when there is a freedom of information request for release of their salary.

(4) Inasmuch as the disclosure of residence addresses or telephone numbers could constitute an unreasonable invasion of personal privacy, a determination as to disclosure under FOIA of residence addresses and telephone numbers must be made on a case-by-case basis.

To the extent that today's opinion is inconsistent with opinions dated January 25, 1978, and August 5, 1977, today's opinion as to the release of home addresses and telephone numbers of state employees will be deemed to be controlling.

(5) An individual's Social Security number should most probably not be disclosed pursuant to a freedom of information request.

(6) Information such as where a state employee was housed while traveling on state business would be information from a voucher and thus subject to disclosure unless exempt for a reason defined under Section 30-4-40. Such a determination must be made on a case-by-case basis.

(7) The Freedom of Information Act allows for certain direct and indirect costs to be considered in establishing a fee for searching for or making copies of records.

(8) While the Freedom of Information Act does not specifically require that a request for information be made in writing, it would be a protective measure to have such requests in writing to establish the fifteen-day response period.

(9) While the FOIA does not appear to prohibit the release of information over the telephone, it is advisable to provide responses to such requests in written form to lessen the chances of misunderstanding and to provide an accurate record of the information provided.

(10)Because the definition of "department head" is quite broad, a request for the disclosure of the salary for a particular individual should be referred to the agency which employs the individual to determine whether or not the individual occupies a "department head" position.

TO: Comptroller General

FROM: Patricia D. Petway
Assistant Attorney General

Your office has posed several questions prompted by the recent amendment to the Freedom of Information Act, Section 30-4-10 et seq. of the Code of Laws of South Carolina. After a brief discussion about the interpretation of the amendments, each of your questions will be examined.

By an act numbered H.2263, R-164, various amendments were made to the Freedom of Information Act. A statement of public policy will now be codified as Section 30-4-15 of the Code, slightly amending Section 2 of Act No. 593 of 1978; this statement provides:

> 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 formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, 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.

In light of this purpose, the Office of the Attorney General has strongly encouraged that the Act be interpreted liberally to effectuate the purpose of the Act. Op. Atty. Gen. No. 84-64, dated June 1, 1984. Your questions will be examined with a view toward effectuating this purpose by liberally construing the Act, which is remedial in nature. See South Carolina Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Too, please be advised that exemptions to the Act's applicability are generally construed narrowly, News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake County, 29 N.C. App. 37, 223 S.E.2d 580 (1976), to further the purposes of the Act.

Question 1

Should the office of the Comptroller General refer requests for information to the agency where the expenditure occurred?

This question has been addressed previously by the Attorney General's Office in opinions dated November 4, 1983 and September 7, 1978. As stated in the first-cited opinion:

> There is no provision in the Freedom of Information Act for exemption from disclosure of otherwise disclosable information by one agency merely because the identical information is available from another agency. ... If the individual requesting the information is unable to obtain it from [the agency housing the original record], then the [other agency having a record containing the identical information] should not rely upon any provision of the South Carolina Freedom of Information Act as a basis for denying the request.

Assuming that the information sought in a freedom of information request is disclosable, the conclusions of these prior opinions would remain unchanged by the recent amendments to the Act. The Comptroller General may refer such requests to the agency housing the original record or information; if that agency refuses to honor the request for material deemed to be disclosable, the Comptroller General should then make the information available.

As you are aware, the Act mandates a response within fifteen working days of receipt of a request under the Act. Section 30-4-30(c) provides that the request is to be considered approved if written notification is not provided within the fifteen-day period. While such a referral does not relieve the Comptroller General of responsibility for responding to the request, neither would the referral have the effect of tolling the fifteen-day response period.

Question 2

What type of information is the Office of the Comptroller General allowed to exchange with other state agencies?

Section 30-4-30 (a) of the Code provides that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, ..." The term "person" is defined as "any individual, corporation, partnership, firm, organization or association" by Section 30-4-20(b). Assuming that the Comptroller General fits within this definition, the Comptroller General could make a request for information from public bodies under the Act. The Act itself does not appear to contemplate an exchange of information among or between agencies, however.

The sharing of information among or between agencies is usually authorized by statute, given the confidential nature of many agency records.

