RECEIVED
DEC 15 2015
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2015-5347 (S.C. Ct. App. Filed Sept. 2, 2015)

George S. Glassmeyer,.....Petitioner,

v.

City of Columbia,.....Respondent.

PETITIONER'S REPLY TO RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Kirby D. Shealy III, SC Bar No. 11556
Lyndey Ritz Zwingelberg, SC Bar No. 100804
Adams and Reese LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29201
(803) 254-4190

Attorneys for Petitioner

Other Counsel of Record:
W. Allen Nickles
Nickles Law Firm
1122 Lady Street, Suite 610
Columbia, South Carolina 29201
(803) 779-8080

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

FOIA's "essential purpose"—"to protect the public from secret government activity"[1]—is thwarted in this case by the Court of Appeals' reversal of the lower court's decision finding City improperly withheld information pertaining persons applying for the position of City Manager, including home addresses, personal telephone numbers, and email addresses. For the reasons stated in Glassmeyer's Petition for Writ of Certiorari and for the reasons set forth below, the Court of Appeals failed to consider all relevant facts in this case and erred in applying applicable legal standards. This Court should grant certiorari to consider the issues on appeal.

I. DISCLOSURE OF THE REQUESTED INFORMATION FULFILLS THE STATUTORY PURPOSES OF THE FOIA.

The public has a statutory right to know what information is provided to governmental entities by persons applying for high-level positions of authority because the government relies on such information in making significant hiring decisions. *See* S.C. Code Ann. § 30-4-15 (Rev. ed. 2007) (finding it "vital" that public business be performed in an open and public manner" including "decisions that are reached in public activity"). Such information exposes the character for truthfulness of the applicants being considered for public employment and further reveals information about the government's conduct when making high-level employment decisions. City's review and selection of its highest officer, City Manager, must not be permitted to be performed in a closed and private manner. When application information is shielded from public view, opportunities for "secret government activity" abound.

---

[1] *Perry v. Bullock*, 409 S.C. 137, 141, 761 S.E.2d 251, 253 (2014)); *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219, 221 (1991); *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001).

Consider the absurd case—the sham search for a suitable candidate conducted to provide window dressing to what is otherwise a foregone conclusion. Without the ability to independently verify that a government interviewed and gave due consideration to all qualified applicants—by having the means of contacting them as set forth in their applications, the government could put applications in a file and never give them consideration on the way to selecting a favored candidate. Such illusory hiring processes are more likely to occur in the wake of the Court of Appeals' decision, which raises an unnecessary barrier to proper evaluation of governmental actions by members of the public.

II. THE FOIA PERSONAL PRIVACY EXEMPTION DOES NOT APPLY IN THESE CIRCUMSTANCES.

Under the FOIA, the government has the burden of proving an exemption applies. *Evening Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011). With regard to the personal privacy exception, City must show a reasonable person would claim a privacy interest in the information. *See* S.C. Code Ann. § 30-4-40(a)(2) (exempting information "constitut[ing] an unreasonable invasion of personal privacy"). Second, if such information is subject to a reasonable privacy interest, City must show the individual's privacy interest outweighs the public's need to know. *Burton v*, 358 S.C. 339, 352, 594 S.E. 888, 895 (Ct. App. 2004) (requiring 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").

City's argument that "FOIA does not **mandate** the disclosure of personal and private information" (see Response Brief at p. 2 (emphasis in original)) presupposes the requested information constitutes information subject to a reasonable privacy interest.

Glassmeyer contends it is not. City's Response Brief wholly fails to address Glassmeyer's argument that such information does not qualify as information subject to a reasonable privacy interest by these applicants. Rather, City focuses only on the second part of the FOIA personal privacy exemption analysis and asserts the Court of Appeals appropriately balanced the competing interests between the public and the final five applicants for the position of City Manager.

