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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2014-002221

George S. Glassmeyer,.....Respondent,

v.

City of Columbia,.....Appellant.

INITIAL BRIEF OF RESPONDENT

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RESTATEMENT OF ISSUE ON APPEAL

Respondent would restate the issue on appeal as follows:

Whether the circuit court erred in finding that FOIA compelled disclosure of complaints relating to alleged wrongdoing by former Police Chief Randy Scott?

STATEMENT OF THE CASE

This is an action for declaratory judgment arising out of Respondent George S. Glassmeyer's ("Glassmeyer") request for production of public records from Appellant City of Columbia ("City") pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (Rev. ed. 2007, as amended) ("FOIA"). Glassmeyer filed a summons and complaint for declaratory judgment on July 10, 2013, seeking an order declaring that he was entitled to documents from City, an injunction prohibiting City from withholding the requested documents, and an order awarding his attorney's fees and costs pursuant to S.C. Code Ann. § 30-4-100(b) (Rev. ed. 2007).

City filed its answer on or about July 16, 2013, denying any FOIA violation. City also requested an award of attorneys' fees and costs incurred in its defense. On October 17, 2013, City filed a motion for summary judgment. Glassmeyer filed a cross motion for summary judgment and a motion to strike City's prayer for attorneys' fees on October 18, 2013.

On February 10, 2014, the Honorable Alison Renee Lee heard oral argument on both parties' motions. At that time, City provided the lower court with all materials in its possession that would have been responsive to Glassmeyer's FOIA request for an *in camera* review. On July 23, 2014, Judge Lee granted both of Glassmeyer's motions,

leaving open the question of how much to award Glassmeyer for attorney's fees and costs.

City filed a motion to alter or amend judgment on July 29, 2014, which was denied on September 18, 2014. On October 15, 2014, City filed its notice of appeal.

FACTS

On April 3, 2013, Glassmeyer submitted a written request to City pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (Rev. ed. 207, as amended) ("FOIA"), seeking documents concerning former City of Columbia Police Chief Randy Scott ("Scott"). Affidavit of George S. Glassmeyer ("Glassmeyer Aff.") at ¶ 3; FOIA Request. Glassmeyer sought information related to Scott's request for a personal leave of absence that was submitted to the City on or about April 22, 2013, and Scott's subsequent resignation, effective May 1, 2013. *Id.*; *see also* City's Answers to Glassmeyer's First Set of Requests to Admit ("Requests to Admit"), Nos. 1 and 2.

With regard to Scott's request for a personal leave of absence and subsequent resignation, Glassmeyer requested the following documents:

a. A copy of the written request for a leave of absence submitted on or about April 2, 2013 by police chief Scott;

b. Copies of any and all documents including, but not limited to, statements, memoranda, emails, complaints, notes, and investigative reports relating to any alleged wrongdoing by police chief Randy Scott; and

c. Copies of any and all documents relating to any and all disciplinary actions imposed upon police chief Randy Scott.

Glassmeyer Aff.; FOIA Request.

Within fifteen days of Glassmeyer's FOIA request, on April 5, 2013, City

furnished Glassmeyer with a disk including some, but not all, responsive documents in its possession. Glassmeyer Aff. at ¶ 4; Response to FOIA Request. City stated that it had redacted alleged personal information from Scott's personnel file, citing FOIA's personal privacy exemption, S.C. Code Ann. § 30-4-30(c) (Rev. ed. 2007). *Id.*

City reported there were no documents that would have been responsive to several requests, including: (1) contract of employment; (2) internal affairs investigation(s); and (3) disciplinary action(s). Glassmeyer Aff. at ¶ 5; Response to FOIA Request.

On April 19, 2013, City supplemented its response to Glassmeyer's FOIA request. Glassmeyer Aff. at ¶ 6; Supplemental Response to FOIA Request. Although City produced a significant number of additional responsive documents, it refused to produce certain requested documents which were in its possession, including:

(1) anonymous emails referring to Chief Scott's alleged personal conduct;

(2) unsolicited, unverified complaints referring to Chief Scott's alleged personal conduct; and

(3) third party, unverified allegations of misconduct by Chief Scott.

Glassmeyer Aff. at ¶ 7; Supplemental Response to FOIA Request. City asserted that it was not producing these documents because they did "not qualify as public documents relating to the performance of public officials" and/or they contained "information of a personal nature where public disclosure would constitute an unreasonable invasion of personal privacy." *Id.* (*citing* S.C. Code Ann. §§ 30-4-15 and 30-4-40(2)).