See, for example, Section 1-20-40 of the Code (state agencies to provide information requested by the Audit Council or Reorganization Commission). Should such a need to exchange information arise, it would be wise to consult legal counsel for all entities involved. It would be impossible, by an opinion, to address all instances in which such an exchange could arise, and legal counsel for the entities would be able to evaluate each situation on its merits, given the agencies' statutory authority. An example of sharing information among agencies involved in the state employee payroll process is found in an opinion dated November 27, 1978. This is only one of the many instances in which a question of sharing information could arise.

Question 3

Should individuals be notified when the Comptroller General receives a freedom of information request for release of their salary?

The Act does not address your particular question. As you are aware, the amendments to the Act made sweeping changes with regard to the release of salary information of public employees and officers. Section 30-4-40(a)(6) protects from disclosure salaries paid by public bodies except as permitted on the following:

> (A) For those persons receiving compensation of fifty thousand dollars or more annually, for all part-time employees, for any other persons who are paid honoraria or other compensation for special appearances, performances or the like, and for employees at the level of agency or department head, the exact compensation of each person or employee;
>
> (B) For classified and unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation between, but not including, thirty thousand dollars and fifty thousand dollars annually, the compensation level within a range of four thousand dollars, such ranges to commence at thirty thousand dollars and increase in increments of four thousand dollars;
>
> (C) For classified employees not subject to item (A) above who receive compensation of thirty thousand dollars or less annually, the salary schedule showing the compensation range for that classification including longevity steps, where applicable;
>
> (D) For unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation of thirty thousand

dollars or less annually, the compensation level within a range of four thousand dollars, such ranges to commence at two thousand dollars and increase in increments of four thousand dollars.

(E) For purposes of this subsection (6), 'agency head' or 'department head' means any person who has authority and responsibility for any department, of any institution, board, commission, council, division, bureau, center, school, hospital, or other facility that is a unit of a public body.

Because the Comptroller General may not have available the information needed to determine whether an individual affected by a request would be, for example, a department head, it would be prudent to consult the agency which employs the individual or incurred the expenditure. The appropriate agency would be able to offer the necessary guidance to make certain that the appropriate information is released. The agency could then notify the affected employee as it sees fit. As long as the Act is followed and the correct information is released, the procedure to be followed internally would be a matter of policy rather than state law. But see R. 19-708.06 of the Budget and Control Board and Op. Atty. Gen. dated August 5, 1977, discussed infra.

Question 4

Are the following items excluded from release under the Freedom of Information Act?

A. Home telephone number

B. Home address

C. Social Security number

D. Where state employees spend the night when traveling on state business

Whether to disclose such items is not specifically addressed by the Act. Unless closed to the public by some relevant statute, see Section 30-4-20(c), or as a result of Sections 30-4-40 or 30-4-70, generally the contents of public records are to be disclosed. Residence addresses and telephone numbers have been deemed disclosable since the same are often ascertainable by reference to many publicly attainable books and records. Michigan State Employees Association v. Department of Management and Budget, 135 Mich. App. 248, 353 N.W.2d 496 (1984); Hechler v. Casey, 333 S.E.2d 799 (W. Va. 1985).

Caution should be exercised in disclosing these two items. Section 30-4-40(a)(2) exempts from disclosure "[i]nformation of a personal nature where the disclosure thereof would constitute unreasonable invasion of personal privacy ... ." As indicated by the Michigan State Employees Association decision and others cited therein, such disclosure of residence address has not been deemed an invasion of privacy. However, if an individual has an unlisted or unpublished telephone number or there are reasons such as the need for security which mandate personal privacy, such a release could constitute an unreasonable invasion of personal privacy. Thus, a determination as to disclosure must be made on a case-by-case basis, following guidelines in cases such as Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984) and Child Protection Group v. Cline, 350 S.E.2d 541 (W. Va. 1986). 1/ To the extent that today's opinion is inconsistent with opinions dated January 25, 1978 and August 5, 1977, today's opinion as to the release of home addresses and telephone numbers of state employees will be deemed to be controlling.

An individual's Social Security number should most probably not be disclosed pursuant to a freedom of information request. The disclosure of a Social Security Account number, unless authorized by a statute such as the federal Privacy Act, has been found to constitute a clearly unwarranted invasion of personal privacy. Swisher v. Department of the Air Force, 459 F.Supp. 337, aff'd 660 F.2d 369 (8th Cir. 1981).

