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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

Honorable Daniel Coble

Appellate Case No. 2024-001296

George S. Glassmeyer……. Appellant,

v.

South Carolina Lottery Commission……..…….....Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Did the lower court err in finding Respondent was entitled to judgment as a matter of law that it did not breach the settlement agreement or violate FOIA by declining to provide lottery winners' names at issue in this matter?

II. Did the lower court err in concluding Requests 5, 12, and 18 were both overly broad and unduly burdensome, thus ordering Respondent was entitled to relief under S.C. Code Ann. § 30-4-110(A)?

III. Did the lower court err in deciding Respondent did not violate FOIA by redacting information Appellant sought under FOIA and the Family Privacy Protection Act of 2002 and supplying information in a different format than he requested?

STATEMENT OF THE CASE

In 2013 and 2014, Glassmeyer sent FOIA requests to the Lottery, seeking information about winners of lottery prizes equal to or greater than $1 million. *S.C. Lottery Comm'n v. Glassmeyer*, 433 S.C. 244, 248, 857 S.E.2d 889, 891 (2021). The Lottery determined some information responsive to those requests—lottery winners' names, addresses, telephone numbers, and forms of identification—was exempt under the unreasonable-invasion-of-privacy exemption in section 30-4-40(a)(2) of the South Carolina Code, and the Lottery sought a declaratory judgment to that effect. *Id.* After the circuit court granted judgment on the pleadings to the Lottery, which the court of appeals upheld, the Supreme Court of South Carolina reversed and remanded for a new trial stating, "[w]ithout a trial on the issues to develop a factual record, there is no evidence on which the circuit court could base its judgment." *Id.* at 252, 857 S.E.2d at 893.

On remand, the parties settled in a February 15, 2022 agreement. (R. pp. 77-79; settlement agreement 1-3.) As relevant here, Glassmeyer agreed not to submit FOIA requests to the Lottery seeking information about claimants or prize winners, and the Lottery's policy not to disclose personal information under section 30-4-40(a)(2) would remain in "full force until May 31, 2023." (R. pp. 78; settlement agreement 2.) The agreement also provided that "[i]f the South Carolina General Assembly [did] not enact legislation addressing this specific issue by such date, then the South Carolina Lottery Commission [would] provide the full names, cities, and states of lottery prize claimants in response to FOIA requests after that date." (R. pp. 78; settlement agreement 2.)

On April 4, 2022, Glassmeyer sued the Lottery, arguing it violated FOIA by not posting a fee schedule to its website. Ultimately, the Court granted summary judgment in favor of the Lottery, finding it did not have to post a fee schedule because it does not charge fees for the review, retrieval, redaction, and production of public records in response to FOIA requests. (R. pp. 212-213; fee schedule order 4-5.)

The Lottery then received the instant FOIA request from Glassmeyer on June 21, 2023, which included 18 individual requests. (R. pp. 57-59; Appellant FOIA Request 1-3.) Dolly Garfield, the Respondent's then general counsel, responded to Glassmeyer's request with the Lottery's determination under section 30-4-30(C) of the South Carolina Code on July 5, 2023. (R. pp. 61-67; Respondent FOIA determination 1-7.) The Lottery determined that Proviso 3.5 of the 2023–2024 Annual Appropriations Act—which took effect July 1, 2023—prohibited it from disclosing lottery winners' names in response to Request 1, among others, and that Requests 5, 12, and 18 were unduly burdensome, overly broad, and otherwise improper. (R. pp. 61-67; Respondent FOIA determination 1-7.) As for the remaining requests, the Lottery determined it would provide responsive documents but redact documents responsive to some requests, including Requests 4 and 11. (R. pp. 61-67; Respondent FOIA determination 1-7.)

Over the next month, Garfield and Glassmeyer exchanged over 20 emails about Glassmeyer's FOIA request and the responsive documents that were produced on a rolling basis. (R. pp. 104-145; Respondent Answer, Exhibits A-H.) On August 16, 2023, the Lottery sent a letter to Glassmeyer, conveying it had provided all responsive records subject to disclosure in response to his FOIA request. (R. pp. 147-148;

Respondent Answer, Exhibit I 2-3.) In this letter, Respondent again asked Glassmeyer if he would narrow Requests 5, 12, and 18. (R. pp. 147-148; Respondent Answer, Exhibit I 2-3.)