On or about May 14, 2013, Glassmeyer submitted a second FOIA request for public records, requesting a "copy of the Columbia Police Department Policy and Procedure manual as it existed on July 1, 2012 and a copy of any and all subsequent

amendments, additions, and deletions." *See* Glassmeyer Aff. at ¶ 8; Second FOIA Request. In response, City provided a copy of its police department's Directives and Procedures Manual as well as certain updates to the Directives and Procedures Manual, effective January 2013. *See* Glassmeyer Aff. at ¶ 9; Directives and Procedures Manual; Updates.

ARGUMENT

Standard of Review

In *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), this Court held that "[t]he standard of review for a declaratory judgment action is . . . determined by the nature of the underlying issue." Where a plaintiff seeks a declaratory judgment under FOIA to determine whether certain information should be disclosed, the action is one at law. *Id.*; *see also South Carolina Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994); *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165 (Ct. App. 2003).

"In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 270, 705 S.E.2d 73, 76 (Ct. App. 2010) (*quoting Electrolab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). "The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Id.*; *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

I. FOIA COMPELS DISCLOSURE OF THE REQUESTED DOCUMENTS.

FOIA codified the legislative intent that gave rise to its enactment:

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

S.C. Code Ann. § 30-4-15 (Rev. ed. 2007) (emphasis added). "The essential purpose of the FOIA is to protect the public from secret government activity." *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219, 221 (1991). "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003) (*citing Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001)).

A public body cannot withhold information sought by a citizen under FOIA unless the information falls into one of the fifteen exemption categories contained within § 30-4-40, or is otherwise exempt from disclosure under various other FOIA provisions. S.C. Code Ann. § 30-4-40 (Rev. ed. 2007). The presumption is for disclosure: "The burden of proving that an exemption to disclose exists under [FOIA] lies with the government." *Evening Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011). FOIA exemptions must be construed narrowly to conform to the public purposes of the Act. *Evening Post Pub. Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005). If a document does not fall within one of the enumerated exemptions, then the document and/or information cannot be withheld by a public body.

Id. Whether an exemption applies is necessarily a case-by-case determination. *Id.*; *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996).

City violated FOIA by failing to provide the requested "statements, memoranda, emails, complaints, notes, and investigative reports relating to . . . alleged wrongdoing by police chief Randy Scott." The documents constitute "public records" subject to disclosure under FOIA, S.C. Code Ann. § 30-4-20(c) (Rev. ed. 2007). Neither the personal privacy exemption, S.C. Code Ann. § 30-4-40(a)(2), nor the exemption for matters otherwise exempt from disclosure by statute or law, S.C. Code Ann. § 30-4-40(a)(4), apply.

Even if Scott had a legitimate privacy interest in the requested documents, Glassmeyer has shown that there is a significant public interest that outweighs such privacy concerns in this case. *See Burton v. York County Sheriff's Dep't*, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004). The lower court's order compelling production of these documents should be affirmed.

A. The requested documents constitute "public records" and are subject to disclosure under FOIA.

The FOIA is clear that "[a]ny person has a right to inspect or copy any public record of a public body . . . ." S.C. Code Ann. § 30-4-30(a). City has raised the threshold issue of whether the requested documents constitute "public records" subject to mandatory disclosure under FOIA. *See* Appellant's Initial Brief at p. 6. "[P]ublic record" is defined in FOIA as

> *All* books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, *in the possession of, or retained by a public body.*

S.C. Code Ann. § 30-4-20(c) (emphasis added). The broad definition of "public record"

clearly encompasses the complaints received by City regarding misconduct by former police chief Scott.

Exceptions to the "public record" definition are also set forth in Section 30-4-20(c) and include:

> Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act . . . .

S.C. Code Ann. § 30-4-20(c) (Rev. ed. 2007). City has no basis under Section 30-4-20(c) to claim that the information Glassmeyer seeks does not fit within the definition of "public record" such that it may be properly withheld. The requested complaints of alleged wrongdoing do not fall within any of the specifically articulated exclusions from the "public record" definition and City does not make any claim that these specific exceptions apply.