Home addresses, telephone numbers, and email addresses included by applicants on form applications should not have been found the subject of a reasonable privacy interest in these circumstances. Although such information is unquestionably subject to a general privacy interest, courts in other jurisdictions have recognized applicants for public positions have a lesser privacy interest in such information than do ordinary citizens. *See State ex re. The Plain Dealer Pub. Co. v. Cleveland*, 661 N.E.2d 187 (Ohio 1996) (quoting *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316 (Ak. 1982) ("Public officials must recognize their official capacities often expose their private lives to public scrutiny. Further, the information sought is that which has been voluntarily provided by the applicants to the municipalities.")). *See also Gannett River States Pub. v. Hussey*, 557 So. 2d 1154, 1159 (La. Ct. App.) *writ denied*, 561 So. 2d 103 (La. 1990) ("Expectations of privacy diminish the higher one progresses or aspires in the hierarchy of government."); *Lambert v. Belknap County Convention*, 949 A.2d 709, 719 (N.H. 2008) ("By applying to fill an elected public office, the candidates surrendered much of 'the privacy secured by law for those who elect not to place themselves in the public spotlight.'") (quotation omitted).

Cases relied upon by Glassmeyer in support of his arguments are not "dated" or inappropriately "narrow," as proclaimed by City. (See Response Brief at p. 3 n. 2). In *Webb v. Shreveport*, 371 So.2d 316 (La. App. 1979), the Louisiana appellate court held jurisprudence required the release of home addresses and telephone numbers for public employees. *Id.* at 317. Glassmeyer concedes the *Webb* decision was rendered prior to the Louisiana legislature's enactment of La. R.S. § 44:11(A), which permits redaction of specific information, including home telephone numbers and home addresses, from "personnel records of a public employee of any public body." La. R.S. § 44:11(A). As explained by Glassmeyer, and unrefuted by City, there is no statutory exception in South Carolina's FOIA specifically shielding from disclosure home addresses, telephone numbers, and email addresses. The fact that the Louisiana state legislature chose to amend its FOIA after the appellate court's decision in *Webb* does not distinguish the court's analysis from the issues in this case; in fact, it supports Glassmeyer's position in this matter.

Moreover, Louisiana's amendment, permitting redaction of home addresses and telephone numbers, does not provide such information with blanket protection as City would have this Court believe. Rather, the amendment requires a showing that "such employee has chosen to have a private or unlisted home telephone number," or "has requested that the number be confidential," or "has requested that the address be confidential." *Id.* at La. R.S. § 44:11(A)(1)-(3). As indicated in the record before this Court, there is not a shred of evidence that any of the applicants in this case chose to have a private or unlisted telephone number, requested that their phone numbers be kept private, or requested that their home address be treated as confidential.

City's attempts to distinguish *Herald Co. v. City of Bay City*, 614 N.W.2d 873 (Mich. 2000); *Bradley v. Saranac Comm. Schools Bd. of Educ.*, 565 N.W.2d 650 (Mich. 1997); and *Mager v. State Dept. of State Police*, 595 N.W.2d 142 (Mich. 1999), are likewise unavailing. (See Response Brief at p. 3 n. 3.) City argues these cases have all been "modified" by the Michigan Supreme Court. (Id.) At the risk of stating the obvious, City's position emphasizes Glassmeyer's argument that the Court of Appeals' reliance on Michigan case precedent was erroneous as evidenced by more recent judicial modifications.

In *Bradley v. Saranac Comm. Schools Bd. of Educ.*, 595 N.w.2d 650 (Mich. 1997) and *Mich. Fed. of Teachers & Sch. Related Personnel, AFT, AFL-CIO v. Univ. of Mich.*, 753 N.W.2d 28 (Mich. 2008), the Michigan Supreme Court expanded the "description of what information is 'of a personal nature,'" holding that information constituting "intimate" or "embarrassing" details of an individual as well as information of a "private" or "confidential" nature is subject to the exemption. *Id.* at 677. In so expanding the definition of what constitutes "private information," the Michigan Supreme Court held home addresses and telephone numbers of employees of the University of Michigan were properly withheld. *Id.*

This Court not only recognizes that South Carolina's FOIA fails to explicitly define what constitutes "information of a personal nature," but this Court has also clearly stated its reluctance to set forth a definition of what information may be deemed exempt. *See Evening Post Pub. Co.*, 392 S.C. at 83, 708 S.E.2d at 748. Accordingly, Glassmeyer's reliance on earlier case decisions from Michigan, specifically distinguishing *Bradley*, 595 N.W.2d 650, and *Mich. Fed. of Teachers & Sch. Related*

Personnel, 753 N.W.2d 28, was intentional and appropriate. Moreover, as argued by Glassmeyer, *Mich. Fed. of Teachers*, which "modified" *Herald Co. v. City of Bay City*, 614 N.W.2d 873 (Mich. 2000), is factually distinguishable from the instant case. Here, Glassmeyer did not seek to obtain the home addresses and telephone numbers of all City's employees; rather, he carefully circumscribed his request to the top five applicants for the position of City Manager. To the extent the *Herald v. Bay City* case is factually analogous, the Michigan Supreme Court's narrower interpretation of "personal information" is more convincing than later iterations.