Appellant filed this lawsuit on September 15, 2023, alleging the Lottery breached the settlement agreement with him because it would not disclose lottery winners' names in response to his FOIA request. (R. pp. 48-67; Complaint 1-21.) He also alleges the Lottery violated FOIA in other respects explained below, including by not supplying documents to all his requests and by redacting certain information. (R. pp. 50-52; Complaint 3-5.) The Lottery filed an answer and counterclaim to Glassmeyer's verified complaint— which was verified by its then general counsel and supported by expert John Nichols—seeking relief from three of Glassmeyer's requests as "unduly burdensome, overly broad," and "otherwise improper" under section 30-4-110(A). (R. pp. 96-102; Answer and Counterclaim 14-19.) Appellant answer Respondent's Counterclaim by reply on October 31, 2023. (R. pp. 175-179; Answer and Counterclaim 1-6.)

Additionally, the Lottery moved for partial dismissal, arguing Proviso 3.5 prohibited it from disclosing lottery winners' names and personal information. Glassmeyer opposed the motion and, for his part, moved to dismiss the Lottery's counterclaim. (R. pp. 69-82; Respondent partial motion to dismiss with exhibits 1-14.) Following a hearing on October 13, 2023, the lower court denied both parties' motions via Form 4 orders. (R. pp. 38-43; orders denying motions to dismiss counterclaim and complaint.) After the Chief Administrative Judge for Common Pleas in Richland

County assigned the case to the undersigned, the lower court entered a scheduling order at the parties' request. (R. pp. 33-34; scheduling order 1-2.)

The parties filed and briefed cross-motions for summary judgment, and the lower court held a hearing at the Richland County Courthouse on January 5, 2024. (R. pp. 181-257; Respondent motion for summary judgment with exhibits 1-20; R. pp. 181-244; Appellant motion for limited summary judgment 1-10; R. pp. 245-254; Affidavit of Glassmeyer 1-12; R. pp. 504-515.) At the end of the hearing, counsel for both parties agreed to submit cross-motions for summary judgment—without the necessity of another hearing—to brief a claim relating to Request 4 that was not addressed in their initial motions. (R. pp. 416; January 5 hearing transcript 59.) Both parties also conceded during the hearing there are no genuine issues of material fact, and the lower court can decide the questions presented as a matter of law. (R. pp. 361; January 5 hearing transcript 4.)

Respondent filed its supplemental motion for summary judgment addressing the issues regarding drawer's signatures and winner names on January 18, 2024. (R. pp. 258-263; Respondent supp. summary judgment motion with exhibit 1-6.) Appellant filed his supplemental motion for summary judgment on January 19, 2024. (R. pp. 264-273; Appellant supplemental summary judgment motion 1-9.) Respondent filed its second supplemental motion for summary judgment regarding the redactions of drawer's signatures on January 25, 2024. (R. pp. 274-296; Appellant second supplemental summary judgment motion with exhibits 1-9.) The lower court held consideration of all filed motions under advisement and all parties appeared for a

hearing on the cross motions for summary judgment on March 8, 2024. (R. pp. 428-476; March 8 hearing transcript 1-49.)

On May 6, 2024, the lower court entered its order granting Respondent's motions for summary judgment and denying Appellants. (R. pp. 6-28; Order on summary judgment 1-23.) Appellant filed and served his motion for reconsideration on May 16, 2024. (R. pp. 309-313; motion to reconsider 1-5.) Respondent filed and served its response to the motion to reconsider on June 3, 2024. (R. pp. 314-316; response to motion to reconsider 1-3.) On July 19, 2024, the lower court denied the motion to reconsider. (R. pp. 1-2; order denying the motion to reconsider 1-2.) This appeal followed on August 6, 2024. (R. pp. 317-318; notice of appeal 1-2.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "When the parties file cross-motions for summary judgment, the issue becomes a question of law for the [c]ourt to decide de novo." S.C. Pub. Int. Found. v. Calhoun Cnty. Council, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021); see also Quicken Loans, Inc. v. Wilson, 425 S.C. 574, 579, 823 S.E.2d 697, 700 (Ct. App. 2019) ("Whe[n] cross[-]motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." (quoting Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)).

"[T]he interpretation of a statute is a question of law for the [c]ourt to review de novo." Calhoun Cnty. Council, 432 S.C. at 495, 854 S.E.2d at 837. "Determining

the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n, 417 S.C. 562, 566, 790 S.E.2d 783, 785 (Ct. App. 2016)(quoting Lambries v. Saluda Cnty. Council, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014)), aff'd as modified, 424 S.C. 542, 819 S.E.2d 124 (2018). "Questions of law may be decided with no particular deference to the trial court." Wilson, 425 S.C. at 579, 823 S.E.2d at 700 (quoting Wiegand, 391 S.C. at 163, 705 S.E.2d at 434). "In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." Buchanan, 417 S.C. at 566, 790 S.E.2d at 785 (quoting Lambries, 409 S.C. at 7-8, 760 S.E.2d at 788). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the [c]ourt's sense of law, justice, and right." Id. at 567, 790 S.E.2d at 785 (quoting Lambries, 409 S.C. at 8, 760 S.E.2d at 788).

