

**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 AMENDED INITIAL BRIEF

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SC Court of Appeals

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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,

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

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 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 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)

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

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.

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), 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) 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 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.

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.

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.

CONCLUSION

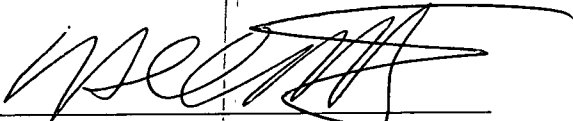
Review of the records provided to Glassmeyer in the Modified Response of September 4, 2013 demonstrates that the City has acted within the requirements of FOIA in balancing privacy interests while offering access to public information regarding selection of its City Manager. See generally, City of Columbia 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

⁴The 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.

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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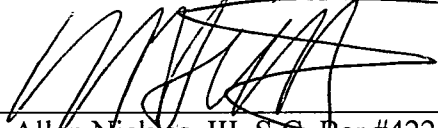
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Appellant's Amended Initial Brief by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

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This 20 day of November, 2013.

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