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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2013-001880

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

v.

City of Columbia,.....Appellant.

RESPONDENT'S PETITION FOR REHEARING

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Attorneys for Respondent

Pursuant to Rules 221(a) and 240 of the *South Carolina Rules of Appellate Procedure*, Respondent George S. Glassmeyer ("Glassmeyer") respectfully files this Petition for Rehearing regarding the Court's decision filed September 2, 2015 (Op. No. 5347). In its opinion, this Court reversed in part the lower court's finding that Appellant City of Columbia ("City") violated the South Carolina Freedom of Information Act ("FOIA") by withholding home addresses, personal telephone numbers, and personal email addresses submitted to City by the final five candidates in connection with their applications for the position of City Manager.

Rule 221(a), SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law and/or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933). For the following reasons, Respondent submits the Court misapprehended applicable law and/or fact by relying on provisions of the Michigan Freedom of Information Act, the United States Freedom of Information Act, and case law interpreting these statutes. In addition, the Court failed to apply applicable South Carolina law in concluding that home addresses, personal telephone numbers, and personal email addresses were appropriately withheld by City on the basis of FOIA's personal privacy exemption, S.C. Code Ann. § 30-4-40(a)(2).

ARGUMENTS

I. THE CITY'S DISCLOSURE OF HOME ADDRESSES AND PERSONAL TELEPHONE NUMBERS OF APPLICANTS FOR THE POSITION OF CITY MANAGER WOULD NOT CONSTITUTE AN UNREASONABLE INVASION OF PERSONAL PRIVACY.

The Court correctly noted that the analysis of any FOIA case involving the potential application of FOIA's personal privacy exemption involves balancing an individual's privacy interest against the public's need to know. *Burton v. York County*

Sheriff's Dept., 358 S.C. 339, 352, 594 S.E. 888, 895 (Ct. App. 2004). For the exemption to be properly applied, there must be a privacy interest at stake and that interest must outweigh the public's interest in the information sought. *Id.*

A. The Court incorrectly analyzed the applicants' privacy interest in the home addresses and telephone numbers.

The South Carolina FOIA exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." S.C. Code Ann. § 30-4-40(a)(2) (Rev. ed. 2007). Information of a "personal nature" alone is not exempt. Rather, it must be such that a reasonable person would claim a privacy interest in the information in order to be protected. This Court found home addresses and personal telephone numbers of the final five candidates for the position of City Manager constituted information "in which the applicants have a privacy interest" (Opinion page 7) based on the Court's application of the U.S. Freedom of Information Act, 5 U.S.C.A. §§ 552, *et seq.* ("US FOIA"), Michigan Freedom of Information Act, M.C.L.A. §§ 15.231, *et seq.* ("Michigan FOIA"), and judicial opinions interpreting both statutory schemes.

This Court's reliance on cases interpreting the US FOIA was inappropriate. The South Carolina Supreme Court has clearly and unambiguously stated "federal case law interpreting the US FOIA is not binding in this state because the exemptions contained in the [US FOIA] are more expansive than those contained in South Carolina's FOIA." *Newberry Pub. Co., Inc. v. Newberry County Com'n on Alcohol & Drug Abuse*, 308 S.C. 352, 354 n.4, 417 S.E.2d 870, 872 n. 4 (1992). Because the exemptions under the US FOIA have been construed more broadly than the South Carolina FOIA personal privacy exemption, the US FOIA is not only not binding upon South Carolina courts, it should

not be viewed as persuasive authority. *See Evening Post Pub. Co. v. City of North Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005) ("exemptions in section 30-4-40 are to be narrowly construed so as to fulfill the purpose of FOIA"). The Court's application of *U.S. Dept. of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994), which interpreted the personal privacy exemption under the US FOIA, was therefore improper.

The Court also relied on Michigan's version of the Freedom of Information Act, M.C.L.A. §§ 15.231, *et seq.* ("Michigan FOIA"), without drawing any similarities between Michigan's FOIA and South Carolina's FOIA. Michigan's version of the personal privacy exemption, M.C.L.A. § 15.243(a), exempts from disclosure "information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." In *Michigan Federation of Teachers & School Related Persons v. University of Michigan*, 753 N.W. 2d 28, 43 (Mich. 2008), the Michigan Supreme Court clarified its interpretation of its privacy exemption by stating "information of a personal nature" as used in the statute should be more expansively interpreted as including "private or confidential information relating to a person, in addition to embarrassing or intimate details" as was set forth in *Bradley v. Saranac Comm. Schools Bd. of Educ.*, 565 N.W.2d 650 (Mich. 1997). *Id.* at 40.

