

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
G. Edward Welmaker, Circuit Court Judge  
Charles B. Simmons, Jr., Master-in-Equity

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Case No. 2010-CP-23-6767

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Arthur M. Field,..... Respondent-Appellant,

v.

Henry McMaster, Attorney General, .....Appellant-Respondent.

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**APPELLANT'S INITIAL BRIEF OF APPELLANT-RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the Orders below erroneously required the disclosure of information that was either nonpublic information under § 35-1-607(b)(1) of the Securities Act, or was exempt from disclosure under FOIA § 30-4-40(a)(7)(correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships).
2. Whether the July 18, 2011 Order was a final order.
3. Whether the court below erred in disclosing certain information in the privilege log over objection and without staying that disclosure pending appeal.

## STATEMENT OF THE CASE

This action under the Freedom of Information Act, *S.C. Code Ann.* §§ 30-4-10, et seq., was filed on August 17, 2010 by plaintiff Arthur Field against the Attorney General's Office. Plaintiff claimed that certain documents he requested in 2009 under the Freedom of Information Act (FOIA) had not been produced. The Attorney General answered, asserting that all non-exempt documents had indeed been produced, and that this action should be dismissed.

Both parties filed motions for summary judgment. R. \_\_\_, \_\_\_. The case was scheduled for hearing on those motions on January 24, 2011 before Judge Edward W. Miller. As the transcript of that hearing R. \_\_\_, indicates the hearing was continued in order to see whether plaintiff Field could narrow his request. R. \_\_\_.

Plaintiff subsequently served the request discussed at the hearing. R. \_\_\_. The Attorney General responded to plaintiff in detail, noting that the supposedly-narrowed request was actually broader than the original FOIA request had been. R. \_\_\_.<sup>1</sup> The Attorney General also noted that it would, if requested by the Court, provide the Court *in camera* with descriptions and/or copies of any nonpublic or exempt document for review by the Court. *Id.* Given that plaintiff Field did not narrow his request as he had indicated he would, this effort to end the case by

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<sup>1</sup> That response was also subsequently provided to Judge Welmaker. R. \_\_\_. (3/15/11 Tr. 14, 20).

agreement did not succeed.

The motions for summary judgment were therefore again scheduled for hearing and were heard by Judge G. Edward Welmaker on March 15, 2001. R. \_\_\_. Judge Welmaker took the motions under advisement. R. \_\_\_.

Less than week after the hearing, the Supreme Court of South Carolina decided *Evening Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011). The Supreme Court held, among other things, that that case should be remanded in order for the circuit court to review the relatively small quantity of documents that the circuit court had not previously examined in that FOIA action. Judge Welmaker shortly thereafter issued an order referencing the *Evening Post* case. R. \_\_\_.<sup>2</sup> That Order held in view of *Evening Post*, “the appropriate action is for an *in camera* review of the documents requested in Petitioner's July 13, 2009 FOIA request. Respondent is to prepare a privilege log consisting of each document requested and denoting the applicable exemption(s) or privilege(s) claimed. Respondent is to comply with the provisions of this order by submitting the documents to The Honorable Charles B. Simmons, Master-in-Equity for Greenville County by May 2, 2011. Judge Simmons shall conduct a review of the documents and issue an appropriate order as to the merit of the

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<sup>2</sup> That Order crossed in the mail with a letter from defendant's counsel calling the recent case to Judge Welmaker's attention. R. \_\_\_.

claims.” R. \_\_\_.

The Attorney General moved for certain changes to the March 31, 2011, Order, based on practical concerns. R. \_\_\_. The motion noted that the documents requested consisted of the contents of approximately seven file drawers, that is, almost two file cabinets. *Id.* The motion asked that the March 31, 2012 Order be amended to address certain aspects of the practicalities of making the documents available to Judge Simmons for review. Judge Welmaker issued a Supplemental Order, filed on April 20, 2011, in which the procedures for complying with the earlier Order were set forth in detail. R. \_\_\_.

On May 13, 2011 (the extension date set forth in the April 20, 2011 Order, R. \_\_\_), the boxes of documents and privilege log were delivered by the Attorney General’s Office to Judge Simmons. *See* R. \_\_\_ (cover letter).

On May 31, 2011, an amended privilege log was filed. *See* R. \_\_\_ (cover letter). On the same day, the Attorney General filed a Motion for Documents to Remain Under Seal or in Camera, in which it was requested that any Order of Judge Simmons not identify either the contents of the documents or their identities, regardless of the result reached, in order to protect that information from disclosure pending review by an appellate court. *See* R. \_\_\_.

Additional privilege log information was provided to Judge Simmons following a conference call on June 3, 2011. R. \_\_\_ (cover letter). Judge Simmons

did not thereafter hold a hearing with respect to the issues of which documents or categories of documents might be nonpublic or exempt. However, by letter dated July 6, 2011, Judge Simmons provided the parties with an advance copy of the Order and exhibits (including the privilege log) that he advised he would be filing with the Clerk on July 15, 2011 (later changed to July 18, 2011). R. \_\_.<sup>3</sup> He advised that the reason for his providing an advance copy was to permit the parties additional time to review the Order in view of the time period for filing “any appropriate motions relative to the Order.” R. \_\_\_.

The Order was filed on July 18, 2011. The terms of the Order will be discussed below, but the result was that Judge Simmons held some documents to be exempt from disclosure and others not exempt. The Order further held as follows:

The Court allows Respondent [the Attorney General’s Office] 10 days from the date of this Order being filed and served to file a motion specifically objecting, with the reasons for such objection, to disclosure of any information contained in Exhibit A. Likewise, Petitioner shall also have the right to file a similar motion seeking disclosure of items listed on Exhibit B. Any such motion shall then be heard by the undersigned in open court, if in the Court’s discretion such a hearing is necessary, so as to allow the Court to hear from both parties relative to the reasons for disclosure or nondisclosure.

R. \_\_.

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<sup>3</sup> The version of the Order attached to that letter is identical to the one filed on July 18, 2011. Only the one filed on July 18, 2011, is included in the Record on Appeal.

On July 28, 2011, the Attorney General filed a Motion to Alter or Amend Judgment pursuant to Rules 52 and 59(e), S.C.R.C.P. R. \_\_\_. A Motion to Stay was filed on the same day, requesting in advance a stay pending appeal of any order that might order any documents to be disclosed. R. \_\_\_.

The court below had held in the above-quoted portion of its July 18, 2011, Order that a hearing might be held on the motions referenced therein, but the Attorney General's July 28, 2011 motions were denied without a hearing in an Order filed August 18, 2011 and received on August 22, 2011.

One issue raised by the Attorney General in the July 28, 2011, motion was directed toward whether Judge Simmons appropriately entered judgment on the parties' claims, as opposed to denying summary judgment for both sides and then holding a plenary hearing on the merits. Judge Simmons held that any issues not "relative to Petitioner's FOIA request" were regarded by him as "left to be addressed by Judge Welmaker." R. \_\_\_, n. 1.