City asserts that the complaints against Scott "do not qualify as public documents" because they "literally happened to fall into [City's] hands." *See* Hearing Transcript at p. 10, lines 23-25. City argued that there is a "very serious distinction" between "documents that [are] gathered by or generated by the government" and documents that are merely provided to the government without any affirmative governmental action. *Id.* at p. 10, line 21 – p. 11, line 2. City cites no statutory exception or case law that supports its position that documents merely given to a public body do not

constitute "public records." Any such distinction is unavailing and contradicts the plain language of S.C. Code Ann. § 30-4-20(c).

The definition of "public record" includes within its scope "all" documents, "regardless of physical form or characteristics." S.C. Code Ann. § 30-4-20(c) (Rev. ed. 2007). This definition includes those documents that are affirmatively created or manipulated by a public body ("prepared, owned, used") as well as those documents that are passively "in the possession of, or retained by" a public body. *Id.* The requested documents were undisputedly provided to City, in City's possession at the time of Glassmeyer's FOIA request, and are still being retained by City. Hearing Transcript at p. 22, line 18 – p. 23, line 20. There is no statutory distinction upon which to base a conclusion that the requested documents do not constitute "public records" subject to disclosure under FOIA.

City states as a secondary basis for withholding the subject complaints that the documents do "not qualify as public documents" because they do not "relat[e] to the performance of public officials." Glassmeyer Aff. at ¶ 7; Supplemental Response to FOIA Request. In support of its position, City cites FOIA's "findings and purpose" section, S.C. Code Ann. § 30-4-15 (Rev. ed. 2007). *See* Initial Brief of Appellant at p. 6.

South Carolina law is clear that a public body cannot withhold information sought by a citizen under FOIA unless the information falls into one of the fifteen exemption categories contained within § 30-4-40, or is otherwise exempt from disclosure under various other FOIA provisions. S.C. Code Ann. § 30-4-40 (Rev. ed. 2007). *See also Evening Post Pub. Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005) (if a document does not fall within one of the enumerated exemptions, then it cannot be

withheld). Nothing in FOIA permits a public body to withhold documents based on its subjective view that the documents do not "regard the 'activities of their public officials.'"

In addition to lacking any foundation in FOIA, City's argument that the requested documents do not "regard the 'activities of . . . public officials'" is substantively meritless. *See* Appellant's Initial Brief at p. 6 (citation omitted). The very essence of Glassmeyer's request was to copy or inspect complaints received by City regarding alleged wrongdoing of its public officials. *See* Glassmeyer's Motion for Summary Judgment at pp. 7-10. Alleged wrongful conduct or violations of the law by former police chief Scott unquestionably pertains to "activities" of a "public official."

The definition of "public record" in the FOIA is expansive and encompasses the requested documents. The information Glassmeyer requested includes complaints of wrongdoing which were admittedly in City's "possession." Regardless of whether City "used" the documents or merely "retained" them, FOIA compels their production pursuant to S.C. Code Ann. §§ 30-4-20(c), 30-4-30(a). City has no basis under FOIA to claim that the items it holds "do not qualify as public documents" such that they may be properly withheld, and the lower court should be affirmed on this issue.

B. The personal privacy exemption does not provide City with grounds to withhold the requested information, because its disclosure would not constitute an unreasonable invasion of Scott's personal privacy.

City asserts that the information Glassmeyer requests may be withheld under the personal privacy exemption, S.C. Code Ann. § 30-4-40(a)(2) (Rev. ed. 2007). *See* Appellant's Initial Brief at p. 4. The lower court rejected City's argument, holding Scott does not have a reasonable expectation of privacy with regard to the information

requested, and this Court should affirm. *See* Summary Judgment Order at p. 4.

The personal privacy exemption provides that "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy" may be withheld from production. *Id.* The exemption specifically identifies categories of information that constitutes personal information *per se*, disclosure of which would result in an "unreasonable invasion of privacy" (for example, gross receipts contained in an application for business license). *Id.* It is undisputed that none of these categories of *per se* private information are at issue in this case.

None of the information contained in the complaints filed with City regarding Scott's alleged misconduct is properly withheld under the personal privacy exemption. *See* S.C. Code Ann. § 30-4-40(a)(2) (Rev. ed. 2007). Complaints of improper action made by third parties should not be considered "[i]nformation of a personal nature where public disclosure thereof would constitute unreasonable invasion of personal privacy." *Id.* Rather, such complaints are mere representations or allegations made by others, whether true or untrue, regarding violations of the law or City policy by City employees. These documents, and the information they contain, are not properly considered "personal," "private," or otherwise subject to protection. *See also Perkins v. Freedom of Information Commission*, 635 A.2d 783, 785 (Conn. 1993) ("the [personal privacy exemption] was not intended to shield the misconduct of public officials from public knowledge").