"In analyzing the first prong [of the Michigan privacy exemption], consideration must be given not merely to the question whether the identifying information is of a personal nature. Rather, the inquiry must be broader, and must consider whether any information disclosed in association with identity is of a personal nature." *Detroit Free Press v. City of Warren*, 645 N.W.2d 71, 74 (Mich. Ct. App. 2002). "[T]he customs,

mores, or ordinary views of the community must be taken into account" in the court's determination that requested information is of a personal nature. *Herald Co., Inc. v. Ann Arbor Public Schools*, 568 N.W.2d 411, 414 (Mich. Ct. App. 1997) (quotation omitted).

South Carolina decisions have never interpreted the South Carolina FOIA's personal privacy exemption or the definition of "information of a personal nature" used therein as broadly as the Michigan courts have interpreted the Michigan FOIA's privacy exemption. Rather, South Carolina courts have consistently circumscribed the exemption narrowly, on a case-by-case basis. *See Evening Post Pub. Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011) ("The determination of whether documents or portions thereof are exempt ... must be made on a case-by-case basis....") (quotation omitted). The South Carolina FOIA does not explicitly define what constitutes "information of a personal nature" and judicial decisions interpreting the phrase have never announced a definition to be applied in all cases. The Supreme Court has indicated its reluctance to set forth a definition is intentional: "[T]he exemptions should be narrowly construed to *not provide a blanket prohibition of disclosure* in order to 'guarantee the public reasonable access to certain activities of the government.'" *Evening Post Pub. Co.*, 392 S.C. at 83, 708 S.E.2d at 748 (emphasis added).

Legislative intention as to what information falls within South Carolina's personal privacy exemption can be gleaned from a review of the entire Act. For example, Section 30-4-50 of the FOIA regarding "matters declared public information" provides "home addresses and home telephone numbers of employees and officers of public bodies revealed in response to a request pursuant to [the FOIA] may not be used for commercial solicitation purposes." *Id.* The General Assembly obviously intended that home

addresses and telephone numbers would be disclosed in response to a FOIA request *absent evidence that the information would be used for commercial solicitation purposes. See also* S.C. Code Ann. § 30-4-40(a)(2) (deeming exempt "information relating to public records which include the name, address, and telephone number ... of an individual or individuals who are handicapped or disabled *when the information is requested for person-to-person commercial solicitation of handicapped persons* solely by virtue of their handicap") (emphasis added). The Court's opinion ignores—and in fact nullifies—these provisions of the FOIA, despite a long line of cases mandating that disparate sections of a statutory scheme be interpreted so that they are all effective. *See Tillotson v. Keith Smith Builders*, 357 S.C. 554, 558, 593 S.E.2d 621, 624 ("The language [of a statute] must be read to harmonize its subject matter with its general purpose [and] sections which are part of the same general statutory law must be construed together...."); *Hodges v. Rainey*, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000) ("Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.").[1]

Numerous other states have held home addresses, while constituting "information of a personal nature," are not so confidential and private as to be exempt from disclosure under state freedom of information acts. For example, in *Warden v. Bennett*, 340 So. 2d 977 (Fla. Dist. Ct. App. 1976), a District Court of Appeal of Florida held:

> While an employee may occasionally want his address kept confidential, it is seldom that the address of a governmental employee would not be ascertainable from other sources. Therefore, an employee's expectation that his address cannot be ascertained is minimal.

[1] The Court cited similar authorities in the preface to its analysis of the issues in this case.

340 So. 2d at 979; *see also Webb v. Shreveport*, 371 So. 2d 316 (La. App. 1979) (holding "neither city nor its intervening employees had a reasonable expectation of privacy against disclosure of a public record containing names and addresses of city employees).

The facts underlying the *Michigan Federation of Teachers* case are distinguishable, making this Court's reliance on the decision in this case wholly inappropriate. In *Michigan Federation of Teachers*, a teachers' union submitted a FOIA request to the University of Michigan "seeking numerous items of information that [the University] possessed regarding *every* University . . . employee. The information sought included first and last names, job title, compensation rate, and work addresses and telephone number. Two additional items of information sought by [the teachers' union] [included] the employees' home addresses and telephone numbers." 753 N.W. at 32 (emphasis added). The scope of the teachers' union's Michigan FOIA request was expansive enough to capture the home address and telephone number of more than 37,000 employees of the University.