In light of the possibility that there were still issues that needed to be addressed by Judge Welmaker, and also as a precaution with respect to certain new conclusions reached by Judge Simmons, the Attorney General filed another Motion to Alter or Amend on August 31, 2012, addressing it both to Judge Simmons and to Judge Welmaker. R. \_\_\_

Shortly thereafter, both judges issued separate orders, both filed on

September 15, 2012. Judge Welmaker's Order held that

motions for summary judgment filed by both parties are denied. Clearly a genuine issue of material facts exists. The volume of documents in dispute is further evidence that this case is not appropriate for summary judgment at this stage.

\* \* \*

For the appellate benefit of the parties this is considered a final order.

R. \_\_\_. Judge Welmaker further held that "Any decision as to staying the enforcement of the July and August orders of Judge Simmons is left to his discretion." R. \_\_\_. This Order appears at first blush to contain a contradiction in terms, i.e., an order denying summary judgment but stating at the same time that it was final. However, in its context, it appears that that Order simply served as a confirmation that Judge Welmaker's April 4, 2011, Order, which the Attorney General had argued to have been somewhat ambiguous on the point, was intended to be a denial of both parties' motions for summary judgment, coupled with a referral to Judge Simmons for disposition of the case on the merits.<sup>4</sup>

Judge Simmons in turn declined to reconsider any aspect of his ruling on the FOIA issues. R. \_\_\_. With respect to the Motion to Stay, however, he noted that

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<sup>4</sup> If the Court were to read Judge Welmaker's September 15 Order literally, that is, as simply denying both sides' motions for summary judgment and leaving the case to proceed further, then both the present appeal and plaintiff's cross appeal are probably premature.

“Once either side files an appeal, any disclosures of documents would be stayed pending appellate court Order.” R. \_\_\_. Judge Simmons also noted that his September 15, Order was a final order. *Id.*

The first denial of reconsideration was received by counsel for the Attorney General on August 22, 2012. The Attorney General filed its Notice of Appeal, which included both of the September 15, 2011, Orders as well as all others, on September 19, 2012. The present appeal by the Attorney General seeks reversal of the parts of the Orders below that would require disclosure of material that the Attorney General contends is either nonpublic or exempt from disclosure.

Plaintiff Field filed a cross appeal on September 24, 2012, with respect to the Order of Judge Simmons dated August 18, 2011 and both of the Orders dated September 15, 2011.

## STATEMENT OF FACTS

### A. Background.

The documents sought in this case relate to an investigation of plaintiff Arthur Field by the Securities Division of the Attorney General's Office pursuant to the South Carolina Uniform Securities Act, *S.C. Code Ann.* § 35-1-101, et seq.<sup>5</sup> Sections 35-1-601, et seq., vest the Attorney General as Securities Commissioner with broad investigative and enforcement powers with respect to matters in which securities fraud is alleged. *See, e.g.*, § 35-1-601, et seq. The Attorney General as Securities Commissioner also is responsible for the registration of securities. § 35-1-300, et seq.

The voluminous securities investigation files reviewed by the court below provide ample information about the nature of the allegations against Field. For present purposes, a brief background can be found in an order of District Judge Henry M. Herlong in the course of dismissing a federal civil action, brought by Field against the Attorney General and certain attorneys and investigators in the Attorney General's Office. In that now-dismissed action, Field claimed damages and requested an injunction against threatened or actual criminal investigation or prosecution of Field and others. *Field v. McMaster*, 2010 WL 3257888 (D.S.C.

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<sup>5</sup> By statute, the Attorney General is the Securities Commissioner for South Carolina. *S.C. Code Ann.* § 35-1-102(28).

2010), *aff'd*. 2010 WL 4137565 (4th Cir. 2010), *cert. denied*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1788 (2011). The Order of Judge Herlong described the factual background as follows:

Plaintiffs [including present Plaintiff Field] are principals of Capital Investment Funding, LLC (“CIF”). Defendants are current or former employees of the South Carolina Attorney General's Office (“the Office”). On May 11, 2007, the Securities Division of the Attorney General's Office (“the Division”) issued a Notice of Intent to Seek a Stop Order (“Notice”) against CIF alleging that “the registration statement submitted by [CIF was] incomplete, false, misleading, and tends to work a fraud upon purchasers.” (Defs. Mem. Supp. Summ. J. Ex. 11 (Notice at 1).) Plaintiffs allege that the issuance of the Notice “was a ruse” . . . .

2010 WL 3257888 at 1.<sup>6</sup>

As can therefore be seen from the files at issue and the above background quotation, the Securities Division of the Attorney General’s Office has conducted an extensive investigation into the activities of plaintiff Field and his corporation, Capital Investment Funding, LLC. That investigation has never been terminated. In addition, Field himself has informed this Court that he is under active investigation by the State Grand Jury. In a letter dated April 7, 2012 (opposing a briefing extension request), plaintiff Field advised the Court that “the Attorney General, defendant herein, sent me a letter telling me I am a target in a State Grand Jury investigation

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<sup>6</sup> Judge Herlong declined to enjoin any prosecutorial activities. *Id.* He also dismissed the damage claims based on certain immunities and on the plaintiffs’ failure to allege constitutional violation by the defendants.

concerning this very matter.<sup>7</sup>”

The files whose disclosure is in issue constitute the investigative file of the Securities Division of the Attorney General’s Office with respect to Field and other persons or entities that were the subject of Field’s FOIA request.. The Securities Division also has a Registration Branch whose files contain a number of documents relating to the registration of securities. §35-1-301, et seq. Unlike the investigative files, the registration files are primarily public documents. § 35-1-607(a).

The extensive investigative file of the Securities Division with respect to Plaintiff Field fills almost two file cabinets. R. \_\_\_ (4/13 motion) It was placed into twelve boxes of materials for review by Judge Simmons. R. \_\_\_ (7/18 Order at 2). That investigative file consists of two broad categories of information: (a) written material obtained in connection with a securities investigation, and (b) material generated by the attorneys or investigators or other staff of the Securities Division, and which is in the form of internally-used information such as legal memoranda, drafts, or research, or is in the form of correspondence to persons outside the Division, such as experts and other witnesses.

**B. FOIA requests and the responses.**

At about the same time as the time of filing of the federal action, that is, in July

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<sup>7</sup> This information with reference to Field receiving a target letter had not otherwise been disclosed to the undersigned private counsel for the Attorney General’s Office.

2009, Field submitted a FOIA request to the Attorney General's Office. Complaint, Exhibit A. R. \_\_\_\_\_. The request was directed to the Securities Division of the Attorney General's Office. *Id.* It essentially sought every document, or at least every document not exempt from disclosure under the Act, in the Securities Division of the Attorney General's Office that may have pertained to Field, his co-plaintiffs in the federal action, CIF, and a number of other corporate entities as well. Field also sought certain nonexempt personnel information about one attorney and three investigators in the Attorney General's Office, all of whom were involved in investigative or prosecutorial activities. *Id.*<sup>8</sup> The request specifically noted that it was intended to "permit preparation for various administrative and civil proceedings." *Id.*<sup>9</sup>

In response, the Attorney General's Office produced nearly 2,500 pages of public documents. R. \_\_\_, \_\_\_. (Chambers Affidavit, Paragraph 4 and 8/3/09 letter attached thereto.) An additional response was made in September 2009, R. \_\_\_, and at that time, the Attorney General's Office advised that certain exemptions applied, and that the Office considered its response to be complete. R. \_\_\_. (Chambers Affidavit

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<sup>8</sup> The nonexempt personnel information was provided to Field, and there is now no outstanding claim by Field pertaining to personnel records.