1/ In determining whether an invasion of privacy would be unreasonable, the West Virginia court set forth five factors to be considered:

1. Whether disclosure would result in a substantial invasion of privacy and, if so, how serious?
2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.
3. Whether the information is available from other sources.
4. Whether the information was given with an expectation of confidentiality.
5. Whether it is possible to mould relief so as to limit the invasion of individual privacy.

Child Protection Group v. Cline, supra, 350 S.E.2d at 543.

By Section 30-4-50(6), "[i]nformation in or taken from any account, voucher or contract dealing with the receipt or expenditure of public or other funds by public bodies" is specifically declared to be public information. To receive reimbursement for lodging while traveling on state business, a state employee or officer attaches a receipt from the place of lodging to the request for reimbursement, which then is transmitted to the Comptroller General for payment. Thus, information such as where a state employee was housed while traveling on state business would be information from a voucher and thus subject to disclosure unless exempt for a reason defined under Section 30-4-40 such as unreasonable invasion of personal privacy. Such a determination must be made on a case-by-case basis, using criteria such as those provided in the enclosed cases.

A regulation of the Budget and Control Board, R.19-708.06, has established the following guidelines:

> Under the Freedom of Information Act, the State of South Carolina and its political subdivisions should release only the employee's salary range, grade, job description, date of employment, position questionnaire, sex, race, name and title. Actual salaries of the directors of agencies, departments, institutions and commissions must be released. Such information shall be released only upon a written request signed by the party requesting it. Any further disclosure could come only if the employee authorizes the release or a court of competent jurisdiction orders such disclosure. The agency may assess the requesting party a reasonable charge for the costs incurred in providing the information requested.

It appears that information other than that detailed in the regulation has been deemed disclosable by courts in other jurisdictions, such as residence addresses and telephone numbers as outlined above. Clearly, the regulation could not be read to limit disclosure under the Act, particularly in light of Society of Professional Journalists v. Sexton, supra. 2/ If disclosure of an item not listed in the regulation is requested, it would be a more cautious approach to evaluate the item in light of the new Act and, if any doubt exists, make the disclosure to comply with the liberal purpose of the Act.

2/ In Sexton, a regulation of the Department of Health and Environmental Control was invalidated by the court as it added certain limitations, not contemplated by the Act, to a DHEC statute concerning the furnishing of death certificates.

Question 5

Is the Comptroller General allowed to charge for the cost of providing information?

A. Direct cost?

B. Indirect cost?

Section 30-4-30(b) provides the following guidelines for charging fees:

> The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records. Such records shall be furnished at the lowest possible cost to the person requesting the records. ... Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees shall not be charged for examination and review to determine if such documents are subject to disclosure. Nothing in this chapter shall prevent the custodian of the public records form charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of such costs prior to searching for or making copies of the records.

The statute thus allows for certain direct and indirect costs to be considered in establishing a fee for searching for or making copies of records. If you have a question about whether a particular item should be included in determining the fee, please advise and more pertinent guidance will be offered.

Question 6

Must a request for information be in writing?

The Act does not specifically require that a request be made in writing. However, the receipt by a public body of a written request for information pursuant to the Act triggers the fifteen working-day period in which a determination to grant the request must be made. For that reason, it would be advisable to have a request in written form, to be able to establish the fact of receipt, date of receipt, and also to accurately calculate the response period. Considering the nature of the information which could conceivably be requested from your office, it would be a protective measure to have such requests in writing.

Question 7

The Freedom of Information Act refers to releasing certain salaries in a range of $4,000.00. How are these ranges established?

The portion of the Act to which you refer is Section 30-4-40(a)(6)(B), which mandates disclosure of salaries

> [f]or classified and unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation between, but not including, thirty thousand dollars and fifty thousand dollars annually, the compensation level within a range of four thousand dollars, such ranges to commence at thirty thousand dollars and increase in increments of four thousand dollars[.]

We understand that the Division of Human Resource Management is working on the establishment of these ranges. When we have been notified by the Division that the ranges have been established, we will so advise your office. If questions remain after such establishment, we will be happy to work with your office to provide the necessary assistance.

Question 8

Should information be released over the phone or in writing?