On the other hand, the FOIA request submitted by Glassmeyer sought information regarding only the final five applicants for the position of City Manager. Given the extraordinary scope of the teachers' union's FOIA request for information and the significantly narrower FOIA request submitted by Glassmeyer to City in this case, the Michigan Supreme Court's rationale in *Michigan Federation of Teachers* is inapposite. This Court's opinion failed to address the fact that applicants for City Manager were seeking a highly visible, top-level government position, which involves a completely different privacy calculus than the situation faced by the Michigan Supreme Court regarding all employees of a public university.

Moreover, the Michigan Supreme Court did not decide all of the University employees' home addresses and telephone numbers were protected. Rather, the University previously released the requested information pertaining to 20,812 employees who had given the University permission to publish such information. *Id.* at 31-32. The University only refused to "turn over the home addresses and telephone numbers of the remaining 16,406 employees who had withheld permission to publish that information . . . ." *Id.* at 32. In support of its decision to withhold the data, the University produced six affidavits from employees who stated they did not want their personal information released to the public. *Id.* at 32. "Some of the affiants attested that the release of this information would threaten their own or their family's safety." *Id.*

In the present case, City withheld the home addresses, personal telephone numbers, and personal email addresses of all five candidates for the position of City Manager and provided no evidence that these candidates objected to the publication of such information or had any particular reason why they wished to have this information withheld. *See also Herald Co. v. City of Bay City*, 614 N.W.2d 873, 880 ("defendants have failed to establish on this record why any of the information requested by plaintiff is the kind of intimate or embarrassing information that this FOIA exception protects").

Even if Michigan's FOIA were comparable to South Carolina's and the *Michigan Federation of Teachers* case was factually analogous, the Court failed to consider *Herald Co. v. City of Bay City*, 614 N.W.2d 873 (Mich. 2000), on which *Michigan Federation of Teachers* relies. The *Herald* case is more similar to the facts of the instant dispute and application of its holding would necessitate a ruling in Glassmeyer's favor.

In *Herald*, the Michigan Supreme Court unanimously held that defendant Bay City violated the Michigan FOIA by failing to disclose public records concerning the final seven candidates for the position of Bay City Fire Chief, in particular the candidates' names, current job titles, cities of residence, and ages. *See id.* The court concluded "the fact of application for a public job, or the typical background information one may disclose with such an application, is simply not 'personal' within the contemplation of this exemption." 565 N.W.2d at 880.

The *Herald* court relied on its decision in *Bradley v. Saranac Comm. Schools Bd. of Educ.*, 565 N.W.2d 650 (Mich. 1997), in which the Michigan Supreme Court held personnel records of public school teachers and administrators were not of a "personal nature" subject to protection under the Michigan FOIA privacy exemption. The court recognized "none of the [personnel records] contain information of an embarrassing, intimate, private, or confidential nature, such as medical records or information relating to the plaintiffs' private lives." *Id.* at 655.

The *Herald* court also distinguished *Mager v. State, Dept. of State Police*, 595 N.W.2d 142 (Mich. 1999). In *Mager*, the plaintiff requested the State Police provide the names and addresses of persons who owned registered handguns. In determining the requested records were of a "private and personal nature," the court determined the fact of gun ownership was "information of a personal nature" and "[t]he ownership and use of firearms is a controversial subject." *Id.* at 146. Accordingly, "[a] citizen's decision to purchase and maintain firearms is a personal decision of considerable importance." *Id.* at 147. The court did not determine home address and telephone number information for

registered gun users was by itself personal and private and therefore subject to protection. Instead, the court held:

> In contrast to the fact of gun ownership, which ... certainly may be viewed as an intimate and potentially embarrassing aspect of one's private life, ... the fact of application for a public job, or the typical background information one may disclose with such an application, is simply not "personal" within the contemplation of this exemption. Given the public nature of the position at issue, we think it difficult to conclude that the "customs," "mores," and "views" of the community contemplate that an application for such a position could be made without expectation of considerable public scrutiny.

Id. at 880.

The Court was guided by a misapprehension of applicable law and fact in holding the final five candidates for the position of City Manager had a privacy interest in their home addresses and telephone numbers.

B. The Court erred in balancing the applicants' perceived privacy interest more heavily than the public's need to discover such information.

