

**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.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Circuit Court erred in finding that FOIA compelled disclosure of anonymous emails, unsolicited unverified complaints, and third-party unverified allegations of misconduct.**
2. **Whether Appellant had an obligation to investigate complaints that were not filed in accordance with the Columbia Police Department's procedures.**
3. **Whether Appellant is entitled to challenge the trial court's ruling on the ground that the withheld documents do not qualify as public complaints under FOIA.**

STATEMENT OF THE CASE

This is an appeal from the Court of Common Pleas for the Fifth Judicial Circuit. The issues on appeal are whether the South Carolina Freedom of Information Act (“FOIA”) compels the disclosure of anonymous emails, unsolicited unverified complaints, and third party allegations of misconduct relating to a former police chief, whether Appellant’s Police Department had an obligation to investigate complaints that were not filed in accordance with published procedures, and whether Appellant may challenge the trial court’s ruling on the ground that the requested documents refer to allegations that were not “public” and were not presented in accordance with published procedures.

STATEMENT OF THE FACTS

On April 3, 2013, Respondent George S. Glassmeyer (“Glassmeyer”) submitted a FOIA request to Appellant City of Columbia (“City”) requesting to inspect, among other items, “copies of any and all documents including, but not limited to statements, memoranda, emails, complaint, notes, and investigative reports relating to any alleged wrongdoing by [the former] police chief” and “copies of any and all documents relating to any and all disciplinary actions imposed upon [the former] police chief.” The City responded by providing all requested materials except: (a) anonymous emails referring to alleged personal conduct; (b) unsolicited, unverified complaints referring to alleged personal conduct; and (c) third-party, unverified allegations of misconduct.

On July 10, 2013, Glassmeyer filed a non-jury complaint seeking a declaration that the City unlawfully failed to respond to his April 3, 2014 FOIA request, an injunction compelling disclosure of documents or information responsive to his FOIA

request and an award of reasonable costs and attorney fees. (Complaint ¶¶ 14-16) The City filed an answer on July 16, 2013 denying any FOIA violation and requesting attorney's fees and costs incurred in defense. On October 17, 2013, the City filed a motion for summary judgment. On October 18, 2013, Glassmeyer filed a motion for summary judgment and a motion to strike the City's prayer for attorney fees.

The motions were heard on February 10, 2014 by the Honorable Alison Renee Lee. The City provided Judge Lee the withheld information for *in camera* review. Following submission of briefs, oral argument and review of withheld materials, by order issued July 23, 2014, Judge Lee entered the following findings:

- To withhold “public records under FOIA” an agency must prove that the information falls within one of fifteen exemptions in § 30-4-40; (R. p. 4)
- The materials withheld fall within the “broad definition of public records” set forth in § 30-4-40; (R. p. 5)
- Although the material withheld may relate to “off-duty” conduct, Glassmeyer has a legitimate interest in determining “whether the Department followed its own policies and investigated complaints, which is a matter of public interest” (R. p. 6)
- Glassmeyer “only seeks information regarding complaints of ‘alleged wrongdoing’ and ‘disciplinary action.’” (R. p. 7)
- Although the reasons were not given in the complaint, Glassmeyer claimed at the hearing that the City violated its [Police Department]

manual by failing to investigate allegations set forth in various complaints against Scott. (R. p. 7)

- Glassmeyer bases this contention on the representation that “[t]he Internal Affairs Policy in the manual sets forth a requirement for the Department to conduct ‘an investigation of all citizen complaints including anonymous complaints.’” (R. p. 7)
- The Department policy “requiring an investigation militates in favor of the public’s interest in allegations and the reason why the Defendant chose not to investigate the allegations.” (R. p. 7)
- The focus of this case is not on the accusations themselves but the Department’s knowledge of the complaints and its response upon receipt. (R. p. 8)
- The case focuses not on the content of the allegations, but on what steps the Department took upon receipt of the information pursuant to its policies. (R. p. 8)

On July 29, 2014, the City filed a motion to alter or amend the above order on grounds that legitimate reasons were shown for withholding the information identified in its FOIA response and because the requested documents refer to allegations that were not presented in keeping with published procedures required for investigation of public complaints about police conduct. On August 4, 2014, Glassmeyer filed a memorandum in opposition to the motion to alter or amend and on August 5, 2014, the City filed a reply memorandum. On September 17, 2014, Judge Lee denied the motion to alter or amend. This appeal followed.

STANDARD OF REVIEW

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

LEGAL ARGUMENT

I. FOIA does not compel disclosure of anonymous emails, unsolicited verified complaints, and third party allegations of misconduct relating to the former police chief.

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

The information requested by Glassmeyer contains "personal information" subject to protection established by common law principles and designated by the General Assembly in the Family and Personal Identifying Information Privacy Protection Act. S.C. Code Ann. § 30-2-30.¹ Such information is exempt from disclosure by S.C. Code

¹ "Personal information" is defined by this Act to include "information that identifies or describes an individual including, but not limited to, an individual's photograph or digitized image, social security number, date of birth, driver's identification number, name, home address, home telephone number [and] medical or disability information ..."