<sup>9</sup> Field later claimed before Judge Miller and Judge Welmaker that the reason for the request was to assist the Court's receiver in connection with the liquidation of CIF. R. \_\_\_, \_\_\_ (transcripts).

and 9/24/09 letter attached thereto).<sup>10</sup> As discussed above in the Statement of the Case, Field eventually filed the present action in August 2010. Judge Welmaker ordered the Attorney General to submit to Judge Simmons the documents that the Attorney General contended to be not subject to disclosure

**C. Information provided to Judge Simmons.**

In response to Judge Welmaker's Orders requiring the production of a privilege log, the Attorney General on May 13, 2011, had the boxes of documents comprising the investigative file, along with an *in camera* privilege log, delivered to Judge Simmons. A copy of the cover letter was sent to plaintiff Field. R. \_\_\_. A second version of the privilege log was sent to Judge Simmons on May 31, 2011, also *in camera*, but also with a copy of the cover letter to plaintiff Field. R. \_\_\_. The Motion to Seal referenced above was filed at the same time. In that motion, R. \_\_\_, the Attorney General contended that even the identity or existence of exempt documents was properly subject to protection from disclosure. The relief requested in that motion was that any detailed descriptions of the documents at issue, as well as the

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<sup>10</sup> On July 28, 2010 Field submitted another FOIA request. R. \_\_\_ (Complaint, Exhibit C), but this was not the subject of Judge Welmaker's April 4, 2011, Order, and Field has not made any contention that Judge Welmaker should have addressed the 2010 request. . In any event, Field was advised by letter dated August 16, 2010, that the Attorney General's Office was reviewing the request. By letter dated October 29, 2010, attached to the Chambers Affidavit, R. \_\_\_, Mr. Chambers advised that the requested items had either already been produced, were exempt for reasons stated therein, or did not exist. R. \_\_\_.

contents of the documents, not be disclosed in any order which was to be made available to plaintiff Field and to the public, but that a second, more detailed version of the Order should also be prepared and kept *in camera*, to be supplied to a reviewing court if necessary. *Id.* As will be seen, part of this relief was effectively denied, with the result that the detailed privilege list was disclosed to plaintiff Field by the court's sending him an advance copy of the July 18 Order, leaving the Attorney General with no remedy for that disclosure.

On June 3, 2011, Judge Simmons held a conference call with the parties. As summarized by Judge Simmons in the July 18 Order, the purpose of that call was to require the Attorney General "to submit to the Court a privilege log capable of production to Petitioner based upon the Court's opinion that Petitioner had rights to know, at least in very general terms, the nature of the documents Respondent was contending were exempt from disclosure." R. \_\_\_. Following that conference call, the Attorney General produced another version of the privilege log, which is attached to the July 18 Order. R. \_\_\_. That log consisted of four columns. In the cover letter that accompanied that privilege log, the Attorney General advised that it did not object to the Court disclosing Columns 1 and 4 to plaintiff Field. R. \_\_\_. Those columns consisted of the physical file location and the nature of the privilege claimed. R. \_\_\_. The Attorney General did object to the disclosure of Column 2, which contained the specific title of each file folder. *Id.* Finally, the Attorney General also asked that if

possible, Column 3, a general explanation of the contents of each file folder, also not be disclosed. Notwithstanding these requests, the July 18 Order disclosed the entire log.

The July 18 Order held that some documents were exempt and some were nonexempt. R. \_\_\_. The documents held exempt were detailed in the Court's attachment to that Order, R. \_\_\_, with a brief explanation for each set, similar to the claim of privilege asserted in the privilege log of the Attorney General. The documents deemed nonexempt by the July 18 Order consisted of everything in the Attorney General's privilege log, Exhibit A to the Order, that was not exempted by the Court's list, Exhibit B to the Order.

With respect to the next steps to be taken, the July 18 Order provided as follows:

The Court allows Respondent 10 days from the date of this Order being filed and served to file a motion specifically objecting, with the reasons for such objection, to disclosure of any information contained in Exhibit A. Likewise, Petitioner shall also have the right to file a similar motion seeking disclosure of items listed on Exhibit B. Any such motion shall then be heard by the undersigned in open court, if in the Court's discretion such a hearing is necessary, so as to allow the Court to hear from both parties relative to the reasons for disclosure or nondisclosure.

R. \_\_\_. The Order concluded by discussing the mechanics of producing the nonexempt documents, "[o]nce the Court determines the exact documents to be

disclosed.”

Upon receipt of the advance copy of that Order (some days ahead of its actual entry, as noted above), the Attorney General’s Office identified those documents tentatively ordered by the Court to be produced. Those documents were then physically flagged within their respective folders, which were returned to Judge Simmons. For each folder, a separate sheet was prepared and submitted to Judge Simmons along with the folder, detailing the flagged documents therein and the reason for nondisclosure. Copies of the sheets were also attached to the July 28, 2011 Motion to Alter or Amend.

The sheets and flags on the documents were keyed to six different categories, numbered 3 through 8.<sup>11</sup> R. \_\_\_. Of the six categories, Nos. 3, 4, 5 and 7 pertained to various specific types of attorney correspondence and/or work product. Category 6 pertained to materials obtained in the course of a Securities Division investigation.<sup>12</sup>

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<sup>11</sup> There were no categories 1 and 2—those numbers were originally intended for other purposes not related to categorization.

<sup>12</sup> Category 8 was discussed in Note 2 of the July 28 Motion to Alter or Amend. It contained a large number of documents which had probably already been disclosed to plaintiff Field, but which remained technically nonpublic documents or documents exempt from disclosure. With respect to nonpublic or exempt documents already disclosed to plaintiff Field, the Attorney General has been of the view that the nondisclosure of them should not matter to plaintiff Field, who by definition has already seen them. On the other hand, the Attorney General was concerned not to disclose nonpublic or exempt documents of any kind, in case it should turn out that a waiver might be found, or that there was no authority for the

In his Order dated August 8, 2012, Judge Simmons stated that he had reviewed that more detailed log and held “that there is no basis to alter or amend the Order of July 18, 2011.” R. \_\_\_. As set forth above, a second Motion to Alter or Amend was filed by the Attorney General and denied in different parts by both Judges Welmaker and Simmons, R. \_\_\_. Those latter denials came within the 30-day period for appeal from the denial of the first Motion to Alter or Amend, and were therefore included in the Notice of Appeal filed on September 19, 2011.