It is a stretch for City to argue the General Assembly's enactment of the Family Privacy Protection Act, S.C. Code Ann. § 30-2-10 *et seq.* (Rev. ed. 2007, as amended) ("FPPA") and the Personal Financial Security Act, S.C. Code Ann. § 16-13-500 *et seq.* (Rev. ed. 2000, as amended) ("PFSA") expanded FOIA's personal privacy exemption to include home addresses and telephone numbers of public employees. (See Response Brief at p. 4.) The FPPA and PFSA both explicitly prohibit improper use or disclosure of "personal identifying information" by persons who obtain such information from state agencies. *See* S.C. Code Ann. § 30-2-30 and S.C. Code Ann. § 15-13-510. As a preliminary matter, there is no legislative pronouncement in any of these statutory schemes that "personal identifying information" is synonymous with "information of a personal nature" as used in the FOIA. Moreover, such an analogy would be disingenuous considering the General Assembly's intent in passing both the FPPA and PFSA.

The overarching goal of the FPPA and PFSA is to provide special protections for "personal identifying information" collected and held by the government so as to minimize the risk of financial or identity theft or fraud. *See* S.C. Code Ann. § 30-2-50

and S.C. Code Ann. § 16-13-510. These statutes explicitly apply to the government's "*collection* of personal information pertaining to citizens of the State," S.C. Code Ann. § 30-2-20; S.C. Code Ann. § 30-2-40(B) (emphasis added), and are therefore inapplicable to identifying information, such as home addresses and telephone numbers, voluntarily submitted by applicants to public offices.

Moreover, neither the FPPA nor the PFSA prohibit or even discourage governmental dissemination of personal identifying information. Rather, the FPPA restricts those persons who "obtain[]" such information "from a state agency" from "knowingly" using such information for "commercial solicitation" purposes. *See* S.C. Code Ann. § 30-2-50(A). The PFSA prohibits persons from "commit[ting] the offence of financial identity fraud or identity fraud." S.C. Code Ann. § 16-15-510(A). In order to minimize the opportunities for such improper usage, the FPPA requires each state agency to provide a notice to all requestors directing that persons who obtain records are prohibited from using the information for commercial solicitation and encourages state agencies to take other "reasonable measures to ensure that no person . . . obtains or distributes personal information . . . for commercial solicitation" purposes. *Id.* at S.C. Code Ann. § 30-2-50(B) and (C). The PFSA contains no restriction or limitation whatsoever on the government's usage, collection, or dissemination of such information to the public. Only social security numbers are imbued by the General Assembly with special restrictions on dissemination. *See* Personal Identifying Information Privacy Protection Act, S.C. Code Ann. §§ 30-2-300 – -330 (Supp. 2014). such information is not at issue in this case.

Moreover, even assuming a reasonable privacy interest in the requested information existed, the Court of Appeals failed to appropriately balance the significant public interests in the requested information against the diminished privacy interest held by the applicants. As courts in other jurisdictions have recognized: "Where, as here, 'a public body is appointing an individual to fill a position normally filled by an elected official, the reasons for allowing public scrutiny of the actions taken are even more compelling.'" *Lambert v. Belknap County Convention*, 949 A.2d 709, 716 (N.H. 2008) (quoting *Gannett Satellite Info. Net. v. Bd. Of Educ.*, 492 A.2d 703, 706 (N.J. Super. 1984). "Such public scrutiny is of even greater import when the public body at issue consists of persons who by their very nature represent the will of the people, and, in their actions, are substituting their judgment for that of the people." *Id.*; *see also Booth Newspapers, Inc. v. Univ. of Michigan Bd. of Regents*, 507 N.W.2d 422, 431 (Mich. 1993) ("it was in the greater public interest to know the qualifications of the candidates for public positions and the hiring procedures of public officials").