ARGUMENT

I. The lower court erred in finding Respondent was entitled to judgment as a matter of law that it did not breach the settlement agreement or violate FOIA by declining to provide lottery winners' names at issue in this matter?

In the lower court's analysis regarding Glassmeyer's complaint that Respondent improperly refused to provide the names of lottery winners in response to his Request 1, the court conflates two distinct causes of action, those being contract law and FOIA compliance.

As provided in the 2022 settlement agreement between the parties (a contract), it was agreed that if the General Assembly did not enact legislation

addressing the disclosure of winners' names by May 31, 2023, that Respondent would provide such names in response to FOIA requests after that date. (R. pp. 77-79; settlement agreement 1-3.) It is undisputed that the General Assembly failed to enact such legislation on or before May 31, 2023, as it is also undisputed that Respondent received a FOIA request from Glassmeyer for such names on June 21, 2023. (R. pp. 57-59; Appellant FOIA request 1-3.) "FOIA's record disclosure requirement provides that 'any person has a right to inspect or copy any public record of a public body' subject to certain exceptions. S.C. Code Ann. § 30–4–30(a). A public body must provide any requested records **within** ten days (excepting Saturdays, Sundays, and legal public holidays of a request), and the body may collect fees to cover the costs of searching for and producing records. S.C. Code Ann § 30–4–30(B)—(C)." Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (emphasis added). The very moment that Lottery received Glassmeyer's FOIA request all conditions and terms of the agreement had been satisfied and Lottery had an immediate duty to provide the winners' names, per the agreement. (R. pp. 78; settlement agreement 2.) The fact that Respondent had 10 (ten) business days to supply is final written determination to the associated FOIA request, pursuant to S.C. Code Ann. § 30-4-30, did not transform the agreement into a FOIA request. Rather, the FOIA issues are separate and distinct and improperly conflated by the lower court.

As to the FOIA request, the lower court correctly states that Respondent had the equivalent of ten (10) business days after receipt of Glassmeyer's request to respond with its final written determination as to the availability of the public record, including winners' names, and that on the tenth day the referenced budget Proviso had already

become effective, which purportedly barred Respondent from releasing winners' names. But Appellant and the lower court are mistaken. As shown above, Section 30-4-30(C) provides the public body with these ten days to allow it to make a determination as to the public availability of the requested records. The settlement agreement requires Respondent's production of winners' names as that determination had already been made by mutual consent of the parties in the 2022 settlement agreement.

> As a further condition of settlement, the parties agree that the South Carolina Lottery Commission's current FOIA policy governing the disclosure of personal information under the unreasonable invasion of privacy exemption to FOIA, S.C. Code Ann. § 30-4-40(a)(2), shall remain in full force until May 31, 2023. If the South Carolina General Assembly does not enact legislation addressing this issue by such date, then the South Carolina Lottery Commission will provide the full names, cities, and states of lottery prize claimants in response to FOIA requests after that date.
>
> George S. Glassmeyer agrees not to submit, directly or indirectly, any FOIA requests to the South Carolina Lottery Commission through May 31, 2023 seeking information regarding claimants and/or prize winners through that date.
>
> Mediation Settlement Agreement 2. (R. pp. 78; settlement agreement 2.)

The record establishes that Appellant submitted a request for information on June 16, 2023 (acknowledged as received by Respondent on June 21, 2023) seeking information regarding lottery prize claimants/winners from Respondent. The Court can take judicial notice, and the parties stipulated to the dates that Proviso 3.5 (as contained in H.4300, the 2023-2024 Annual Appropriations Act) took effect. The legislative record establishes that this proviso did not become law until July 1, 2023. The parties specified in the above passage of its agreement that after May 31, 2023, the Appellant could request information that Respondent would then provide "[i]f the General

Assembly does not enact legislation addressing the issue by such date." The General Assembly had passed the proviso at issue (June 14) by the time Appellant submitted his FOIA request (June 16) or it was received by Respondent (June 21) but either way Appellant's request was received before the legislation was signed (June 26) or became effective (i.e., the day of enactment) on July 1, 2023.

Respondent's construction of when its duty to supply a written determination to Appellant began is misplaced. FOIA is clear that the duty to respond with a written determination begins upon receipt of the request. See S.C. Code Ann. § 30-4-30(C)("Each public body, upon written request for records made under this chapter, shall within ten days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of the request, notify the person making the request, notify the person making the request of its determination and the reasons for it…") Respondent may have had ten days excepting weekends and public holidays to fulfill its duty and supply the written determination before it became a violation of SCFOIA, but it makes no sense to say it did not have the duty of performance or FOIA compliance until after the proviso became effective. The Respondent's duties under the agreement or the FOIA cannot be abrogated because it willfully chose to wait until the law has changed. Thus, Lottery could, and should, have notified Glassmeyer that the winners' names were immediately available on or about receipt of his FOIA request which was well before the Proviso became effective. The lower court erred in ruling otherwise.