City conceded during the hearing on the parties' motions for summary judgment that some of the complaints are publicly available documents, including court records. *See* Hearing Transcript at p. 7, line 15 – p. 8, line 25; p. 10, lines 5-15; *see also*

Appellant's Initial Brief at p. 10, n. 5. The lower court noted in its Summary Judgment Order that "copies of records from family court proceedings . . . are available to the public unless sealed." *See* Summary Judgment Order at p. 4 (*citing Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006)). "Therefore, there can be no level of privacy expected in those specific documents." *Id.*

City states in footnote 5 in its Initial Brief that it "provided [Glassmeyer] the civil action number of the [family court] proceedings in question." *See* Appellant's Initial Brief at p. 10, n. 5. City implies that providing the family court action number should be deemed the equivalent of fulfilling its mandate to provide public records to Glassmeyer. This implication is patently false. While providing such information might allow Glassmeyer to verify whether documents in City's possession were indeed filed in court, FOIA does not allow a public body to meet its obligations to the public merely by pointing a citizen to another repository where the records may be found.

For the reasons stated above, Scott did not and does not have a reasonable expectation of privacy in the complaints sought to be produced by City. The lower court held that "[w]hile complaints by third parties of improper actions against Scott *may be of a personal* nature, public disclosure of the complaints would not constitute an unreasonable invasion of personal privacy. Such complaints are mere representations or allegations made by others, whether true or untrue . . . ." Summary Judgment Order at p.4. This Court should affirm on these grounds that the requested documents are not protected by the personal privacy exception under the FOIA.

C. No other statute or law provides a separate ground for City to withhold the requested information.

Section 30-4-40(a)(4) of FOIA also provides an exemption for "matters

specifically exempted from disclosure by statute or law." *Id.* (emphasis added). City submits that The Family and Personal Identifying Information Privacy Act ("Privacy Act"), S.C. Code Ann. § 30-2-30 (Rev. ed. 2007), shields the requested documentation from production. *See* Appellant's Initial Brief at p. 4, n. 1. It does not.

City fails to cite any provision of the Privacy Act allowing or otherwise authorizing it to withhold the information at issue in this case. The Privacy Act merely proscribes the obtaining of personal information from a state agency for *commercial solicitation purposes*. *See* S.C. Code Ann. § 30-2-50 (Rev. ed. 2007). City's gratuitous reference to the "personal" information definition under the Privacy Act is not an applicable basis for withholding the documents requested by Glassmeyer. That definition exempts from disclosure "information that identifies or describes an individual, including, but not limited to, an individual's photograph or digitized image, social security number, date of birth, driver's identification number, name, home address, home telephone number [and] medical or disability information . . . ." S.C. Code Ann. § 30-2-30. None of this information is at issue in this case and does not provide City with a basis for failing to provide the complaints of alleged wrongdoing against Scott.

D. Even if the requested documents contained information of a "private nature," the balancing test of *Burton* compels production because there is a substantial public interest in the documents and City's response to receiving them.[1]

Our Supreme Court has recognized that "one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of

[1] City baldly asserts that Glassmeyer "has articulated no public interest that would compel disclosure." However, Glassmeyer has demonstrated in exhibits to his Motion for Summary Judgment that a discrepancy exists between the City's Police Department's Policies and Directives Manual and the actions City took with respect to the allegations against former Police Chief Scott that it received. The public has a right to know why.

legitimate public or general interest." *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) (*quoting Meetze v. Assoc. Press*, 230 S.C. 330, 95 S.E.2d 606, 609 (1956)). In *Burton v. York County Sheriff's Dep't*, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004), the South Carolina Court of Appeals noted that in considering whether FOIA compels documents involving private information, "[w]e must . . . resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other." *Id.*

In *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996), the South Carolina Supreme Court stated:

> We disagree with [the City's] contention that the internal investigation reports of law enforcement agencies are *per se* exempt because they contain personal information as a matter of course. The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis.

Id. at 387, 475 S.E.2d at 749 (citations omitted). In the case at bar, this Court should conclude that based on the facts of this case, the public's interest outweighs any alleged privacy interests which form the predicate for City's attempt to withhold the complaints against former Police Chief Scott from public view.