### **SUMMARY OF ARGUMENT**

Despite the volume of documents involved in this case, the Attorney General has always contended, and still contends, that the case is actually very simple. The documents requested by plaintiff Field, while voluminous, have already been pared down to the contents of the Securities Division investigative file regarding plaintiff Field. Several thousand pages of public documents had already been produced to Field by the time the present action was filed.

The Securities Division investigative file, like all of the Division’s investigative files, consists virtually exclusively of two kinds of documents: matters received in the course of a securities investigation, and therefore deemed nonpublic by § 35-1-607(b)(1), and the correspondence and work product of the attorneys in

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disclosure of nonpublic documents under § 35-1-607(b)(1) even if copies of those documents were already in the possession of the requestor.

the Securities Division and their staff, including investigators. These two categories encompass virtually the entire universe of what the investigative files contain, as the various privilege logs show.

Judge Simmons conducted a detailed and conscientious review of the many documents, but he initially overlooked, and subsequently misapprehended, the applicable legal test for applying § 35-1-607(b)(1) to the first category of documents. That section provides, without exception or a balancing requirement, that documents received in the course of a securities investigation. are not public documents. Judge Simmons instead applied a balancing test properly used in other contexts, but not this one.

With respect to the other category of documents, attorney correspondence and work product exempted by § 30-4-40(a)(7), the July 18 Order did not say why the court below rejected the Attorney General's claim of exemption for some of those documents, but the Order others held many other such documents to be exempt under that provision.<sup>13</sup> The Attorney General agrees completely with Judge Simmons' decision regarding the correspondence/work product documents that he held to be not subject to disclosure. The only error the Attorney General asserts as to the documents

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<sup>13</sup> Section § 30-4-40(a)(7) exempts "Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." This is generally referenced herein simply as the "correspondence/work product" exemption, although the full extent of the statutory exemption was referenced in the privilege logs.

ordered to be disclosed is that the same rationale set forth in the Court's Exhibit B to the July 18 Order should have applied to those other documents as well.

The Attorney General submits that an appropriate degree of review by this Court of the documents found nonexempt by the court below, and the reasons asserted by the Attorney General for their being nonpublic or exempt, will show that the July 18 Order should be reversed, to the extent that it ordered disclosure.<sup>14</sup>

As a result of the relatively narrow nature of the legal principles involved in this case, there is probably no need for a remand for further review by the court below. This Court should simply conclude, after review, that §§ 35-1-607(b)(1) and 30-4-40(a)(7) together require that the remaining documents under review be deemed nonpublic or exempt.

Although it may not be necessary to reach the issue, the July 18 Order should not be regarded as a final order, because by its terms it left further actions to be taken by both the parties and the court below.

Finally, although the issue is now moot in the present case, the Attorney General would request that this Court address the issue of what should be the proper approach to protecting against the premature disclosure of nonpublic or exempt

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<sup>14</sup> By referring to "an appropriate degree of review," the Attorney General would note that it has been held that courts reviewing documents in camera may use sampling procedures when dealing with large numbers of documents, as here. *See, e.g., Meeropol v. Meese*, 790 F.2d 942, 958 (D.C. Cir. 1986). Another practical method for review by this Court is also suggested below at p. \_\_.

information by a trial court in FOIA litigation. This important issue is one that under the familiar test of mootness is “capable of repetition, yet evading review.” The court below effectively, and incorrectly, made itself the final arbiter of whether identifying information about documents should be released to a FOIA plaintiff.

## ARGUMENT

- 1. The Orders below erroneously required the disclosure of information that was either nonpublic information under § 35-1-607(b)(1) of the Securities Act, or was exempt from disclosure under FOIA § 30-4-40(a)(7)(correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships).**

A reading of the July 18 Order of Judge Simmons indicates that Judge Simmons may have been of the erroneous opinion that the Attorney General had declined to produce any documents to plaintiff Field. *See, e.g.*, R. \_\_\_ (July 18, 2012 Order at 3)(noting the Attorney General’s objections to “each and every of the 1000’s of pages of documents in its files. . . .”). To be sure, it is true that the Attorney General did object to the production of all documents in the nonpublic or exempt investigative files of the Securities Division, but the Attorney General prior to the filing of this action had already produced, promptly and without objection, at least 2,500 pages of public records pertaining to the subject areas of the request. R. \_\_\_ (Chambers affidavit and exhibits); R. \_\_\_ (July 28 motion to alter or amend, p. 3). Certain personnel records were also produced. R. \_\_\_ (Chamber letter, May 2011) In other words, the documents the Attorney General found to have been nonpublic or

exempt had already been produced, and therefore had been filtered out of the material submitted to Judge Simmons. They were not subject to disclosure in large part because they were in files that almost by definition contained material that was completely nonpublic under § 36-1-607(b)(1) or exempt under § 30-4-40(a)(7).<sup>15</sup>

In terms of the practicalities of review by this Court of the matters challenged by the Attorney General, the most convenient source of information for the Court's guidance is the attachment to the July 28 Motion to Alter or Amend, R. \_\_\_. Each individual page in that attachment corresponds to a specific folder contained within a specifically-identified box, as provided to Judge Simmons. Each page in turn identifies the specific document or documents within each folder and sets forth the basis for a claim of nonpublic status or exemption. In many cases, only one or two documents would need to be reviewed in each folder. Each of the bases referenced in the attachment is discussed below. In other words, the legal argument for each category is set forth herein, and the identification of each document to which each argument applies is set forth in the attachment.

Compared to the original quantity of documents reviewed by Judge Simmons,

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<sup>15</sup> As discussed in n. 10 above, the Attorney General also objected to material in its investigative files that were sent to plaintiff Field or his counsel. It is difficult to see why this would matter to plaintiff Field, who would already be familiar with the documents. The basis for this objection was simply to avoid a potential waiver, and because §35-1-607(b)(1) does not suggest an exception for nonpublic documents even when they are known to the requestor.

the number identified in the aforementioned document is relatively small and specific. *See, e.g.*, R. \_\_\_ (identifying “Westlaw research and notes”); R. \_\_\_ (identifying “research regarding possible witnesses”); R. \_\_\_, \_\_\_ and \_\_\_ (various references to subpoenaed material and other information that clearly came to the Securities Division from outside sources.) These are typical illustrations of the kinds of documents that Judge Simmons held to be subject to disclosure. Again, their number is small, relatively speaking.

- A. The court below erred in failing to apply S.C. Code § 35-1-607(b)(1), which provides that records obtained by the Securities Commissioner (Attorney General) in connection with an investigation under Section 35-1-602 are not public records.**

The Attorney General has always claimed in this action that all materials in the Securities Division investigative files that were obtained in connection with a securities investigation under *S.C. Code Ann.* § 35-1-602 were specifically rendered nonpublic by § 35-1-607(b). That section provides that such materials “obtained by the Securities Commissioner in connection with an audit or inspection under Section 35-1-411(d) or an investigation under Section 35-1-602” are “not public records.” (Emphasis added.) Section 35-1-607 is modeled on Section 607 of the Uniform Securities Act of 2002. R. \_\_\_. That section of the Uniform Act has been enacted in similar form in a number of states. *See* R. \_\_\_. The uniform act is very clear. No case in any jurisdiction has been found in which a

court has actually needed to construe the provisions of this part of the Uniform Act.