II. The lower court erred in concluding Requests 5, 12, and 18 were both overly broad and unduly burdensome, thus ordering Respondent was entitled to relief under S.C. Code Ann. § 30-4-110(A).

Respondent is not entitled to relief from Appellant's Requests 5, 12, and 18 as production of this responsive information would be "unduly burdensome, overly broad, and otherwise improper", under S.C. Code Ann. §30-4-110(A), for it to provide, as urged in Respondent's filed counterclaim and defense in this matter. Instead, Appellant is entitled to summary judgment, a declaration that Respondent violated FOIA when it failed to supply responsive information to these requests, and an injunction to require Respondent to supply the responsive information within a reasonable timeline and manner, pursuant to S.C. Code Ann. §30-4-110(A).

The record of this matter is silent as to any attempt by Respondent to ask Appellant whether his requests (5, 12, 18) may be limited in (a) quantity of responsive information provided, or (b) time regarding when it would be provided, or (c) scope generally that would affect either the quantity of records produced or the duration of when it might be produced. Instead, the Respondent indicated in its written determinations for each (S.C. Code Ann. § 30-4-30(C)) that "SCEL determines that the requested information … is unduly burdensome, overly broad and is an otherwise improper request." (R. pp. 61-67; complaint exhibit B 1-7.) In each written determination, Respondent then provides approximations of how many records would be responsive to each of the requests and concludes the information would not be provided to Appellant.

The South Carolina Freedom of Information affords public bodies, like Respondent, the ability to defray the costs associated with their statutory duties of transparency under the Act. "The public body may establish and collect fees as provided for in this section." S.C. Code Ann. § 30-4-30(B). In fact, Respondent "may

establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records." Id. Notably, this record and prior litigation between the parties (2022-CP-40-01769) shows that Respondent did not collect fees associated with FOIA requests. At this point, Respondent in this matter is judicially estopped from changing this position (not that it is doing so), but even if the Court agreed that Respondent could change its position and require a reasonable deposit of the expected charges of Mr. Glassmeyer's request here, that would afford more transparency (despite Mr. Glassmeyer's personal cost) than what Respondent is requesting in this case. The record reveals that Respondent wants to maintain publicly that it does not charge for FOIA requests, but then when a FOIA requester, like Appellant, submits a request for responsive information Respondent possesses, the Lottery Commission and public bodies like them can now simply say 'No, the information would be unduly burdensome, overly broad, and otherwise improper' to provide. Respondent should be praised for its stance of not charging for FOIA requests, but it cannot say to requesters like Appellant that it would simply cost too much in time or resources to supply responsive information upon meeting some arbitrary and private threshold.

Here, Respondent's problem is one of their own making. As to the cost, Respondent had the option to institute and post a FOIA fee schedule to its website. The Appellant sued the Respondent in 2022, for failure to post a fee schedule as required by S.C. Code Ann. § 30-4-30(B) "The public body shall develop a fee schedule to be posted online." The Respondent responded in its answer that "Defendant admits that no fee schedule is posted to its website because no such schedule exists. Respondent did not charge, and had never charged, citizens for costs associated with responding to

FOIA requests." The court in that matter agreed with that rationale and granted summary judgment to the Respondent. Then upon receiving the FOIA request in the instant case, used that stance to say that they did not have to do more in response than to say that the requests 5, 12, 18 are unduly burdensome, overly broad, and otherwise improper where Respondent still did not charge for FOIA requests and then made no effort to seek some agreement to otherwise change the scope of a request. Appellant's declaratory judgment request was indeed narrow in this respect, but he does then ask for an injunction, pursuant to S.C. Code Ann § 30-4-100 to supply the responsive information within a reasonable time. If Respondent had charged fees in this matter, this issue would not be controversy before the Court.