The federal balancing test articulated by City is not applicable in this state. *See* Appellant's Initial Brief at pp. 5-6 (*citing Casa de Maryland, Inc. v. U.S. Department of Homeland Sec.*, 409 Fed. Appx. 697, 700 (4th Cir. 2011). The South Carolina Supreme Court has held that federal case law interpreting the US FOIA is not binding on state courts interpreting the South Carolina Freedom of Information Act. Specifically, in *Newberry Pub. Co., Inc. v. Newberry County Comm'n on Alcohol & Drug Abuse*, 308

S.C. 352, 417 S.E.2d 870 (1992), the Supreme Court noted: "In support of its argument, [the public body] relies on various federal cases. However, [the public body]'s reliance on these cases is misplaced; the exemptions contained in the federal FOIA are more expansive than those contained in South Carolina's FOIA." *Id.* at 354 n. 4, 417 S.E.2d at 872 n.4. City's attempt to apply a Fourth Circuit and United States Supreme Court "burden shifting" analysis with regard to the personal privacy exemption is inconsistent with binding South Carolina precedent.

Even if the complaints filed with City implicated Scott's legitimate privacy interests, such interests are outweighed by the public interest where, as here, City fails to follow its own directive to investigate complaints and generate investigative reports. City admitted in its responses to Glassmeyer's FOIA request that it was in possession of various complaints of wrongdoing by Scott. *See* Glassmeyer Aff. at ¶¶ 4-6; Response to FOIA Request; Supplemental Response to FOIA Request. These complaints included allegations that Scott violated City's policies and directives, and possibly also violated the law of this State. *See id.* Despite its admission that such complaints were in its possession, City conceded that there were no corresponding internal affairs investigations or disciplinary actions involving Scott. *Id.*

The City of Columbia Police Department's Directives and Procedures Manual ("Manual") lays out City's policies regarding internal affairs and disciplinary procedures. *See* Glassmeyer Aff. at ¶ 9; Directives and Procedures Manual at Section 2, Chap. 6 and Section 3, Chap. 3. The Manual states:

> All members of the Department . . . are responsible for conforming to departmental policies and procedures and are subject to discipline under the provisions of this chapter. Any member who violates the oath of office or trust, the laws of the United States, the State of South Carolina,

> or the City of Columbia or who violates any provisions of departmental policies and procedures . . . is subject to disciplinary action.

Id., Manual Chap. 3, Sect. 3 at § 3.0. Under the Manual, all sworn officers of the City are required to comply with both the employee code of ethics and the law enforcement code of ethics, both of which address personal conduct. *See e.g.,* Manual at Section 3, Chap. 3 § 8.0 (Code of Conduct) and §§ 8.4(20), 8.4 (26) (providing that officers are "always on duty" and provides discipline for "Conduct Unbecoming a Law Enforcement Officer").

The Manual sets forth in Section 2, Chap. 6 the Internal Affairs Policy for the Department. This Chapter specifically states:

> The Department **requires an investigation of all citizen complaints, including anonymous complaints** against the Department or Departmental personnel. It will also address citizen inquiries concerning Departmental regulations, policies, and procedures, actions taken by Departmental personnel in the performance of their duties and other issues that involve the Department and its personnel. Adherence to this directive will help ensure the integrity of the Department, while protecting the rights and interests of private citizens and Departmental personnel.

Glassmeyer Aff. at ¶ 9; Manual Section 2, Chap. 6 at § 1.0 ("Directive") (emphasis added). The Manual provides a list of "Types of Formal Discipline" in Section 3, Chap. 3 at § 5.0. *Id.* The types of action subject to formal discipline include any improper action taken by Departmental staff in both their official and personal capacities. Section 7.0 provides: "When disciplinary action is taken or recommended by a supervisor, a 'Report of Disciplinary Action and/or Termination form will be completed.'" Glassmeyer Aff. at ¶ 9; Manual.

Section 3, Chapter 3 § 1.0 ("Directive") states that "The Columbia Police Department will exercise disciplinary action, when required, in a consistent and impartial manner." Glassmeyer Aff. at ¶ 9; Manual. Subsection 3.0 further provides: "In those

cases where the Department's guidelines are violated, there must be a uniform system of discipline." *Id.* The Department's own Manual contemplates that the purpose of uniform investigative and disciplinary action is to protect the rights and interests of private citizens. This is true for not only those citizens who make complaints against City or its personnel, but also citizens who have a vested interest in ensuring that City follows its stated policies and procedures. Section 2, Chapter Six ("Internal Affairs") of the Manual confirms: "Adherence to this directive will help ensure the integrity of the [City] while protecting the rights and interests of private citizens and [City] personnel." Glassmeyer Aff. at ¶ 9; Manual.