Section 30-4-30(c) provides that if a request pursuant to the Act is granted, "the record must be furnished or made available for inspection or copying." The language of the Act anticipates that a record be furnished in physical form, though release over the telephone does not appear to be prohibited. As noted in response to your sixth question, the information requested from your office could involve sensitive matters; for that reason, and further to lessen the chances of misunderstanding and to provide an accurate record of the information provided, it would be advisable to provide responses to such requests in written form.

Question 9

The Freedom of Information Act appears to imply that exact salaries of department heads regardless of the salary amount must be released. How are department heads identified or defined?

Section 30-4-40(a)(6)(A) mandates the disclosure of the exact compensation of employees at the level of agency or department head. Section 30-4-40(a)(6)(E) defines "agency head" or "department head" to be "any person who has authority and responsibility for any department, of any institution, board, commission, council, division, bureau, center, school, hospital, or other facility that is a unit of a public body." This defini-

tion is quite broad and, as suggested for other parts of the Act, should be construed liberally to effectuate the policy of openness intended by the Act. See Section 1 of H.2263, R-164.

If your office should receive a request for the disclosure of the salary of a particular individual, it is conceivable that your office would not know whether that individual occupied a position of "department head." It would therefore be advisable to consult the agency which employs the individual to determine whether the individual is a "department head," thus mandating disclosure of his exact compensation. If doubt remains as to whether a particular piece of information should be disclosed even after consultation with the appropriate agency, this Office's policy is to disclose such information in doubtful cases, to carry out the purposes of the Act. See Op. Atty. Gen. No. 84-53, dated May 10, 1984.

OPINION NO. 87-70 July 24, 1987

Military personnel cannot satisfy actual residency requirements in South Carolina for in-state tuition rates while stationed in another state when such personnel were not domiciled and residing in South Carolina at the time of entry into military service.

TO: General Counsel
System Legal Department
University of South Carolina

FROM: J. Emory Smith, Jr.
Assistant Attorney General

You have requested the advice of this Office as to whether the "physical presence" requirements for in-state tuition rates must be met by military personnel who attempt to change their domicile to South Carolina while in military service elsewhere when such personnel were not residing in South Carolina immediately prior to entering service. A previous opinion of this Office concluded that military personnel that have established domicile and residence in South Carolina would lose neither status upon their military transfer to another state absent an intent to establish residence and domicile elsewhere. Ops. Atty. Gen., April 16, 1987. South Carolina law requires persons to "reside in" South Carolina for no less than twelve (12) months as well as to be domiciled here in order to receive in-state rates. §59-12-20(A) of the Code of Laws of South Carolina, 1976, as amended.

The following statement is applicable here:

> "Where a soldier or sailor claims residence in a State which is neither the state in which he is stationed nor the State from which he entered the service, the fact of military service appears to have little effect

ATTACHMENT B

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

May 18, 2005.

The Honorable Thomas L. Moore
Senator, District # 25
Gressette Senate Office Building, Suite 513
Columbia, South Carolina 29211

Dear Senator Moore:

You have requested an opinion regarding a letter you received concerning the subject of confidentiality and the allocation of funds for emergency food and shelter. The letter you received was attached to your opinion request and forwarded to this Office. It was explained therein that Federal Emergency Management Agency (FEMA) had authorized local boards to distribute allocated funds for emergency food and shelter. The letter noted that the local board was required to compile information and submit a report to the "FEMA board" who then submitted a report to the "Federal Emergency Management Agency." Moreover, the author explained that one of the organizations involved in the program had included the names of recipients in its report. Another organization refused to view the report, claiming that the disclosure of recipient names was a violation of those individuals' privacy rights. The letter then clarified that the names were only shared with members of the local board and that the names were collected solely for the purpose of preventing fraudulent "duplication" ("recipients going from one organization to another and receiving help twice through the same grant."). Finally, the letter questioned whether disclosure of this information was a breach of confidentiality, and whether the local boards should require recipients to sign a release of information form before providing assistance.