The lower court is mistaken in it dominate reliance on discovery practice principles to resolve this FOIA controversy. "Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation." Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul., 337 S.C. 476, 489, 523 S.E.2d 795, 802 (Ct. App. 1999)("Where the [General Assembly] elects not to define the term in the statute, the court will interpret the term in accord with its usual and customary meaning.") Instead, the lower court took a different (unproper) direction: "The Court thus draws on its experience handling discovery issues in analyzing Requests 5, 12, and 18, while keeping in mind the purpose of FOIA and the liberal construction afforded its provisions." (R. pp. 11; order on summary judgment 6.) The lower court cites Rule 26, SCRCP, for the guidance it provides trial courts in resolving disputes over discoverable information. (R. pp. 11; order on summary judgment 6.) See Rule 26(a), SCRCP (stating discovery

"shall be limited by the court if it determines that . . . the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation"). Determining the expense of production is certainly one of the four mentioned inquiries in resolving a claim under S.C. Code Ann. § 30-4-110. But the "amount in controversy, the limitations on the parties' resources, and the importance of issues at stake in the litigation" are absent as considerations found anywhere in Title 30, Chapter or any of its supporting case law. Rule 26(a), SCRCP. The central inquiry for public bodies, like Respondent, upon receipt of a FOIA request is provide a written determination of availability of responsive records and information to the request. See S.C. Code Ann. § 30-4-30(C)("This determination must constitute the final opinion of the public body as to the public availability of the requested public record …"). It is the availability, or existence, of the responsive information within the possession or custody of the public body that FOIA demands Respondent provide. See S.C. Code Ann. § 30-4-20(C). Remedial legislation mandating government transparency for its citizenry can simply not be subrogated to the interests of litigating parties voluntarily appearing before a tribunal. They are fundamentally different regimes supporting wholly different policy aims.

"This Court's primary function in interpreting a statute is to ascertain the intent of the legislature." State v. Baker, 310 S.C. 510, 427 S.E.2d 670 (1993). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Id. "Generally, statutes are to be construed with reference to the whole system of law of which they form a part." See

82 C.J.S. Statutes § 362 (1953). "In construing a statute, this Court is constrained to avoid an absurd result." South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994). This matter concerns the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. §30-4-10, et. seq., which unlike many other South Carolina statutory schemes, has a codified purpose:

> 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.

S.C. Code Ann. § 30-4-15. "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (S.C. 2001)(citing South. Carolina Dep't of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978)). Finally, FOIA's only prohibited purpose for submitting a request ("commercial solicitation" found in S.C. Code Ann. §30-4-50(B)) is in stark contrast to policies underpinning resolving discovery disputes between warring litigants. "Discovery requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution." Oncology & Hematology Assocs, 692 S.E.2d at 924-25. This is not to say that that discovery practice jurisprudence may not be used to inform a court's resolution of novel issues like those in S.C. Code Ann. §30-4-110 present here. It is only to point out that the lower court cannot deviate from, or otherwise minimize, the controlling statutory authority in FOIA's codified purpose when resolving a dispute like this. To

do so, like the lower court did in this case, is an error that fails to properly apply state law and enforce government transparency.

The parties stipulated to the factual record concerning the alleged time it would take Respondent to comply with Appellant's FOIA request. The lower court spent several pages of its order describing in detail the burden Respondent faced if it were forced to disclose the responsive information. (R. pp. 9; order on summary judgment 7-10.) The lower court finishes its unduly burdensome analysis though by declaring "[i]f these requests do not qualify as unduly burdensome, particularly the blockbuster request demanding every agency email over a two-year period, it is tough to imagine what would." (R. pp. 15; order on summary judgment 10.) At no point does the lower address the modifying language under the S.C. Code Ann. §30-4-110 ("unduly") separately or in conjunction with making it possible "to learn and report fully the activities of their public officials at a minimum cost or delay" to Appellant. S.C. Code Ann. § 30-4-15. Instead, as pointed out above, the lower court simply pointed to the size, seemingly exclaimed "big" and ended the inquiry. This is error by the lower court and the decision must be reversed requiring disclosure of the information.

The lower court also committed error by concluding that Appellant's requests 5, 12 and 18 were overly broad. (R. pp. 15-16; order on summary judgment 10-11.) The lower court again relies too heavily on discovery practice, ignoring FOIA's codified purpose in resolving this issue in favor of Respondent. "See Rule 26(b)(1), SCRCP (allowing a party to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action")." (R. pp. 15; order on summary judgment 10.) Unlike the above though, the lower court does

mention that Mr. Glassmeyer's affidavit explains that requests 5, 12, and 18 were sent for the purpose of investigating potential embezzlement in the Lottery Commission "similar to situations involving other lotteries around the nation." (R. pp. 15; order on summary judgment 10; R. pp. 504-515; affidavit of Glassmeyer 1-12.) The lower court's order continues for the next three paragraphs where the Court finds that because Appellant did not limit the scope of this requests, even though "some of the records may very well be tailored to Glassmeyer's concern of purported embezzlement with the Lottery," Respondent was entitled to a declaration that these requests were overly broad. (R. pp. 16; order on summary judgment 11.) By its own words, it seems the lower court understood that Respondent could provide responsive information ("[b]ut most will have nothing to do with it.") (R. pp. 16; order on summary judgment 11.) Yet, in this case the lower court used the novel approach urged by Respondent, to declare that even though Appellant's request reaches responsive information, Respondent is entitled to a declaration that the request was overly broad. "Without any limitation, this request is too unreasonable and appears to be a fishing expedition." (R. pp. 16; order on summary judgment 11.)