City characterized the complaints it received as "bile from third parties" which did "not arise to the level of a public act" and which were not required to be investigated. *See* Hearing Transcript at p. 7, lines 20-23, p. 8, lines 16-21. City's characterization of the allegations in these complaints as the basis for its reason for failing to investigate is contradicted by its own Manual, which mandates investigation of *all* allegations, even those submitted anonymously, and even those involving personal conduct. City argued that "in its deliberations about this, [it] determined that they weren't" going to respond to the complaints because "they weren't going to do [the complainant's] bidding." *Id.* at p. 10, lines 10-12. "[City] felt that it was – [the complainants'] allegations were relating to private conduct, and they didn't warrant any investigation." *Id.* at p. 10, lines 13-15. City's "deliberations" and "determinations" regarding the complaints it received were documented nowhere and are not capable of independent verification by the public.

Moreover, City's characterization of the complaints in its possession as "anonymous and unsubstantiated" begs the question of why it did not take any action to

verify the complainants' identities and/or explore the merits of the claims through an investigation. City's attempt to withhold the complaints by characterizing them as "anonymous and unsubstantiated," despite its admitted failure to investigate them, and then argue that because the complaints are unsubstantiated, City is not required to produce them, is exactly the type of "activities of public officials" that FOIA was intended to subject to public disclosure.

"The essential purpose of the FOIA is to protect the public from secret government activity." *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219, 221 (1991). Section 30-4-30(a) states: "Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by Section 30-4-40, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a). This statutory "right" ensures that governmental business is performed in an open and public manner, that citizens are informed of the activities of their public officials, and government officials cannot as easily hide or avoid scrutiny where appropriate. *See* S.C. Code Ann. § 30-4-15.

Pursuant to its own policies and procedures, City had an express obligation to investigate *any* complaint it received. Glassmeyer Aff. at ¶ 9; Manual at Sect. 2, Chap. 6 § 1.0 ("Directive"). City's pronouncement to the lower court that it "deliberat[ed]" regarding the complaints and "determined" not to undertake any official investigation into the allegations (Hearing Transcript at p. 10, lines 10-15) is in violation its own directives. That City ignored its own policy and conducted no formal investigation into the accuracy of the allegations provides Glassmeyer and the public with a legitimate interest in discovering why City chose to flatly ignore them without further inquiry.

The public has an interest in ensuring that the City investigates complaints of wrongdoing made by citizens. City's own directives recognize this public interest. *See* Glassmeyer Aff. at ¶ 9; Manual at Sect. 2, Chap. 6 § 1.0. Where City expressly acknowledges that it has citizen complaints in its possession, there is no excuse for its failure to take action. Whether anonymous emails referred to former police chief Scott's alleged personal conduct; unsolicited and unverified complaints referred to Scott's alleged personal conduct; or third-party, unverified allegations described misconduct by Scott, City's failure to investigate is indefensible. According to explicit City policy, *all* complaints must be investigated, without exception, yet in this case City admits that no investigation occurred. *See* Glassmeyer Aff. at ¶¶ 4-6; Response to FOIA Request; *see also* Requests to Admit at Nos. 13 and 14.

This Court's decision in *Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), is instructive. In *Burton*, a reporter for a local paper requested information from the York County Sheriff's Department concerning a suspension of four of its officers following an internal investigation stemming from a citizen complaint. *Id.* at 344, 594 S.E.2d at 891. The Department denied portions of the plaintiff's request on the basis that the information was "personal" and disclosing it would result in an alleged "invasion of privacy." *Id.* at 345, 594 S.E.2d at 891.

On appeal this Court disagreed with the Department, determining that the plaintiff's request for the complaints and investigative reports was not subject to FOIA's personal privacy exemption and affirming the lower court's mandate that documents be produced. *Id.* at 352, 594 S.E.2d at 895. This Court weighed the officers' right to privacy against the public nature of their position and the public's interest in the manner

in which the officers discharged their duties. *Id.* at 352, 594 S.E.2d at 895. Because the documents requested by the plaintiff focused on the performance of the officers' duties and allegations of misconduct, this Court determined that the public interest substantially outweighed the officers' right to privacy and held that the documents should have been disclosed. *Id.*

City's attempt to analogize Burton's failure to appeal or otherwise contest the lower court's finding that "allegations relating to off-duty sexual practices and activities of the deputies [are] personal and private . . ." is not convincing. *See* Initial Brief of Appellant at pp. 7-8 (citing *Burton* at 345, 594 S.E.2d at 891). Glassmeyer is not attempting to uncover Scott's "off-duty sexual practices and activities," but rather is attempting to investigate why City failed to take investigative or disciplinary action in response to numerous complaints alleging violations of City policy and/or applicable law.