Even if the applicants had a legitimate privacy interest in their home addresses and telephone numbers, South Carolina law requires a court to weigh such an interest against the public's need to know the information. *See Burton v. York Cty. Sheriff's Dept.*, 358 S.C. 339, 352, 594 S.E. 888, 895 (Ct. App. 2004) ("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") (quotation omitted). The Court misapprehended law and/or fact in concluding the interest in keeping the home addresses and telephone numbers from public view outweighed the public's interest in evaluating City's hiring process.

Again, the *Herald* decision from the Supreme Court of Michigan is persuasive: In addition to finding the requested information regarding the final seven applicants for Bay City's fire chief was not "information of a personal nature" under the first prong of the Michigan privacy exemption, the *Herald* court went on to discuss why the requested information would also fail the second prong of the privacy exemption. 614 N.W.2d at 880-881. The court noted disclosure of the information concerning the final candidates for fire chief would serve the policy underlying Michigan's FOIA because it would facilitate the public's access to information regarding the affairs of their city government. *Id.* at 880. Thus, the invasion of privacy, assuming there was one, was not "clearly unwarranted." *Id.* at 881. Courts in other jurisdictions have similarly held: "[T]here are legitimate reasons why the public might wish to know the address of a public employee. On balance, we believe that the addresses of public employees do not fall within [the applicable exception]." *Warden v. Bennett*, 340 So. 2d 977, 979 (Fla. Dist. Ct. App. 1976). This Court erred in not reaching the same conclusion as it analyzed the public's need to know the information sought by Glassmeyer here.

The dissimilarities between the cases cited by the Court in support of its decision and the case at hand should not be diminished. In *U.S. Dept. of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994), the United States Supreme Court drew a significant distinction this Court failed to apprehend in its analysis of the subject dispute. In *Federal Labor Relations*, the Court stated,

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within th[e] statutory purpose. That purpose, however, is not fostered by disclosure about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Id. at 496, 114 S.Ct. at 1013 (*citations omitted*). The reason *Michigan Federation of Teachers*, 753 N.W.2d 28, *Federal Labor Relations*, 510 U.S. 487, and *Mager*, 595 N.W.2d 142, are not dispositive in the subject case is because the requested information in those cases related to home addresses of private persons that were merely accumulated by governmental agencies as a byproduct of their respective operations.

On the other hand, the information listed by persons applying for official governmental positions, including home addresses and personal telephone numbers, goes to the heart of the government's conduct, decision-making and relationship with its citizens. The public has a substantial right to know the basis of a public body's decision to hire its chief executive officer, particularly with respect to the representations made to the public body by the favored candidates for the position. *See, e.g., Herald Co. v. City of Bay City*, 614 N.W.2d 873. The presence, whether intentional or accidental, or absence of errors and omissions in such applications, even as to matters as mundane as addresses and telephone numbers, provides valuable information to the public that it needs to evaluate its government's performance.

It is this distinction that renders the Court's reliance on the South Carolina Family Privacy Protection Act, S.C. Code Ann. § 30-2-10 *et seq.*(Rev. ed. 2007, as amended) ("FPPA"), with respect to home addresses and telephone numbers misguided. In the Act, the General Assembly recognized: "Although there are legitimate reasons for state and local government entities to *collect* social security numbers and other personal identifying information from individuals, government entities should *collect* the information only for legitimate purposes or when required by law." S.C. Code Ann. § 30-2-300(2) (Supp. 2014) (emphasis added). As this Court recognized, the Act reveals a

legislative recognition of "the need for state agencies to develop privacy policies and procedures to limit and protect the *collection of personal information*" (Opinion page 7) (emphasis added).[2] The information requested by Glassmeyer was voluntarily submitted by the final five applicants for the position of City Manager, not merely collected from citizens by City as a part of its regular business operations.

This Court's failure to recognize the significant distinction between information maintained by the government as a necessary corollary of its daily operations and information provided to it voluntarily by persons seeking high-level positions of authority was a misapprehension of applicable law. For these reasons, the Court erred in finding that the requested home addresses and personal telephone numbers for the final candidates for the position of City Manager were appropriately redacted by City.