In this case where the record is clear that Respondent did not charge fees associated with any FOIA request, it is error for the lower court to not then point to language within Title 30, Chapter 4 (The South Carolina Freedom of Information Act) when explaining that such provisions mandate a requester should take care with how broadly a request is worded so as not burden public bodies unnecessarily. But the lower court could not, because FOIA does not have such a restriction. A requester can submit a request that yields information as vast as that person desires. What this case concerns

is whether a trial court can use discovery practice principles, characterize a particular request's breadth as a "fishing expedition," and chastise a requester for not narrowing a request to say that public body is forgiven from its duties. Ironically, such a paternalistic approach from the lower court and Respondent was the state history the Legislature was trying to remedy when it passed FOIA. "When adopting FOIA, the legislature stated, 'it is vital in a democratic society that public business be performed in an open and public manner.'" Quality Towing Inc. v. City of Myrtle Beach, 547 S.E.2d 862, 345 S.C. 156 (S.C. 2001)(citing S.C. Code Ann. § 30-4-15 (Supp.2000)). If the codified purpose is to be realized in this matter the lower court must be reversed and Respondent must be enjoined to provide the responsive information pursuant to Appellant's requests 5, 12, and 18.

III. The lower court erred in deciding Respondent did not violate FOIA by redacting information Appellant sought under FOIA and the Family Privacy Protection Act of 2002 and supplying information in a different format than he requested

The lower court ruled that Respondent did not violate FOIA by producing information sought – check signatures – in a different format than Appellant sought in his Request 4. (R. pp. 23; order on summary judgment 18.) Specifically, the lower court said that when Appellant sought the check signatures unredacted, Respondent was correct in responding that "signatures are not subject to disclosure and are considered private information under the Family Privacy Protection Act, S.C. Code Ann. § 30-2-10 *et seq.*, which requires public officials to redact records that contain such personal information." (R. pp. 21-22; order on summary judgment 16-17.) The court noted that Respondent did explain in separate correspondence to Appellant that

"the respective drawers of the checks were completed by SCEL's CFO and the CFO that preceded him" and also provided a chart with CFOs' names with each corresponding check. The lower court mooted Appellant's claims for relief (declaratory judgment and injunction) and said "[w]hile the form may have been different – printed instead of a cursive signature – Glassmeyer received the information." (R. pp. 21-22; order on summary judgment 16-17.) As explained further below the authority cited concerns the collection of the information within a public body like Respondent not information generated by the public body, like some the signatures discussed.

Appellant's ongoing request for the signatures on Item #4 of his FOIA request is not mooted by the Respondent asserting what information was beneath the redactions, rather than revealing the information, pursuant to the request. Furthermore, it is a violation of Appellant's rights to use the Family Privacy Protection Act of 2002 to redact the information.

First, the lower court erred in determining that a declaratory judgment would be "purely academic", and the injunction would "accomplish nothing in this case." (R. pp. 22-23; order on summary judgment 17-18.) Citing Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d, 474, 478; S.C. Lottery Comm'n v. Glassmeyer, 433 S.C. 244, 250, 857 S.E.2d 889, 892 (2021). The un-redaction of the records before the Court would establish that Respondent improperly applied an exemption to this information and would afford Appellant an understanding of how these records were created and (perhaps) negotiated with lottery claimants, at the core of Respondent's statutory function and plainly and activity of public officials.

Second, the lower court entirely misunderstood that there is a meaningful legal difference between receiving the information beneath the redactions rather than being forced to trust Respondent that the information it says are on those records is actually what is on them. If Mr. Glassmeyer were able to receive the information beneath the improper redactions and were to publish that information truthfully and accurately, such publication would be cloaked in a qualified privilege against any claims made about that information. "The privilege extends only to a report of the contents of the public record and any matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged." Jones v. Garner, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (S.C. 1968). If Appellant were to rely on the statements of Garfield regarding the identity of the presently hidden signatures, then the most protected statement he could make that would be privileged would be 'General Counsel for the South Carolina Lottery Commission said that [the CFO] signed the check and provided a chart of the names of drawers with corresponding check numbers that matched the check in my possession.' The privilege would not extend to a statement that a particular person signed a check (or that a particular claimant endorsed it), only production of the information presently under the redactions would afford Mr. Glassmeyer the privilege.