The disparity between City's receipt of various complaints against Scott and its failure to investigate the allegations despite express policy directives requiring an investigation militates in favor of the public's interest in the allegations and the reason why City chose not to investigate them. *See* S.C. Code Ann. § 30-4-15 (Rev. ed. 2007) ("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").

City's stated concern that "holding that such personal information [in anonymous or other complaints] must be disclosed upon request will only expose those who wish to serve the public to unknowable mischief" is a red herring. *See* Appellant's Initial Brief at p. 8. City states as a hypothetical example that "unscrupulous or misguided opponents"

could "manipulate[e]" the system by filing complaints containing meritless allegations with City anonymously and then turn around and submit a FOIA request for such complaints, opening City and its employees up to "unknowable mischief." *Id.* at p. 8. Such a result could only be obtained, where, as here, City fails to independently investigate allegations against its employees. Had City taken the complaints at issue, investigated them pursuant to its Directives, and generated an investigative report concluding that the allegations were meritless, there would be no resulting problem of unsubstantiated allegations being released to the public. City's failure to investigate or produce an investigative report cannot be used by City as a shield from mandated production of public records.

The lower court should be affirmed on the basis that even if Scott's privacy interests were implicated by Glassmeyer's FOIA request, there exists a significant public interest in exposing why City failed to take any required responsive action following its receipt of complaints against its employees.

E. City's argument that the complaints sought by Glassmeyer were not filed in accordance with the published procedures for investigation is not preserved for appeal.

In its motion to alter or amend City argued for the first time that none of the requested complaints were submitted to City pursuant to its recommended procedures. *See* Motion to Alter or Amend at pp. 4-5. City contended that because the requested complaints were not provided to City by complainants in accordance with its recommended procedures, it had no corresponding obligation to investigate the allegations. *Id.* at p. 5 ("A journey must begin for one to question the steps taken."). It further argued that because it had no obligation to investigate the complaints since they

were not provided to it through proper channels, Glassmeyer's "public interest" argument failed. *Id.*

The lower court recognized that City's arguments had not been previously presented to the court and were therefore waived. *See* Order Denying City's Motion to Alter or Amend at p. pp. 2-3. It is well established that "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) (citation omitted); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (E.D. Va. 1984) ("I do not conceive of Fed. R. Civ. P. 59(e) as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment."). *See also Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396, 404 (4th Cir. 1998).

The purpose behind Rule 59(e) is to allow a party to correct misapplications of law or fact or to preserve legal issues for appeal. *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). "[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the great importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Id.* at 779-780 (citation omitted). Issue preservation rules are designed to give the lower court a fair opportunity to rule on the issues, and thus provide the appellate courts with a platform for meaningful review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quotation omitted).

Where a party does not raise an issue to the trial court prior to the lower court's

order or judgment, the party has waived its right to make that argument. *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693 (2014) (citation omitted). In *Stevens & Wilkinson*, the Supreme Court held that it was error for the Court of Appeals to have considered an argument made by City that was improperly raised for the first time in a Rule 59(e), SCRCP motion. *Id.* at 567, 762 S.E.2d at 695. "The circuit court, relying on well-settled precedent, declined to reach this issue because it was improperly raised for the first time in the Rule 59(e) motion. The court of appeals should have refused to entertain that theory as well for the same reasons." *Id.* Similarly, here, this Court should refuse to entertain City's argument which was not timely presented to the lower court.

Reserving arguments until a motion to alter or amend defeats the public policy of securing the just and speedy resolution of disputes and ensuring that all legal issues are presented to the lower court for its consideration. *Herron*, 395 S.C. at 470, 719 S.E.2d at 645 (issue preservation rules are designed to prevent a party from "keeping an ace card up his sleeve"). City failed to bring to the lower court's attention its recommended procedure for receiving complaints against its employees and accordingly failed to preserve this issue for appeal.