Moreover, despite the Court's assertion to the contrary, the fact that City provided city and zip code information is not dispositive of whether candidates for the position of City Manager live within city limits. In a report prepared for Congress, the Congressional Research Service ("CRS") observed:

> Because ZIP Codes are based on the location of delivery post offices, they often do not correspond to political jurisdiction boundaries. This means that millions of Americans receive their mail from a post office in an adjacent town, village, or neighborhood, and their mailing addresses reflect the name and ZIP Code of that post office rather than the jurisdiction where they actually live. . . .
>
> The widespread use of ZIP Codes for non-postal purposes has exacerbated problems for those citizens whose *mailing addresses do not match their*

[2] Glassmeyer would also note that the policy reasons that undergirded the General Assembly's enactment of the FPPA involved the finding that "[t]he social security number can be used as a tool to perpetuate fraud against an individual and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to the individual," particularly when used in combination with other "identifying information," such as names and addresses. See S.C. Code Ann. § 30-2-300 (Supp. 2014). Glassmeyer would concede the validity of the General Assembly's concerns as to the danger of identity theft that accompanies the collection and release of social security numbers, but these concerns are not implicated here.

> *actual town or city of residence*, and frequently for the municipalities as well.

Nye Stevens, Congr. Research Serv., RL 33488, *Changing Postal ZIP Code Boundaries* 2 (2006) (emphasis added). As this report reveals, numerous residences within a particular zip code or the town listed in one's mailing address may not be situated within the jurisdictional limits of that municipality. The Court's suggestion that City's decision to provide city and zip code information gave the public sufficient information to "determine the city in which the applicants lived through the materials the City provided" (Opinion at p. 8), is lacking any basis in law or fact.

Even if the five applicants had a significant privacy interest in the information they offered to City in their pursuit of the City Manager position, that interest is substantially outweighed by the public's need to know the information, which was not discernable from the information the City furnished to Glassmeyer.

II. APPLICANTS' PERSONAL EMAIL ADDRESSES DO NOT INVOKE ANY PRIVACY INTEREST AND ARE NOT PROTECTED BY SOUTH CAROLINA'S FOIA.

The Court erred in concluding personal email addresses were properly withheld by City pursuant to FOIA's personal privacy exemption. Section 30-4-40(a)(2) only enables a public body to withhold "[i]nformation of a personal nature." Although the FOIA provides no definition of "information of a personal nature," this Court can look to other statutes and laws for guidance.

In its opinion the Court referred to the South Carolina Family Privacy Protection Act, S.C. Code Ann. § 30-2-10, *et seq.* (2007) ("FPPA"), as forming part of the basis for its conclusion that the applicants have a privacy interest in their respective home

addresses, telephone numbers and personal email addresses.[3] However, the South Carolina Legislature specifically excluded electronic identification names, including electronic mail addresses, from the definition of "personal identifying information." *See* S.C. Code Ann. § 30-2-310(A)(1)(e) (Supp. 2014). While "personal identifying information" is not necessarily synonymous with "information of a personal nature," this exclusion nonetheless conveys a clear legislative finding that email addresses are not imbued with such privacy concerns that they should be subject to special protection or handling by public bodies. The Court's failure to acknowledge the Legislature's exclusion of such information from the definition of "personal identifying information" was error, particularly in light of its conclusion that such information is exempt from disclosure under FOIA's personal privacy exemption.

By failing to provide any other substantive basis for its decision reversing the lower court regarding applicants' personal electronic mail addresses, the Court has overlooked or misapprehended the issues on appeal.

CONCLUSION

For the reasons stated above, this Court should grant Respondent's Petition for Rehearing in this case.

Respectfully submitted,

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[3] As set forth above, Glassmeyer disagrees with the Court's conclusion that the FPPA constitutes a legislative recognition of a privacy interest in any of these items.

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September 17, 2015.

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PROOF OF SERVICE

I certify that I have served Respondent's Petition for Rehearing, by depositing a copy in the United States Mail, postage prepaid, on September 17, 2015, addressed to his attorney of record, W. Allen Nickles, III, Esquire, at 1122 Lady Street, Suite 610, Columbia, South Carolina 29201.

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September 17, 2015

VIA Hand Delivery:
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: *City of Columbia v. George S. Glassmeyer*
Appellate Case No.: 2013-001880
A&R File No.: 053004-000001

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and seven (7) copies of Respondent's Petition for Rehearing together with our firm's check in the amount of $25.00 to cover the filing fee. Please file the original and six (6) copies pursuant to Rule 240, SCACR, and return the extra copy to me via our courier.

By copy of this letter, I am serving all counsel of record with the Petition as set forth in the enclosed Proof of Service. Thank you for your attention to this matter.

Sincerely,

Kirby D. Shealy III

KDSIII/LRZ/vhm
Enclosures

cc: W. Allen Nickles, III, Esquire (w/enc.)