Respondent is wrong to say that Mr. Glassmeyer cannot avail himself of fair reporting privilege. While it is true that many reported decisions in South Carolina, including the Jones case quoted by Respondent, concern newspaper Respondents. That has more to do with the fact that newspapers bought ink by the barrel and were the most frequent publishers of information over the last few centuries. Now a publisher can be

anyone with a website or smartphone. If South Carolina intended to confine fair reporting privilege to journalists or the news media then it would have done so, but it hasn't. In fact, Jones cites a case where a nonmedia Respondent's use of the privilege was upheld. "We find the trial court properly submitted to the jury the factual questions of whether Appellants abused the fair report privilege." Jones at 487 (citing Cullum v. Dun & Bradstreet, Inc., 228 S.C. 384, 90 S.E.2d 370 (S.C. 1955). In Cullum, Cullum Motor Sales appealed the directed verdict issued in Dun and Bradstreet's favor "upon the ground that the testimony admitted of no reasonable inference other than the communication in question was published on a qualified occasion, and there was no evidence of malice." Cullum at 387. The Court found that Dunn and Bradstreet was a "mercantile agency" and that after some discussion, provided a ruling that there was not sufficient evidence to take the case to the jury concerning malice, such that the fair report privilege controlled the case as a matter of law. Id. at 391. Appellant is entitled to the benefit of the privilege if he is to report on his findings from these FOIA requests, but he cannot do that until he is provided with all the records Respondent possessed in handling its statutory duties. This case is not mooted by Respondent telling Appellant what is in the records that they are choosing to hide from him.

Also, the lower court was incorrect in saying that the Family Privacy Protection Act, S.C. Code Ann. § 30-2-10 *et seq.*, requires public officials to redact public records that contain personal information when they are requested. "'Personal information' means information that identifies or describes and individual including, but not limited to, an individual's photograph or digitized image, social security number, date of birth, driver's identification number, name, home address, home telephone number, medical

or disability information, education level financial status, bank account numbers, account or identification number issued by or used, or both, by any federal or state governmental agency or private institution, employment history, height, weight, race, other physical details, signature, biometric identifiers, and any credit records or reports." Among other things, "personal identifying information" includes but is not limited to, driver's license numbers; social security numbers; dates of birth; current names, when combined with, and linked to, other identifying information; current addresses, when combined with, and linked to, other identifying information. S.C. Code Ann. § 16-13-510(D) (Personal Financial Security Act).

The lower court's reliance and citation to the Family Privacy Protection Act, S.C. Code Ann. § 30-2-10 et seq., is meaningful for its general obligations regarding the custody and control of "personal identifying information" of Respondent but fails to describe lawful authority to withhold the signature of a public official on a public record at issue in this controversy concerning a FOIA request. Chapter 2 of Title 30 (FOIA is Chapter 4) fails to address or specifically define "individual" for purposes of its provisions, nor does it contemplate whether it is specifically exempted from requests made under Chapter 4. Essentially, if Respondent's authority for the redaction of the public official's signature was to apply to FOIA, then it would have said so explicitly. A plain reading of the entire Family Privacy Protection Act reveals no applicability to FOIA requests. Chapter 2 of Title 30 only deals with the custody and control by a public body like Respondent.

Consequently, if the Court considers that the Family Privacy Protection Act (Chapter 2) can be used in reply to a Chapter 4 request, then what is before this Court,

as a matter of first impression, is whether a public body has "intentionally communicate[d]" or "otherwise made available to the general public" the information Chapter 2 seeks to protect. FOIA provides that the public body must "notify the person making the request" and then must furnish the record to that individual. In no way does compliance with a specific, individual FOIA request mean the public body has made a record available to the general public. Additionally, the furnishing of information (public records) under FOIA fits within the statutory duty encompassed therein. It cannot be said to be an "intentional communication" as the duty to supply records is independent and separate from a public body's willingness or intention to supply records. This interpretation fits within what 30-2-310(A)'s other subsections seek to prohibit: (a) "collect" certain information, (b) "fail … to segregate" certain information "so that the social security number may be easily redacted **pursuant to a public records request**," (c) "fail … to provide … a statement of the purpose" for the collection and use of certain information, (d) "use" the information for an unstated purpose, (f) "intentionally print or imbed an individual's [information] … on a card required for the individual to access government services", (g) "require an individual to transmit the individual's ... [information] … over the Internet," (h) "require an individual to use the [information] … to access an Internet web site," (i) "print an individual's [information] … on materials that are mailed." S.C. Code Ann § 30-2-310(A)(1)(a)-(i)(emphasis added). If the General Assembly had intended (e) to swallow all of Title 30, Chapter 4 then it would have at least alluded to "public records requests" as was done in subsection (b).