In the July 18 Order, Judge Simmons did not specifically mention § 35-1-607(b), although he did hold that numerous documents did not need to be disclosed because they were “obtained in investigation and not subject to disclosure.” *See, e.g.,* R. \_\_\_ (7/18/12 Order,. Court’s exempt list.) Judge Simmons instead applied the weighing test contained in § 30-4-40(a)(3) and applied in such cases as *Newberry Pub. Co., Inc. v. Newberry County Com'n on Alcohol and Drug Abuse*, 308 S.C. 352, 417 S.E.2d 870 (1992). This was error, because § 35-1-607(b) does not contain the weighing tests set forth in § 30-4-40(a)(3), instead simply providing that Securities Division investigative documents are “not public records.”<sup>16</sup> As the Supreme Court noted in *Newberry Pub. Co., Inc.*, “If the legislature had wanted to create a blanket exemption for all criminal investigative reports, regardless of content, it clearly could have done so.” 308 S.C. at 355, 417 S.E.2d at 872. In

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<sup>16</sup> Originally, the Attorney General’s Office had claimed that some of the documents should also be exempted under § 30-4-40(a)(3), which pertains only to documents “that were compiled in the process of detecting and investigating crime.” (Emphasis added.) That claim was in addition to the claim asserted pursuant to § 35-1-607(b). However, it eventually became clear that all of the documents requested by Plaintiff were actually in the possession of the Securities Division and were obtained for purposes of civil enforcement actions by that Division. This meant that any exemptions claimed for documents relating to criminal investigations or that might be in the possession of the State Grand Jury were no longer in issue. This is indicated by Paragraph 5 of Judge Welmaker’s Order of April 20, 2011. R. \_\_\_.

enacting § 35-1-607(b) in the securities investigation context, the General Assembly did in fact create just the kind of “blanket exemption” to which *Newberry Pub. Co.* alluded. As a result, the court below erred in applying a balancing test to documents that were rendered nonpublic in their entirety by §35-1-607(b)(1).

The Attorney General reiterated the applicability of § 35-1-607(b) in its first Motion to Alter or Amend, R. \_\_\_. Judge Simmons, in his August 18 Order denying that motion, held that “it appears that the intent [of § 35-1-607] was not to protect the State in its investigatory role but rather to protect individual citizens who may find themselves the subject of an investigation from having those investigatory records made public. In other words, even under § 35-1-607(b)(1), there may instances where an individual has a right to certain documents not otherwise exempt from production.” R. \_\_.<sup>17</sup>

The Attorney General respectfully submits that Judge Simmons’ approach to § 35-1-607(b)(1) was in error. That section provides simply and without exception that certain documents, including those materials obtained in connection with a securities investigation, are “not public records.” FOIA, of course, only requires the disclosure of documents that are public records. § 30-4-30(a). Once a document

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<sup>17</sup> This new holding in the August 18 Order was addressed in the Attorney General’s second Motion to Alter or Amend filed August 31, 2011, R. \_\_\_, which motion was denied by Judge Simmons by Order filed September 15, 2011.

is deemed not a public record, FOIA has no application. FOIA also probably provides for the same result by another route, exempting “[m]atters specifically exempted from disclosure by statute or law.” § 30-4-40(a)(4). (As an aside, it should be noted that FOIA was last amended in 2003, while § 35-1-607(b)(1) was added in 2005.) Either way, the documents received by the Securities Division in the course of an investigation are clearly not required to be disclosed.

Indeed, far from being a person who should be able to review nonpublic investigative records, the subject of the investigation is probably the last person who should be accorded such a right, because of the potential harm to the public interest that might come from the premature disclosure of investigative materials. The General Assembly (and the drafters of the model act on which this provision is based) felt strongly enough about this as to eliminate any balancing test that would require a showing of potential harm to the investigation. The documents are simply nonpublic, and should not have been required to be disclosed to anyone, especially plaintiff Field.<sup>18</sup>

The reasoning advanced in the August 18 Order was similar to that rejected in an Ohio case, *State ex rel. Dublin Securities, Inc. v. Ohio Div. of Securities*, 68

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<sup>18</sup> If a civil or administrative action is ever filed against Field by the Securities Division, his right to review documents held by the Securities Division would be protected and governed by the applicable rules, including discovery rules, that pertain to such proceedings.

Ohio St.3d 426, 627 N.E.2d 993 (1994). The securities statute in that case did make an exception, which the South Carolina statute does not, permitting persons with a “direct economic interest” to review securities investigation files. However, even with that language in the statute, the Ohio Supreme Court held that “it was hardly the legislative intent of R.C. 1707.12 to place investigatory files in the hands of a subject under investigation. . . . The General Assembly specifically intended to provide a right of inspection to consumers with a direct economic interest in the information, not to the target of an investigation.” 627 N.E.2d at 998 (emphasis in original). Accordingly, the protection afforded to nonpublic Securities Division investigative records applies all the more strongly in the present case, where the statute contains no exceptions at all.

The August 18 Order also noted that the Attorney was arguing that “‘not public’ is the same as ‘privileged.’” This is not what was argued, however, at least using the term “privilege” in the strictest sense. The Attorney General simply contended that documents rendered not public as a result of a statute that so provides are either outside of FOIA altogether, or fall within the exemption in § 30-4-40(a)(4) for “[m]atters specifically exempted from disclosure by statute or law.” The result is the same in any event.

The August 18 Order also mentioned, but apparently did not turn on, an issue about the origins of the “received in investigation” documents. Again, § 35-1-

607(b)(1) contains no provision that requires the documents to have come to the Securities Division from some particular source and not from others. Thus, while the August 18 Order would apparently have reached the same result without this conclusion about the origin of the documents, it would have been erroneous for the case to have turned on the point.<sup>19</sup> The origin of the documents is normally apparent from each such document itself. In addition, the Attorney General submitted an affidavit of a securities investigator in the case, noting that the documents which are claimed to be nonpublic under § 35-1-607 were all received from outside the Attorney General's Office, R. \_\_\_, and that that fact is normally apparent from the identity of the sender or the recipient, or both. *Id.*

**B. The court below erroneously declined to hold that certain documents were exempt under § 30-4-40(7), which exempts “correspondence or work products of legal counsel for a public body.”**

The only other broad category of documents for which an exemption was claimed in the privilege log is attorney correspondence and work product, exempted by § 30-4-40(7), which exempts “correspondence or work products of

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<sup>19</sup> As Judge Simmons recognized, R. \_\_\_, (8/18/ order at 3 n. 3), the Attorney General and the Securities Commissioner are the same person. § 35-1-102(28). Judge Simmons stated that this gave rise to “inherent conflicts,” *id.*, but the Supreme Court of South Carolina has held that the Attorney General can prosecute and make certain rulings in securities cases without offending due process. *Majors v. South Carolina Securities Com'n*, 373 S.C. 153, 644 S.E.2d 710 (2007).