Although not specifically mentioned, the process of allocation, distribution and reporting described in the letter appears to be that found in the Federal Emergency Management Food and Shelter Program (EFSP). Therefore, we will advise as to the confidentiality of those who receive EFSP assistance. Second, we observe that, because the EFSP is a federal assistance program, disclosure of information derived from the execution of the program is subject to *federal* disclosure requirements. Finally, as will be seen below, federal case law indicates that the names of the recipients of federal assistance are typically not protected from disclosure pursuant to the Freedom of Information Act if the public's interest in disclosure outweighs the individual's right to privacy. Following review of the pertinent federal statutes and relevant case law, we advise that a court would most likely conclude it not to be a violation of the recipients' privacy if their names are disclosed to the local board. Nevertheless, while perhaps legally unnecessary, it is probably a wise practice for recipients to sign a release of information form prior to providing assistance.

Law / Analysis

Although not specifically addressed in the letter, we have concluded that the author inquired as to the confidentiality of names taken with respect to the EFSP. The Emergency Food and Shelter Program's purpose is "the provision of emergency food and shelter services to needy individuals." *See*, Notice, Federal Emergency Management Agency, The National Board Plan for Carrying out the Emergency Food and Shelter Program," March 4, 1988. We note that the United States Code establishes the Federal Emergency Management Program National Board. 42 U.S.C.A. § 11331. The Board consists of a Director and six members chosen from the United Way of America, the Salvation Army, the National Council of Churches of Christ in the U.S.A., Catholic Charities U.S.A., the Council of Jewish Federations, Inc., and the American Red Cross. The National Board "is chaired by a representative of the Federal Emergency Management Agency (FEMA)." See, http://www.fema.gov/rrr/efs.shtm; see also, 42 U.S.C.A. § 11331 (a). Furthermore, the statute establishes a local board which shall in part "monitor recipient service providers for program compliance" and "ensure proper reporting." 42 U.S.C.A. § 11332 (b)(2), (4). Based upon the description of the program and its processes contained in the enclosed letter, as well as the aforementioned statute, we believe that the subject or inquiry of that letter is the confidentiality of the names of those individuals receiving assistance pursuant to the EFSP.

Thus, we now turn to whether the disclosure of information taken pursuant to the implementation of the EFSP is governed by state or federal law. The EFSP statute explains that the National Board possesses authority to allocate funds to "private nonprofit organizations and local governments," but the Board "may not carry out programs directly." 42 U.S.C.A. § 11343 (b)(1)(A), (b)(2). Furthermore, the statute requires the National Board to create specific written guidelines for implementation of the program. The written guidelines include:

> (1) methods for identifying localities with the highest need for emergency food and shelter assistance;
> (2) methods for determining the amount and distribution to such localities;
> (3) eligible program costs, including maximum flexibility in meeting currently existing needs;
> (4) guidelines specifying the responsibilities and reporting requirements of the National Board, its recipients, and service providers;
> (5) guidelines requiring each private nonprofit organization and local government carrying out a local emergency food and shelter program with amounts provided under this part, to the maximum extent practicable, to involve homeless individuals and families, through employment, volunteer services, or otherwise, in providing emergency food and shelter and in otherwise carrying out the local program; and
> (6) guidelines requiring each private nonprofit organization and local government carrying out a local emergency food and shelter program with amounts provided

> under this part to provide for the participation of not less than 1 homeless individual or former homeless individual on the board of directors or other equivalent policy making entity of the organization or governmental agency to the extent that such entity considers and makes policies and decisions regarding the local program of the organization or locality; except that such guidelines may grant waivers to applicants unable to meet such requirement if the organization or government agrees to otherwise consult with homeless or formerly homeless individuals in considering and making such policies and decisions.

It is apparent from the foregoing that federal law is controlling with respect to the EFSP program. The aforementioned authority requires the local boards to implement the EFSP programs directly as a matter of federal law. In collecting information and implementing federal law, the local boards are acting as part of the federal government. Therefore, the local boards are subject to federal law when acting pursuant to federal policy. Accordingly, in implementing federal law, it appears that the local boards are subject to the disclosure requirements of the federal Freedom of Information Act.

The federal Freedom of Information Act governs the confidentiality of information gathered pursuant to a federal program or by a federal agency. See generally, 5 U.S.C.A. § 552. The Supreme Court has concluded that the Act is designed to "facilitate public access to government documents" and that it creates a "strong presumption" in favor of governmental disclosure. *U.S. Dept. of State v. Ray*, 502 U.S. 164, 73, 112 S.Ct. 541, 547, 116 L.Ed.2d 526 (1991). The Freedom of Information Act requires full disclosure of documents unless the information falls within one of the nine statutory exemptions. *Burka v. United States Department of Health and Human Services*, 87 F.3d 508, 515 (D.C.Cir.1996); see also, *Oglesby v. United States Department of Army*, 79 F.3d 1172, 1176 (D.C.Cir.1996).