The "personal identifying information" of S.C. Code § 30-2-310(A)(1)(e) is further defined "as used in this section, has the same meaning as 'personal identifying information' in Section 16-13-510, except that it does not include electronic identification names, including electronic mail addresses, or parent's legal surname before marriage." Id. Even if the Court determines that Section 310(A)(1)(c) can concern production pursuant to FOIA requests, the signature of a public official on a public record is not properly considered "personal identifying information" in this context. The Personal Financial Security Act, S.C. Code Ann § 16-13-500 et. seq., provides criminal penalties for financial identity fraud. The definition of "personal identifying information" in Section 510 includes several types of information, including social security numbers and other "information issued by a governmental or regulatory entity that uniquely will identify an individual or an individual's financial resources." Notably, "signatures" are not specifically included. The General Assembly specifically included "digital signatures" but did not include the type of information that appears on a government check, which this case concerns. Id. The personal financial security of either the person signing a check from Respondent or endorsing the back of it are not compromised if disclosed pursuant to a FOIA request. But if the financial security of a particular check signer or endorser were actually compromised, Respondent would still not have liability for the disclosure of information. See Bellamy v. Brown, 408 S.E.2d 219 (S.C. 1991). The S.C. Supreme Court ruled that even if information identifying an individual came within one of the statutory exceptions to mandatory disclosure, a citizen identified in the record had no claim against the government for privacy invasion. Id. at 221.

> The FOIA creates an affirmative duty on the part of public bodies to disclose information. The purpose of the Act is to protect the public by providing for the disclosure of information. However, the exemptions from disclosure contained in §§ 30-4-40 and -70 do not create a duty not to disclose. These exemptions, at most, simply allow the public agency the discretion to withhold exempted materials from public disclosure. No legislative intent to create a duty of confidentiality can be found in the language of the Act. We hold, therefore, that no special duty of confidentiality is established by the FOIA.
>
> Bellamy at 221.

Finally, there was some suggestion in the lower court's order that additionally (but not explicitly explained) it be an unreasonable invasion of personal privacy to release these signatures. It would not be.

The signature of the drawer on the check, a person authorized to provide public funds (lottery winnings) to claimants (winners), is what binds Respondent to a particular negotiation of money. Respondent's providing of winnings to claimants is at the core of their public purpose and is quintessential government activity in this sphere. In Burton v. York County Sheriff's Dept, the S.C. Court of Appeals ruled that records concerning the performance of sheriff's deputies was of "large and vital" interest to the public "that outweighs their desire to remain out of the public eye". Burton, 358 S.C. 339, 594 S.E.2d 888 (S.C. App., 2004).

Our Supreme Court has defined the "right to privacy" as the right of an individual to be let alone and to live a life free from unwarranted publicity. Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 586 S.E.2d 108 (2003). However, "`one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest.'" Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984)

(quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)). Indeed, the Court has held that, as a matter of law, "if a person, whether willingly or not, becomes an actor in an event of public or general interest, `then the publication of his connection with such an occurrence is not an invasion of his right to privacy.'" Doe v. Berkeley Publishers, 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998) (quoting Meetze, 230 S.C. at 337, 95 S.E.2d at 609). Consider how many signatures appear on checks that are no longer collected, but signed, and then sent into the world for it to see that Respondent is saying they cannot provide to Appellant in this case.

It is of legitimate and important interest to the public – and specifically, to the Appellant as stated in his affidavit on record in this matter – whether the signer of a Respondent check is a person authorized to do so. To the extent that the person signing the check has an expectation of privacy in the signature they apply to a check (they do not), any expectation is outweighed by public's right to know that information.

Any signature of a claimant/winner on these records is also not an unreasonable invasion of privacy to disclose in this matter. If Respondent possesses the signature on a check or other record within its custody or control, then it must have sought it from claimant for some public purpose. There is no obligation for a claimant to collect winnings. It is the collection and payment of these winnings that is of vital interest to the public whether Respondent is fulfilling its statutory mandate. When a claimant signs the record that apparently Respondent seeks, the claimant is becoming an "actor in an event of public or general interest" such that there cannot be an unreasonable invasion of privacy to disclose the signature. Burton at S.C. 352.

CONCLUSION

In this matter Respondent's issues with Appellant's request to see how those public officials are handling their duties is of Respondent's own making. As shown in this matter, they could have charged Appellant a deposit before starting work on pulling the information he requested. Instead, they said (in part) your request is too big and we will not honor what we agreed to provide in our settlement agreement. This is not how public bodies like Respondent should be able to treat the citizens of this state.

This court should reverse the lower court's order granting summary judgment, order an injunction to supply the information requested, declare Appellant the prevailing party and remand the case for an award of reasonable attorney's fees and costs, pursuant to S.C. Code Ann 30-4-110.

Respectfully submitted,

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April 23, 2025