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

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

Under federal law, once a legitimate privacy interest is implicated, the burden shifts to the FOIA requester to (1) “show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake,” and (2) “show the information is likely to advance that interest.” Casa de Maryland, Inc. v. U.S. Department of Homeland Sec., 409 Fed. Appx. 697, 700 (4th Cir. 2011) Like the federal system, our courts have recognized both statutory and common law privacy interests.

In our State, as in the federal system, statutes supplement constitutional and common law privacy interests. See, Burton, *supra* 338 at 352, 594 at 895. National

Archives and Records Admin v. Favish, 541 U.S. 157, 170 (2003) Indeed, our constitution goes beyond the federal model in providing specific protection against “unreasonable invasions of privacy ...” S.C. Const. art. I, § 10. The right to privacy recognized by common law, statutes, and the constitution should require a FOIA requester to articulate a public interest in obtaining “personal information” about other citizens from the government.² Moreover, as observed by the West Virginia courts, FOIA is not a proper vehicle for satisfying private curiosity. Child Protection Group v. Cline, *supra*, 350 S.E.2d at 544 (W. Va. 1986).

In this instance the City withheld anonymous emails as well as unsolicited, unverified allegations referring to the former police chief’s personal conduct and third-party, unverified allegations of misconduct. In his complaint, Glassmeyer contends that FOIA required the City to release this information. In argument to the trial court, however, Glassmeyer asserted that he wanted to make certain that the City’s Police Department did not provide favorable treatment to the former police chief and that the Police Department followed its published policies in responding to allegations of police misconduct.

As a preliminary matter, the information withheld from disclosure does not fall within the requirements of law and did not deprive Glassmeyer access to information regarding the “activities of their public officials.” S.C. Code Ann. § 30-4-15. Additionally, the material requested includes “personal information” exempt from

² State and federal FOIAs serve the same purpose of providing access to public information while protecting privacy interests. To date, no published opinion has been issued in this state regarding the obligation to demonstrate a public interest when privacy issues are implicated. Nevertheless, as addressed herein, it is established that FOIA only compels disclosure of information relating to public activity and public conduct. Accordingly, private “personal information” is exempt from disclosure under FOIA.

disclosure. See, S.C. Code Ann. § 30-4-40(2) (Information of personal nature where the public disclosure would constitute unreasonable invasion of personal privacy)

Glassmeyer has articulated no public interest that would compel disclosure of information regarding the alleged personal conduct of the former police chief and others.³ Examination of the withheld material, provided to the trial court as received and available for review under seal, confirms that the City appropriately exercised its obligation to protect privacy interests while offering Glassmeyer access to public information regarding the police chief's public activities, compensation and benefits. See generally, City of Columbia v. ACLU of South Carolina, 323 S.C. 384, 475 S.E.2d 747 (1996) (exemptions to disclosure under FOIA must be reviewed on a case by case basis) Moreover, the trial court did not expressly determine that the content of the material submitted for review justifies publication. Responding to Glassmeyer's hearing argument, the Court instead held that the public's interest is confined to the "steps the Department took upon receipt of the information **pursuant to its policies.**" (Emphasis added) (R. p. 8)

In reviewing the withheld materials, this Court should be guided by its opinion in Burton v. York County Sheriff's Department, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) In Burton, the trial judge was faced with a similar request to compel records relating to public and personal conduct of law enforcement officers. Following an *in camera* review, the judge determined that "allegations relating to off-duty sexual practices and activities of the deputies is personal and private ..." 358 S.C. at 345, 594 S.E.2d at 891. The plaintiffs in Burton did not appeal or otherwise contest this finding.

³ The material provided for *in camera* review and filed under seal makes reference to alleged conduct of individuals other than the former police chief, including a private citizen.

On review, this Court held that the manner in which law enforcement officers **prosecute their duties** to be a vital public interest that outweighs their desire to remain out of the public eye. The Court also acknowledged that the plaintiffs did not seek “information regarding **off-duty** sexual activities of the deputies involved.” 358 S.C. at 352, 594 S.E.2d at 895 (emphasis added) Instead, FOIA is available to access information only “of legitimate or public interest.” Id.

If upheld, the trial court’s order will undermine legitimate privacy interests recognized by state and federal law and expand this Court’s carefully crafted Burton decision. In addition, holding that such personal information must be disclosed upon request will expose those who wish to serve the public to unknowable mischief and perhaps manipulation by unscrupulous or misguided opponents. For all of these reasons, the order on appeal should be reversed and guidance provided on application of FOIA to allegations regarding private conduct by public employees.

II. The allegations sought by Glassmeyer were not filed in accordance with the published procedures for investigation of public complaints about police conduct.