Exemption 6 of the federal FOIA deals specifically with personnel files, medical files and similar files and will apply only "... if disclosure would constitute a clearly unwarranted invasion of privacy." 5 U.S.C.A. § 552 (b)(6). In order for this exemption to be governing, a court must 'balance the individual's right of privacy' against the public's right to scrutinize agency action. *Department of State v. Ray*, 502 U.S. at 175. As the Court noted in *Washington Post Company v. U.S. Dept. of Agriculture*, 943 F.Supp. 31, 34 (D.C. Cir. 1996), the Supreme Court has rejected the position that the "disclosure of a list of names and other identifying information is inherently and always a significant threat to the privacy of individuals on the list. Instead, ... whether disclosure of a list of names is a 'significant or a *de minimus* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.'" (quoting *Department of State v. Ray*, 502 U.S. 164, 176 n. 12 (1991)) (quoting *National Association of Retired Federal Employees ("NARFE") v. Horner*, 879 F.2d 873, 877 (D.C.Cir.1989), cert. denied, 494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990)). Therefore, disclosure is required, unless such disclosure

encourages "clearly unwarranted" intrusions upon individual privacy rights. *NARFE v. Horner*, 979 F.2d at 875.

To our knowledge, the courts have not specifically addressed the question of disclosure with respect to the EFSP. However, in similar disclosure cases, public disclosure of names in cases in which there was little chance that privacy rights would be violated have been upheld. In *Washington Post Company v. United States Department of Agriculture, supra*, for example, the Court concluded that disclosure of the names and addresses of individuals receiving government cotton subsidies was not exempted from release under the Freedom of Information Act. In the view of the Court, there was little or no harm of private intrusion while, at the same time, a substantial interest existed to release the information to the public in order that the workings of the agency could be monitored. The Court reasoned that, because the list was so large, most of the names were those of business people who would not realize a significant increase in the volume of solicitation as a result of the disclosure. Moreover, inasmuch as there was a strong public interest in disclosing the names and addresses of recipients to better understand the workings of the agency, the information was public in nature and properly disclosed. 943 F. Supp. at 34, 35, 36.

Furthermore, we have relied upon similar federal case law interpreting the Federal Freedom of Information Act to interpret the South Carolina's Freedom of Information Act where a purported privacy interest is involved. In *Robles v. Environmental Agency*, 484 F.2d 843 (4th Cir. 1973), the Fourth Circuit Court of Appeals had stated that, "in determining the issue of whether disclosure would constitute a 'clearly unwarranted invasion of personal privacy,' the court should 'tilt the balance in favor of disclosure.' We adopted the same reasoning as set forth in *Robles* and added that, "where an exemption from disclosure is applicable to a particular record, such an exemption is, of course capable of being waived." See, *Op. S.C. Atty. Gen.* May 10, 1984; *Op. S.C. Atty. Gen.* November 14, 1989. *See also, Society of Profess. Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) [matters of public interest are not exempt pursuant to privacy exceptions of FOIA]; *Weston v. Carolina Research and Devel. Foundation*, 303 S.C. 398, 402, 401 S.E.2d 161 (1991) [FOIA "mandates that the public be provided with information regarding the expenditure of public funds."

Although a presumption of disclosure exists, we note also that the courts have been hesitant to uphold disclosure when it would invite an unwarranted invasion of personal privacy. In *NARFE v. Horner, supra*, the D.C. Circuit Court found that disclosure of the names and addresses of retired federal employees would be overly intrusive because it would significantly increase the volume of solicitation mail received and was, therefore, an unwarranted invasion of personal privacy. 979 F.2d at 875. Furthermore, in *Stabasefski v. United States*, 919 F.Supp. 1570 (M.D. Ga. 1996) the District Court for the Middle District of Georgia found that the names of Federal Aviation Administration (FAA) employees who had received disaster assistance were exempt from disclosure under the Freedom of Information Act because disclosure would cause unwarranted invasion of personal

privacy. At the same time, disclosure would not reveal any information about the workings of the FAA.