Even if City's arguments were properly preserved, they should be rejected. City's contention that because none of the requested materials were submitted via recommended procedures, City had no corresponding duty to investigate (Appellant's Initial Brief at pp. 8-10) is without any foundation in the record. There is no competent evidence before this Court describing the manner by which City received the subject complaints. The only evidence is that they take the form of anonymous emails referring to Scott's alleged

personal conduct; unsolicited, unverified complaints relating to Scott's alleged personal conduct; and third-party, unverified allegations of misconduct by Scott. *See* Glassmeyer Aff. at ¶¶ 4-6; Response to FOIA Request; Supplemental Response to FOIA Request.

City's naked assertion that it received the subject complaints through channels outside of City's recommended procedures does not constitute competent evidence. *See* Appellant's Initial Brief at p. 4 ("all established procedures for reporting and investigating allegations of misconduct were bypassed"); Motion to Alter or Amend at p. 4 (same). In *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), this Court recognized that "a challenge is without merit where it consists solely of an attorney's statements, unsworn and unsupported by any proof or offer of proof." *Id.* at 288, 715 S.E.2d at 373. Our Supreme Court has stated that an unsworn statement can only be considered as true "on information and belief." *Thevenot v. Commercial Travelers Mut. Acc. Ass'n of America*, 259 S.C. 235, 191 S.E.2d 251 (1972). The factual representations made by City are unsworn and unsupported by any proof or offer of proof.

City leaps to the conclusion that because there are recommended procedures for filing complaints, any complaints submitted to the City *outside* of the recommended method can simply be ignored without further investigation or inquiry. *See* Appellant's Initial Brief at p. 5 ("There being no report, anonymous or otherwise, **pursuant to Department policies**, there is no legitimate basis for compelling disclosure of the information....") (emphasis in original).

City's own Manual makes clear that it is "require[d] [to] investigate[] . . . all citizen complaints, including anonymous complaints." *See* Glassmeyer Aff. at ¶ 9; Manual at Sect. 6, Chap. 2 § 1.0 ("Directive"). There is no stated exception to this rule

and there is no authorized procedure for City to ignore complaints that it receives outside of its own recommended avenues.[2]

City's argument that it was justified in failing to investigate the subject complaints actually provides further support for affirmation of the lower court's decision in this case. This Court should reject City's argument and find that an overarching public interest outweighs whatever privacy interests former Police Chief Scott may have in this case.

CONCLUSION

FOIA protects citizens from secret government activity. The lower court's order mandating that City provide unrestricted access to the information contained in the complaints against former police chief Randy Scott was supported by evidence in the record and should be affirmed. These complaints constitute "public record[s]" under FOIA.

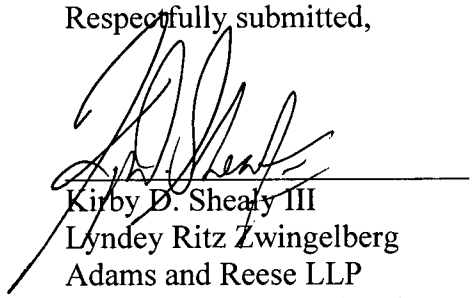
Disclosure of these documents does not constitute an unreasonable invasion of privacy, and there is no other statute or law that prohibits such information from being disclosed. Alternatively, even if there is a privacy interest in the requested information, such interest is outweighed by the public's interest in ensuring City complies with its own policies and directives, mandating an investigation and, if necessary, disciplinary action,

[2] The creation of an exception enabling City to blatantly ignore complaints brought to its attention but which are not provided on its recommended form (*See* Appellant's Motion to Alter or Amend Judgment at Exhibit C) or submitted pursuant to recommended channels would be contrary to public policy. Were the Court to countenance such an argument, it would give City and countless other governmental entities a basis to reject otherwise valid complaints against government officers and personnel and give public bodies a basis to refuse to investigate or discipline their employees for wrongful conduct. Such a result elevates form over substance and should be rejected. *Cf. Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011) ("equity looks to substance rather than form") (*quoting Wilkie v. Phila. Life Ins. Co.*, 187 S.C. 382, 393-94, 197 S.E. 375, 380 (1938)). This maxim applies by "dispensing with pure formalities which would otherwise defeat the equity." *Id.* at 253, 715 S.E.2d at 354.

against its personnel where there is evidence of violations of the law or established policy.

For these reasons, the lower court's order mandating City provide unrestricted access to the requested documents should be affirmed.

Respectfully submitted,



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