legal counsel for a public body and any other material that would violate attorney-client relationships.” Essentially, the way this exemption works in the present case is that the “correspondence/work product” exemption covers all “outgoing” material from attorneys or investigators in the Attorney General’s Office, as well as internal communications or other writings by or between attorneys and others, and legal research. The two broad categories, that is, “received in investigation” and “correspondence/work product” comprise virtually all of the documents still in issue. As noted above, almost 2,500 pages of public, non-exempt documents were supplied to Plaintiff long before this action was filed.<sup>20</sup>

The July 18 Order held that the Attorney General, despite producing an item-by-item privilege log, had made no showing as to how the items in question were “exempt.” (Again, there was no discussion of the nonpublic nature of some of the records.) However, Judge Simmons himself held independently that many of the items were in fact “exempt,” using essentially the same descriptive language in the Court’s list for the exemption (legal counsel correspondence/work product), R. \_\_\_, as had been stated by the Attorney General in its privilege log. R. \_\_\_.

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<sup>20</sup> In the course of the re-review conducted after the issuance of the July 18, 2011, Order, it was discovered that a very small number of documents in the file consisted of copies of public filings by the investigative part of the Securities Division. Plaintiff already has copies of these. These are included among the group of documents that were flagged as “8,” but are atypical of that group because they were in fact made publicly available.

The Attorney General submits that the reasons stated by both the Attorney General and by Judge Simmons for exempting certain documents under § 30-4-40(7) were, when read in conjunction with the documents and their descriptions, sufficient to establish that that exemption validly applied. These reasons are detailed below. The Attorney General would also submit that a review by this Court of the documents and the reasons for exemption, read together, should provide a clear basis for reversing the holding of the court below on those documents. As discussed in the following argument hearing, the only thing that is unclear from the July 18 Order is why Judge Simmons disallowed the claim of exemption under § 30-4-40(7) for some documents while exempting many others. However, applying the general principles set forth below, there can be no question that all of the documents for which the correspondence/work product exemption was claimed should indeed be held exempt, without the need for a remand.

The General Assembly, in protecting correspondence or work product of legal counsel for a public body, unquestionably intended at a minimum to protect materials described in the seminal work product case, *Hickman v. Taylor*, 329 U.S. 495 (1947), the case in which the term “work product” first gained prominence:

[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without

undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly [termed] as the 'Work product of the lawyer.'

329 U.S. at 510-511. The language of the South Carolina FOIA statute does not limit exempted work product and attorney correspondence to documents generated either in litigation or in anticipation of litigation. In any event it is clear that the documents in this matter for which the exemption is claimed were in fact in anticipation of litigation. *See, e.g.*, Redwall 0 of Box 1A.

There are four categories of materials which the Attorney General's Office claimed to be exempt under § 30-4-40(7). R. \_\_\_. Each document was flagged according to the category into which it falls. Each category will be briefly discussed.

- A. Category 3: (Legal research, etc.) Materials pertaining to legal research conducted by an attorney and/or investigator acting at an attorney's direction, during the process of conducting an investigation pursuant to Section 35-1-602 of the South Carolina Securities Act of 2005 and/or preparing for litigation pursuant to the same Act. This material is exempt under in § 30-4-40(7).

The documents in this category typically consist of legal research materials, such as copies of cases from Westlaw or other sources, and other similar legal materials. It is well settled that such materials clearly fall within the protection of

the work product privilege. *See, e.g., N.L.R.B. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 310 (D.D.C. 2009)(“It is hard to imagine a document that memorializes legal research done by a lawyer or law clerk that is not work product”)(emphasis added); *Natta v. Zletz*, 418 F.2d 633, 638 (7th Cir. 1969)(legal research included within work product). In addition, Rule 26(b)(3), S.C.R.C.P., provides that courts “shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney. . . .” Such information is unquestionably embodied in the legal research information obtained by an attorney.

Documents prepared by investigators for attorneys are equally entitled to the work product privilege. *See, e.g., U.S. v. Nobles*, 422 U.S. 225 (1975); *Raso v. CMC Equipment Rental, Inc.* 154 F.R.D. 126 (E.D.Pa. 1994). This principle applies to writings by investigators in any of the work product or correspondence categories flagged by the Attorney General’s Office.

- B. Category 4: (Attorney notes, drafts, etc.) Materials consisting of attorney notes, documents, and other works, in rough draft form and/or prepared for internal use only, prepared by an attorney and/or investigator acting at an attorney’s direction, during the process of conducting an investigation pursuant to Section 35-1-602 of the South Carolina Securities Act of 2005 and/or preparing for litigation pursuant to the same Act. This material is exempt under in § 30-4-40(7).

This category of information consists of written renderings of impressions “formed by . . . counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly

prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.” *Hickman, supra*, 329 U.S. at 509. As with the preceding category, legal research, attorney notes contain “the mental impressions, conclusions, opinions, or legal theories of an attorney. . . .” Rule 26(b)(3), S.C.R.C.P. *See also, e.g., Cua v. Morrison*, 626 N.E.2d 581, 584 (Ind. App. 1993)(work product protects an attorney’s notes and memoranda reflecting the attorney’s theories and mental impressions about the case).

Also in this category are draft pleadings. These also contain attorney theories and mental impressions about the case, and as such, have been held to be work product. *See, e.g., Lopez v. New York City Housing Authority*, 2005 WL 782812, 4 (N.Y.Sup. 2005)(draft pleadings).

- C. Category 5: (Work copies of documents with attorney markings) Materials which contain handwritten notes and/or other markings by an attorney, and/or investigator acting at an attorney’s direction, during the process of conducting an investigation pursuant to Section 35-1-602 of the South Carolina Securities Act of 2005 and/or preparing for litigation pursuant to the same Act. This material is exempt under in § 30-4-40(7).

This category is very similar to Category 4. The only difference is that these documents consist of notes by attorneys or investigators on other documents, all or almost all of which are nonpublic documents under § 35-1-607. These notes are subject to the work product exemption for the same reasons as those in Category 4.

In addition to being nonpublic documents obtained in investigation, they typically contain the mental impressions or theories of attorneys or investigators about the matters contained in the document on which they are written.

- D. Category 7: (Attorney correspondences) Correspondence prepared by an attorney and/or investigator acting at an attorney's direction, during the process of conducting an investigation pursuant to Section 35-1-602 of the South Carolina Securities Act of 2005 and/or preparing for litigation pursuant to the same Act. This material is exempt under in § 30-4-40(7).

The documents in this category consist of outgoing correspondence from the Attorney General's Office to persons connected in some way with the securities investigation. Section 30-4-40(7) includes correspondence of an attorney for a public body using the disjunctive "or," i.e., "correspondence or work product of legal counsel for a public body. . . ." In so providing, the General Assembly presumably intended to exempt attorney correspondence generally, in addition to work product.