In support of his FOIA request, Glassmeyer relied upon Section 06, Chapter 02 (Internal Affairs) of the City of Columbia Police Department Manual.⁴ This policy provides, in relevant part:

The Department requires an investigation of all citizen complaints, including anonymous complaints, against the Department or its personnel. (Paragraph 1.0)

⁴ This section is inadvertently identified as “Section 2, Chap. 6 of the Internal Affairs Policy” in the trial court order. (R. p. 7)

The Internal Affairs Unit will post a brochure in a public location in every police station or substation that outlines the procedures the public will follow in lodging a complaint against the Department or its employees. (Paragraph 3.0)

The Internal Affairs Unit shall be responsible for maintaining accurate records of all complaints against the Department or its personnel. (Paragraph 3.1)

Complaints received by mail by the Office of the Chief or Internal Affairs will be handled as any other complaint. (Paragraph 4.1)

The Internal Affairs policy places citizens on notice that reports of wrongdoing on the part of police officers may be made in person, by telephone, in writing, electronically, and anonymously. The procedures for making such reports are available to the public through various sources. For example, in addition to visiting, calling or writing the Department, citizens may use the web to access the complaint process and procedure. A complaint form is provided. The Department also offers a Citizen Complaint Process with instructions.

Individuals and organizations seeking to make allegations of impropriety involving members of the City's Police Department may do so. None of the requested materials were submitted to the Internal Affairs Unit. Instead, all established procedures for reporting and investigating allegations of misconduct were bypassed. There can be no public interest in determining why the Police Department did not investigate allegations that were never presented.

As noted above, the trial court held that the public's interest in this matter is confined to the "steps the Department took upon receipt of the information **pursuant to its policies.**" (Emphasis added) (R. p. 8) A journey must begin for one to question the steps taken. There being no report, anonymous or otherwise, **pursuant to Department**

policies, there is no legitimate basis for compelling disclosure of the information identified in the City's FOIA response and provided to the trial court for *in camera* review.⁵

The information withheld under FOIA was not submitted through published, available means for reporting police misconduct. This failure establishes that there was no effort to make a "public report" of alleged misconduct. For these reasons, reliance upon Burton and the other authorities cited in the trial court's order that address evaluation or investigation of public officers is misplaced and the City reasonably withheld the documents from public view.

III. The City is entitled to appeal the trial court's ruling on the ground that the withheld documents do not qualify as public complaints under FOIA.

In rejecting the City's motion to alter or amend, the trial court refused to consider the argument that the Police Department had no notice or obligation to investigate the allegations withheld from review. (September 17, 2013 Order p. 2, R. p. 3) The trial court's original order acknowledges, however, that Glassmeyer did not raise this argument in his pleadings, stating: "Specifically, although the reasons were not given in the Complaint, Plaintiff claimed at the hearing and in its memorandum that the City violated its Manual by failing to investigate the allegations set forth in the various complaints against Scott." (July 23, 2013 Order p. 6, R. p. 7) Thereafter, the City

⁵ The trial court noted that certain materials reviewed *in camera* appeared to derive from a family court proceeding and observed that such documents are public in nature. This Court may take judicial notice that family court proceedings are subject to seal. Neither the City nor the former police chief was a party to the referenced family court action. Furthermore, materials provided for review do not carry a family court stamp and are identified as attachments to a request for admission. Items of discovery are not normally filed. The City has provided Glassmeyer the civil action number of the proceedings in question.

properly objected to the trial court's conclusion that "failure to investigate," rather than the content of the materials requested, justifies disclosure under FOIA.

The City could not have anticipated the trial court's ruling on "failure to investigate." As acknowledged by the trial court, Glassmeyer's complaint makes no reference to any alleged obligation to investigate on the part of the City's Police Department. Instead, the complaint is limited to a request to review the content of documents including "investigative reports." (Complaint ¶ 6, R. p. 16) Accordingly, the arguments and materials presented demonstrating that no request for investigation was properly submitted under available procedures is appropriate and should be addressed.

In argument before the trial court, Glassmeyer requested disclosure of information on grounds not asserted in his pleadings and sought to bar the City's objection to his attempt to expand FOIA beyond the confines of reviewing public documents. Contrary to Glassmeyer's position, the bench and the bar will be served by this Court addressing whether FOIA applies to Glassmeyer's "failure to investigate" argument. It is respectfully submitted that upon review of this issue, the Court must conclude that Glassmeyer's complaint does not support the relief provided by the trial court and that the documents withheld fall outside the "public record" as defined in FOIA.


CONCLUSION

In withholding the information requested by Glassmeyer, the City acted only to protect the privacy of its former employee and others and to confine investigative records to public complaints presented in keeping with established procedures. The City has taken no action to prevent unknown accusers from making public their complaints about any employee. Correspondingly, FOIA is not an appropriate vehicle for making

anonymous accusations public. Review of the records provided to Glassmeyer demonstrates that the City has acted within the requirements of FOIA in balancing privacy interests while offering access to public information regarding formal complaints about police conduct. See generally, City of Columbia v. ACLU of South Carolina, supra (exemptions to disclosure under FOIA reviewed on a case by case basis); Seago v. Horry County, supra (the purpose of FOIA is to protect citizens from secret government activity) For these reasons, the decision of the trial court should be reversed and the order of attorney fees vacated.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with
Rule 211(b).

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CERTIFICATE OF SERVICE

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

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