Based upon the foregoing, we advise that the disclosure of recipient names when implementing the EFSP would most likely not constitute a violation of the Freedom of Information Act. In the attached letter, the author explained that the recipient names were provided for the purpose of preventing fraudulent "duplication" (recipients going from one organization to the next and receiving double recovery from the same grant). Importantly, the letter indicates that the names were only disclosed to the local board members rather than to the public at large. Implementing the above-referenced balancing test, we must thus discern whether the right of the recipient's personal privacy outweighs the public's interest in disclosure. See, *Department of State v. Ray*, 502 U.S., *supra* at 175. Second, we must determine whether the information was actually disclosed. Based upon the information presented to us, the only information disclosed were the names of the EFSP recipients. We thus conclude that, because only the names were disclosed, there is little or no chance that disclosure would constitute a "clearly unwarranted invasion of personal privacy." In the present situation, disclosure of the names would do nothing more than reveal the identity of the individual receiving federal assistance. If the recipients' names were coupled with addresses or social security numbers, there would undoubtedly be a far more significant chance for an invasion of privacy. However, as the Supreme Court has indicated, the mere disclosure of a list of names is not automatically an invasion of one's privacy. See, *Washington Post Company v. United States Department of Agriculture*, *supra*; *see also, Hertzberg v. Veneman*, 273 F.Supp.2d 67, 85 (D.C. Cir. 2003) [unlimited disclosure of name and address "is not enough to satisfy the requirements of Exemption 6 ...."] Furthermore, the courts have clearly established that where doubt exists, one should err on the side of disclosure. See, *Robles v. Environmental Protection Agency*, 484 F.2d, *supra*, at 843. Accordingly, we advise that no personal privacy issue is raised by the mere disclosure of recipient names.

In analyzing the issue, the courts have also focused upon the issue of whether disclosure of the names would assist the public in analyzing the actions of the agency. In this case, the author of your enclosed letter noted that the sole purpose for providing the names was to prevent fraudulent "duplication." In *Washington Post*, the Court explained that disclosure served to shed light on "the workings of the Department of Agriculture and the administration of this massive subsidiary program." 943 F.Supp. at 36. Likewise, it appears that disclosure of recipient names in this case would also serve an important public interest. As indicated, the purpose for collecting the names is to prevent fraudulent "duplication." Disclosure would provide valuable information as to who receives funds and how those funds are distributed. Furthermore, disclosure would ensure that the funds are being properly administered in compliance with the program and the statute as required in 42 U.S.C.A. § 11332 (b)(2). Accordingly, we believe that disclosure would not violate personal privacy interests. Furthermore, disclosure serves the valid purpose of monitoring the actions of the local board as well as the organizations distributing the program funds.

We are unaware of any request having been made pursuant to the federal Freedom of Information Act in this instance and therefore assume no such request has been made. Thus, the real question here is whether the names could be properly taken and reviewed by the local board.[1] In implementing the EFSP, the local board is delegated certain oversight responsibilities that it must perform, including:

> (1) determine which private nonprofit organizations or public organizations of the local government in the individual locality shall receive grants to act as service providers;
> (2) monitor recipient service providers for program compliance;
> (3) reallocate funds among service providers;
> (4) ensure proper reporting; and
> (5) coordinate with other Federal, State, and local government assistance programs available in the locality.

42 U.S.C.A. § 11332 (b).

The foregoing statutory language demonstrates that the local board possesses broad authority to implement the program and to oversee that implementation. Yet, the statute is silent as to whether recipient names must be included in any report to the local board. In our view, however, it is within the local board's authority to prevent "duplication" when exercising its aforementioned duties and to monitor how the taxpayer funds are being spent. Therefore, absent express statutory language prohibiting such practice, we are of the opinion that the local boards may collect and view the names of recipients in the scope of fulfilling their duties to monitor recipient service providers and ensure proper reporting. See, 42 U.S.C.A. § 11332 (b). Such a function is part and parcel of the local board's oversight function and is a minimal intrusion upon the recipient's privacy interests.