In *Gannett River States Pub. v. Hussey*, 557 So. 2d 1154 (La. Ct. App.) *writ denied*, 561 So. 2d 103 (La. 1990), the Louisiana appellate court distinguished applications of persons applying for "mid-level employees of a municipality" and those applying for upper-level employment "in a substantial municipality." *Id.* at 1159. "Expectations of privacy diminish the higher one progresses or aspires in the hierarchy of government." *Id.* "[T]he public has a vital and obvious interest in the background of *all* applicants, not just the candidate finally selected by the mayor. The public's scrutiny of the chosen candidate will lose all effect unless it has other candidates to which to compare the one chosen." *Id.* "Thus, on balance, . . . we conclude that because of the

important nature of the position sought, the privacy interest of the city (and those seeking the position), must yield to the public's 'right to know,' as embodied in the public records legislation." *Id.*

City's attempt to cast Glassmeyer's intentions for the requested information as "his own private curiosity" and not for any "legitimate interest" is wholly inappropriate and without factual support in the record. (Response Brief at p. 3.) There is nothing in the FOIA or South Carolina precedent which enables an appellate court to consider the citizen's motivation for seeking to obtain the requested information.[2] Courts in other jurisdictions agree. *See, e.g., Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information."); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (holding whether disclosure is required under the federal FOIA "turn[s] on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested") (internal quotation and citations omitted)); *Abraham & Rose, PLC v. U.S.*, 138 F.3d 1075, 1079 (6th Cir. 1998) ("[T]he requester's intended use [for the records] is also irrelevant in a FOIA action."); *Union Leader Corp. v. City of Nashua*, 686 A.2d 310 (N.H. 1996) ("In Right-to-Know Law cases, the plaintiff's motives for seeking disclosure are irrelevant."); *Assoc. Tax Serv., Inc. v. Fitzpatrick*, 372 S.E.2d 625 (Va. 1988) ("We conclude in light of the

[2] With the narrow exception proscribing use of "name, address and telephone number or other such information 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." *See* S.C. Code Ann. § 30-4-40(a)(2) (Rev. ed. 2007).

statutory language that the purpose or motivation behind a request is irrelevant to a citizen's entitlement to requested information."); *Cashel v. Smith*, 324 N.W.2d 336 (Mich. App. 1982) ("[A] rule which would permit denial of a request for information on grounds that the requester is 'idly or maliciously curious' is repugnant to the act. A person seeking information under the act is generally not required to divulge the reason for the request.").

Statutory "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. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 83, 708 S.E.2d 745, 748 (2011). In failing to consider all relevant facts in its decision, including that Glassmeyer's FOIA request related only to the final five candidates for the position of City Manager, the Court of Appeals' decision in this case creates a new, unfettered means for all public bodies to withhold information such as home addresses, telephone numbers, and email addresses. The Court failed to recognize not only that persons applying for high governmental positions have a lesser privacy interest in such information than private citizens, but also that even assuming such an interest exists, the public's right to know its government's decision-making process in making hiring decisions significantly outweighs any diminished interest the applicants held in such information.

CONCLUSION

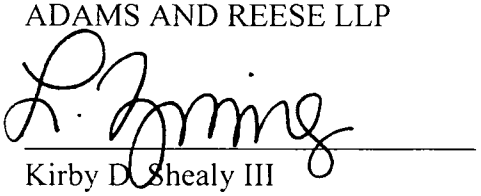
For these reasons, the Court of Appeals was guided by a misapprehension of applicable law and fact in holding the final five candidates for the position of City

Manager had a privacy interest which outweighed the public's right to know.

Accordingly, this Court should grant Glassmeyer's Petition for Writ of Certiorari.

Respectfully submitted,

ADAMS AND REESE LLP



Kirby D. Shealy III
Lyndey Ritz Zwingelberg
Post Office Box 2285
Columbia, South Carolina 29201
(803) 254-4190
kirby.shealy@arlaw.com
lyndey.zwing@arlaw.com

December 15, 2015.

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2015-5347 (S.C. Ct. App. Filed Sept. 2, 2015)

George S. Glassmeyer,.....Petitioner,

v.

City of Columbia,.....Respondent.

PROOF OF SERVICE

I hereby certify I served the Reply to Return in Opposition to Petition for Writ of Certiorari upon the City of Columbia, by depositing copies of the documents in the United States Mail, postage prepaid, on December 15, 2015, addressed to its attorney of record, W. Allen Nickles, III, Esquire, at 1122 Lady Street, Suite 610, Columbia, South Carolina 29201.

Victoria Moody – Paralegal