Additionally, correspondence that includes "the mental impressions, conclusions, opinions, or legal theories of an attorney. . . ," Rule 26(b)(3), unquestionably falls within the meaning of protected work product. The outgoing correspondence, again, typically contains some aspect of an attorney's thinking about the investigation and anticipated litigation, communicated in order to obtain additional information from the person to whom the correspondence is addressed.

From the very establishment of the work product doctrine in *Hickman*,

*supra*, attorney correspondence has been included in the list of matters that need to be protected in order to prevent disclosure of the mental impressions and theories of an attorney. As the Supreme Court held in *Hickman*,

This work [of attorneys] is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly [termed] as the ‘Work product of the lawyer.’

329 U.S. at 510-511 (emphasis added). From a strictly practical sense, it is difficult to see how an attorney in the civil enforcement area of the law could effectively communicate with witnesses, experts, and others with knowledge of the underlying facts under investigation if the correspondence from the attorney to such persons were to be made subject to public disclosure.

For all of the reasons set forth above, the Attorney General submits that the matters for which the correspondence/work product exemption was claimed should have been held exempt pursuant to § 30-4-40(7).

### **C. Potential remand in the discretion of this Court.**

While it may not be necessary to reach this issue, the July 18 Order does not set forth the reasons why some documents were required to be disclosed, while others were not. Rule 52(a), S.C.R.C.P. rule provides that “the court shall find the facts specially and state separately its conclusions of law thereon.” The reason for the rule is “to allow a reviewing court to determine from the record whether the

judgment-and the legal conclusions which underlie it-represent a correct application of the law.” *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 132, 568 S.E.2d 338, 343 (2002). In the quoted case, *Luckabaugh*, the Supreme Court held that an order which held only that a party failed to carry its burden of proof was not sufficient to meet the requirements of Rule 52(a). This is essentially the same as the July 18 Order in the present case, in which Judge Simmons, to the extent that he ordered disclosure simply noted in one sentence that the Attorney General had made “no showing” as to how certain documents were subject to the work product or other exemptions. R. \_\_\_. As already noted, however, the Court used the same types of descriptions in holding that some documents were exempt, and the Attorney General submits that those descriptions are completely adequate. Indeed, those descriptions by the Attorney General correspond closely to the examples set forth in Judge Welmaker’s April 20, 2011, Order. For instance, that Order noted that the documents could be grouped and the privilege noted for all as follows: “File folders 1-7—email correspondence (ATTORNEY-CLIENT PRIVILEGE).” R. \_\_\_ (4/20/11 Order at 2, n.. 3). The privilege logs submitted by the Attorney General were similar, or in some instances, more specific. Moreover, the court below was not limited to only the logs, but had all of the documents before it as well. As a result, the only unexplained issue is why the court below found some documents exempt and others not exempt.

The Attorney General submits that for the reasons set forth above, the issues in this case are primarily legal, in that they involve the application of FOIA or Securities Act principles to a specific set of documents about which there is no factual dispute. As a result, the Attorney General has contended above that this Court can conduct its own review of the comparatively small number of documents that are described in the individualized pages found at R. \_\_\_-\_\_\_, and that such review should lead to reversal of the decision below as a matter of law.

If factual issues are involved at all, which seems unlikely, they are subject to de novo review by this Court in this equitable action. *See, e.g., Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct.. App. 2001)(FOIA case). It has been held that an appellate court need not remand an equitable action for further findings under Rule 52, because in such cases, the appellate court is “free to make findings of fact in accordance with our own view of the preponderance of the evidence.” *Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 485-486, 709 S.E.2d 71, 74 (Ct.. App. 2011). Here, however, if the Court should find that more explanation by Judge Simmons would be useful, this case could fall within the category of those in which findings under Rule 52 or its federal counterpart might not be strictly required, but might nevertheless be desirable. Wright and Miller, *Federal Practice and Procedure* § 2575; *see also, e.g., Ackra Direct Marketing Corp. v. Fingerhut Corp.*, 86 F.3d 852 (8th Cir. 1996)(although district courts are not

normally required to make findings of fact or conclusions of law in ruling on motions, court of appeals may remand when lack of findings by district court would substantially hinder review). In other words, the reviewing court and the parties might benefit from an expanded statement by Judge Simmons of his rationale for requiring some documents to be disclosed. Again, however, the Attorney General submits that this Court can and should review the issues of law and fact (if any) and reach its own conclusions without the need for a remand.

**3. The July 18, 2011 Order was not a final order.**

While this issue may not be material to any issue remaining in the case, the Attorney General submits that the July 18, 2011 was clearly not a final order of the court below. Judge Simmons did not actually hold that that Order was final, but language on p. 3 of his August 18, 2011 Order suggests that he may have been of that opinion.

The July 18 Order provided as follows with respect to the next steps in the case:

The Court allows Respondent [the Attorney General's Office] 10 days from the date of this Order being filed and served to file a motion specifically objecting, with the reasons for such objection, to disclosure of any information contained in Exhibit A. Likewise, Petitioner shall also have the right to file a similar motion seeking disclosure of items listed on Exhibit B. Any such motion shall then be heard by the undersigned in open court, if in the Court's discretion such a hearing is necessary, so as to allow the Court to hear from both parties relative to the

reasons for disclosure or nondisclosure.

R. \_\_\_. The Order then provided that “[o]nce the Court determines the exact documents to be disclosed, the Respondent shall have 7 days from the date of such Order to arrange for pick up of the 12 boxes of documents. . . .” R. \_\_\_ (emphasis added). The Order then provided for the next steps that would occur after that.

The Supreme Court has often held that if an order requires further action by the court, it is not final. *See, e.g., Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996)(“Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory [and not final]”). Under the circumstances, it appears that the July 18, 2011, Order by its terms contemplated further action by both the parties and the Court. In particular, it permitted the parties to file additional motions that contained specific grounds for objections to disclosure or nondisclosure. As a result, it was not final.

There is also some question about whether even the August 18, 2011 Order of Judge Simmons was final. That Order provided or suggested in two different places that further action might remain to be taken by Judge Welmaker. First, with respect to certain issues raised by the Attorney General pertaining to summary judgment, the August 18, 2011, Order provided that any decision about those issues “ultimately is to be made by Judge Welmaker.” R. \_\_\_. 8/18/11 Order at 3. In addition, the same Order, p. 1 n.1, R. \_\_\_ stated that “To the extent there are any other issues pending

between the parties in this action, these are left to be addressed by Judge Welmaker. This specifically includes recoverability of any fees or costs sought by Petitioner.”

Those statements contemplated further action by Judge Welmaker, and therefore should properly be regarded as meaning that as of August 18, 2011, there was still not a final order in this case. Some of the actions requested by Attorney General in the July 28 motion with respect to summary judgment or the need for a hearing on the merits could have made it unnecessary to consider which, if any, documents should be disclosed to plaintiff Field as a result of the July 18 Order.