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[1] We will assume for purposes of this opinion that the organizations providing the names to the local bards are "agencies" for purposes of the federal FOIA. *See, Rocap v. Indiek,* 539 F.2d 174 (U.S. App. D.C. 1976) [Federal Home Loan Mortgage Corp. is subject to substantial federal control and is thus an "agency" for purposes of FOIA]; *Krebs v. Rutgers*, 797 F.Supp. 1246 (D.N.J. 1992) [entity has FOIA or Privacy Act agency status if government is involved in and/or has authority over decisions affecting ongoing, daily operations of entity]. That an entity is an "agency" for purposes of the federal FOIA/Privacy Act is a "threshold" question which must be resolved by a court.

In this instance, it appears that the list of names is originally generated by the organization distributing EFSP funds and that such list is then provided to the local board as part of its review process. It is unclear whether this information would be considered as a record of the organization or of the local board. Again, however, we will assume that the information is that of an "agency" pursuant to the FOIA.

Finally, as to the question regarding release forms, we encourage the use of such forms. As stated, we believe that the recipient names are disclosable, particularly in such a limited fashion as is contemplated here, because disclosure does not constitute a clearly unwarranted invasion of personal privacy. Furthermore, it is well within the authority of the local board to collect the names. Nevertheless, we caution that we have located no judicial decision which is precisely on point in this area. Therefore, although we believe that a court would likely find the names to be disclosable in the circumstances outlined in your letter, we advise that it is probably a good practice for recipients to sign a waiver of information before taking their names.

The courts have concluded that where personal privacy interests are implicated, only the individual who owns such interest, may validly waive it. *See, Sherman v. United States Dept. of the Army*, 244 F.3d 357 (5th Cir. 2001). The privacy interest at stake in FOIA exemption analysis belongs to the individual, not the agency holding the information. *Id.* Thus, certainly a local board would be wise to obtain a valid waiver through the use of a waiver form, particularly if such names are to be disclosed to the public as part of an FOIA request therefor. The use of such forms would serve to remove any doubt concerning the release of such names.

Conclusion

It is our opinion that a court would most likely conclude that the local agency's collection of recipient names pursuant to the Emergency Food and Shelter Program is not exempt under Exemption 6 of the federal Freedom of Information Act. In Exemption 6, "Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.' The device adopted to achieve that balance was the limited exception where privacy was threatened for 'clearly unwarranted' invasions of privacy. *Dept. of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Here, a court would likely conclude that the intrusion upon the privacy interests of recipients of EFSP assistance is "*de minimis*" rather than "clearly unwarranted." All that will be disclosed to the local boards by nonprofit agencies is the name of the recipient receiving federal assistance. Moreover, disclosure of such information properly sheds light with respect to the implementation of the program. Further, as we understand, there has been no request to make such information public, and no FOIA request has been made, but would be only disclosure to the local board is contemplated. The local boards' ability to review such information is a valid exercise of its duties, and in the context of providing the names of recipients of assistance to the local boards, we conclude that such is not a "clearly unwarranted invasion of personal privacy" under the federal FOIA.

With respect to your question regarding the necessity of a release of information form, the use of such a form is obviously a prudent course and we encourage such use. Although we consider any privacy interest in this circumstance to be *de minimis*, a valid waiver of any privacy interest

regarding disclosure of a recipient's name would eliminate any dispute regarding the existence of such privacy right.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

EXHIBIT 2

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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November 12, 2013

Mr. W. Allen Nickles, III
1519 Richland Street
Columbia SC 29201

Re: George Glassmeyer v. City of Columbia
Appellate Case No. 2013-001880

Dear Counsel:

Enclosed is the Initial Brief, Designation of Matter and Proof of Service you filed in the above case.

The initial brief cannot include attachments absent court order. Rule 208, SCACR. Your attachments may be better suited for inclusion in the record on appeal and designation of matter if they meet the requirements of Rules 209 and 210, SCACR.

Please file an Amended Initial Brief, Designation of Matter and Proof of Service within fifteen (15) days of the date of this letter.

Very truly yours,

V. Claire Allen

CLERK

cc: Kirby Darr Shealy, III, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2013-001880

City of Columbia.....Appellant.

v.

George S. Glassmeyer.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Appellant's Motion to Supplement the Record on Appeal by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

Kirby D. Shealy, III
Adams and Reese, LLP
1501 Main Street, 5th Floor
Columbia, South Carolina 29201

This 20th day of November, 2013.

NICKLES LAW FIRM, LLC

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