**4. The court below erred in disclosing certain information in the privilege log over objection and without staying that disclosure pending appeal.**

This issue pertains to the fact that the July 18 Order disclosed information in the Attorney General’s privilege log that the Attorney General had contended to have been exempt from disclosure. A Motion for Documents to Remain Under Seal or In Camera was filed on May 31, 2011, well before Judge Simmons had reached a decision as to what should or should not be disclosed.

Given that the privilege log contents were revealed in full in the July 18 Order (and also in the advance version sent to both parties), it is obvious that this issue is moot with respect to this specific case. However, it is well established that an appellate court can issue a ruling on an appeal on an otherwise moot controversy under at least three scenarios:

1) if the issue raised is “capable of repetition but evading review”; (2) if the question is one of “imperative and manifest urgency to necessitate establishing a rule for future conduct in matters of important public interest”; and (3) if the trial court’s decision “may affect future events, or have collateral consequences for the parties.”

*Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

Here, the opportunity for appellate review was foreclosed when Judge Simmons issued an advance copy of his July 18 Order to plaintiff Field. In its Motion for Documents to Remain Under Seal or In Camera, the Attorney General had contended that there were two aspects of the exempt or nonpublic nature of the documents under review. The first, of course, was the contents of the documents, but the second, which can be equally important, is the identity of each document. To cite one example, a letter of complaint from a particular investor is material that is considered not a public document under S.C. Code Ann. § 35-1-607(b)(1)(records obtained by the Securities Commissioner in connection with an investigation under Section 35-1-602). The existence or identity of the document and the name of the complainant should have been afforded as much protection from disclosure as the contents of any letter outlining the complaint. Similar protections are found elsewhere in state law, such as in LLR licensing matters. *See, e.g.*, § 40-47-116(A)(except as otherwise provided, identity of the person making the initial complaint against a physician must remain privileged and confidential and must not be disclosed for use in any administrative or judicial proceeding of any kind).

Similarly, for instance, if the Securities Division issues subpoenas for records in the course of an investigation, the investigation could be compromised merely by disclosing the existence of a subpoena to a person or entity, even without disclosing the contents of the subpoena or of the response.

This aspect of the matter was not present in cases such as *Evening Post Pub. Co. v. Berkeley County School Dist.*, *supra*, because there it was already known that documents of a certain description existed, and the only issue was whether their content would be revealed. Here, however, neither the existence of certain documents nor their content was known to plaintiff until Judge Simmons released the entire contents of the privilege log. The Attorney General had requested that any Order in this case describe the documents only in a very general manner, such as by physical folder identifier, so as not to disclose anything of substance about them. At the same time, the practicalities of the matter required that the privilege log submitted to the court below be specific enough to assist the trial court in reviewing the material. That requirement, however, should not have been translated by the court below into a requirement that the same level of specific information should also be given to the plaintiff.

To the contrary, it appears to be standard practice for contested FOIA documents and any undisclosed identifying information about them to remain under seal both in the trial court and throughout the course of the appellate process. *See*,

*e.g., State, ex rel. Clark v. Toledo*, 62 Ohio St.3d 452, 584 N.E.2d 662 (1992). In that case, the party who wished to see certain documents argued that the intermediate appellate court should not have conducted an in camera review of the contested documents. The Supreme Court of Ohio disagreed, holding as follows:

Clark now asserts that the court of appeals erred in conducting its in camera review. We hold that the court of appeals did not abuse its discretion in how it conducted an in camera inspection of disputed public records..

In his first proposition of law, Clark argues that the lower court erred when it failed to individually describe each document and specify why each particular document was exempt. We reject that proposition.

Application of a statutory exemption to a particular document is best done by an in camera inspection. *Henneman v. Toledo* (1988), 35 Ohio St.3d 241, 243, 520 N.E.2d 207, 210; *State, ex rel. Natl. Broadcasting Co., v. Cleveland* (1991), 57 Ohio St.3d 77, 81, 566 N.E.2d 146, 150. However, after an in camera review, a court need not individually describe each document and specify the applicable exemption. No such statutory requirement exists; none of this court's decisions in public records cases imposes such a requirement; and we decline to impose such an explicit requirement. To do so could defeat the purpose of the in camera inspection by publicly revealing information exempt from release.

62 Ohio St.3d at 453, 584 N.E.2d at 663 (emphases added). *See also, State ex rel. Vindicator Printing Co. v. Watkins*, 1991 WL 280007, 10 (Ohio App. 1991)(describing the contested documents only as “Exhibit AAA” and “Exhibit BBB.” reviewing them in camera, and providing that the documents would remain

under seal “pending a possible appeal of this court's judgment,” even as to the document the court concluded should be released).

To the same effect are other cases holding that FOIA document release orders should be stayed pending appeal. It is normally held that persons aggrieved by decisions ordering the release of documents under FOIA are “entitled to a stay pending judicial review, because if a stay were denied, and the information released, the case would be rendered moot.” Am.Jur.2d, Freedom of Information Acts, § 598. These principles were spelled out in *McCarthy v. Freedom of Information Commission*, 402 A.2d 1197, 1200 (Conn.Super. 1979), which held as follows:

This singular nature of an appeal from a freedom of information grant requires the issuance of a stay in order to preserve the plaintiffs'<sup>21</sup> statutory right of appeal under s 1-21i(d). Should a stay be denied here, the irretrievable nature of the information ordered released would preclude the court from performing its judicial duty to provide a meaningful remedy, upon proof of entitlement by the plaintiffs, thereby rendering their appeal moot and overturning the court's jurisdiction to review the commission's order, the fundamental reason for this appeal.

(Emphasis added). *See also, e.g., Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir.1979)(issuing stay in FOIA action because “Appellants’ right of appeal here will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered pursuant

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<sup>21</sup> In that case, the plaintiffs were the governmental actors whose documents were subject to release.

to the lower court's order, confidentiality will be lost for all time."); *Center for Int'l Envtl. Law*, 240 F.Supp.2d at 22 (D.D.C.2003)(issuing limited stay in FOIA action "because disclosure of the documents in question will render any appeal moot").

Despite its mootness in the present case, this is an important issue in the administration of FOIA cases in this state, and one that has not been addressed in any reported decision, as far as counsel for the Attorney General is aware. It is also one in which "establishing a rule for future conduct in matters of important public interest," *Casey, supra*, is a valid consideration. Regardless of whether the court below agreed or disagreed with the Attorney General's position on the appropriateness of releasing a volume of arguably nonpublic or exempt information, the court below clearly erred by making itself the final arbiter of that aspect of this case, thereby depriving the Attorney General of appellate review of the issue. Accordingly, the Attorney General would request that the Court consider providing guidance for future situations in which other governmental agencies might also find themselves in a position of being subject to a potential release of nonpublic or FOIA-exempt documents in a manner that would deprive the agency of an effective appellate remedy.

## CONCLUSION

For the foregoing reasons, the Appellant-Respondent Attorney General respectfully submits that the portions of the Orders below that require the disclosure of information should be reversed.

Respectfully submitted,

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