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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

LEGAL ARGUMENT ON REPLY

Appellant, City of Columbia ("City"), offers this reply to Respondent's argument on appeal. Throughout his brief, Respondent, George S. Glassmeyer ("Glassmeyer"), argues that the public policy articulated in the South Carolina Freedom of Information Act ("FOIA") compels the disclosure of documents including: (a) anonymous emails referring to Former Police Chief Randy Scott's ("Scott") alleged personal conduct; (b) unsolicited, unverified complaints referring to Scott's alleged personal conduct; and (c) third party, unverified allegations of misconduct by Scott. Examination of the record (including documents for *in camera* review) does not support this argument.

As addressed in Appellant's brief, the material requested by Glassmeyer includes "personal information" subject to protection established by common law, statute and constitution. Specifically, any application of FOIA must comply with the right of a person to be left alone from unwarranted publicity. Sloan v. South Carolina Dep't. of Pub. Safety, 355 S.C. 321, 586 S.E.2d 108 (2003); Holloman v. Life Inc. Co. of Virginia, 192 S.C. 454, 7 S.E.2d 169 (1940) Accordingly, this court has recognized that when privacy interests are presented, a balancing test must be used to determine whether the public's need to know outweighs the individual's interest in nondisclosure. Burton v. York County Sherriff's Dept., 338 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004) 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) Thus, all "[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," as outlined by FOIA's personal information exception, are not subject to mandatory disclosure. S.C. Code Ann. §§ 30-4-40 (2) and (4)

Glassmeyer would insert the absent phrase "received regardless of source" into the statutory definition of "public record" so that even "those documents that are **passively** 'in the possession of or retained by' a public body" are subject to review on request. (Respondent's Initial Brief, p. 16) (Emphasis added) Having expanded the definition of "public record," Glassmeyer would eliminate case by case review on ground that no "complaints of improper action made by third parties" should be protected from public view. (Respondent's Initial Brief, p. 10) He further asserts that the information sought is "public record" in which citizens have a "vested interest." (Respondent's Initial Brief, p. 16) Glassmeyer describes his objective as obtaining "representations or allegations made by others regarding violations of the law or City policy by City employees." (Respondent's Initial Brief, p. 11) A review of the withheld information reveals, however, that it includes unverified allegations of personal activity conducted outside the scope of Scott's public duties (personal relationships and off-duty conduct) and involves private citizens.

To circumvent privacy interests, Glassmeyer contends disclosure will expose dereliction on the part of the City's police department in failing to independently investigate allegations against Scott. This claim is not contained in any FOIA request submitted by Glassmeyer or in his complaint. Had this position been presented, the City could have informed Glassmeyer that no complaints about Scott, anonymous or otherwise, had been presented to its police department for investigation. Having no notice

of this claim, however, the City was not obligated to issue a denial in its FOIA response or answer.

Glassmeyer first revealed his purported objective of bringing to public light perceived favoritism or irregularities in police investigations at summary judgment. (September 17, 2013 Order, p. 6) The City promptly responded to this new assertion by informing Glassmeyer and the lower court that no complaints were submitted to the Police Department. Contrary to Glassmeyer's argument, adopted by the lower court, providing this information did not raise a "new issue." Instead, the published procedures for an investigation of police conduct were presented in support of the City's original defense and provided by way of judicial notice, available at **any stage** of proceedings, including appeal. Rule 201, SCRE; see also, McCoy v. Town of York, 193 S.C. 390, 8 S.E.2d 905 (1940); State v. Squires, 311 S.C. 11, 426 S.E.2d 738 (1992) (judicial notice taken by the Supreme Court) The withheld documents were not directed to the police department and do not qualify as "citizen complaints" for purposes of investigating police conduct. [1] Accordingly, compelling disclosure cannot serve the "public interest" of determining favoritism in police investigations identified by the lower court.

Glassmeyer argues that the Police Department's Directives and Procedures Manual ("Manual") makes clear that it is "[r]equired [to] investigate] ... all citizen complaints, including anonymous complaints." (Respondent's Initial Brief, p. 16) In support of this argument, Glassmeyer identifies no Manual provision that converts private to public information or expands the scope of FOIA. More importantly, Glassmeyer

[1] Glassmeyer contends that there is no proof of this deficiency apart from the City's unverifiable representation. This argument ignores the opportunity presented below and on appeal to examine the withheld documents. This examination confirms that none of the withheld information was directed to the police department or submitted through published procedures for requesting a police investigation.

ignores published procedures for making "citizen complaints" and seeks to eliminate these procedures from the Court's consideration. (Attachments A-D to Defendant's Motion to Alter or Amend; R. pp. 134-149) This effort is particularly troubling in view of the lower court finding that investigation of police misconduct, rather than the content of the withheld material, is the "public interest" served by Glassmeyer's FOIA request. (July 23, 2013 Order, pp. 6-7; R. pp. 7-8)

On appeal, Glassmeyer contends that allowing the City to "disregard" complaints which are not provided through its established channels would "give the City and countless other governmental entities a basis to refuse to investigate or discipline their employees for wrongful conduct." (Respondent's Initial Brief, p. 24 fn. 2) As a preliminary matter, this appeal does not involve "countless other governmental entities." Likewise, a duty to investigate does not appear anywhere in FOIA. Requiring the City or any other public employer to investigate every third party communication alleging wrongdoing or personal peccadillos would waste public resources and foster a moral police state unintended by FOIA.

The trial court held that the public interest in this case is confined to "the steps the Department took upon receipt of the information pursuant to its policies." (July 23, 2013 Order, p. 7, R. p. 8) This is the ruling on appeal. The record (specifically the sealed documents provided for *in camera* review) establishes that no request for investigation was directed to the police department, despite published means of making such requests. Complaints made "privately" and outside the scope of published means for requesting action are not converted into matters of public interest compelling disclosure under FOIA merely because the recipient of the complaint is a public officer or employee. Instead, as

observed by the West Virginia courts, FOIA is not a proper vehicle for satisfying private curiosity. Child Protection Group v. Cline, 350 S.E.2d 541, 544 (W. Va. 1986) (identifying factors for evaluating privacy interests, including the extent of public interest, objective of disclosure, alternative sources, and expectation of confidentiality), See also, SCAG Op. No. 87-69 (July 16, 1987), at p. 176. Here, each communication could have been made publicly or through alternative means. Accordingly, FOIA is not a necessary or proper instrument for obtaining access to the requested information.

CONCLUSION

Glassmeyer argues that **any** communication concerning the alleged behavior of a public employee must be made available to the public on request unless there is a specific statute carving out an exemption. This expands the concept of "public interest" significantly beyond the scope of any statute or published opinion and ignores the obligation to examine each FOIA request on an individualized basis. City of Columbia v. ACLU of South Carolina, 323 S.C. 384, 387, 485 S.E.2d 747, 749 (1996) Moreover, Glassmeyer's stated objective for challenging the City's FOIA response is to determine why there was no police department investigation. That objective has been satisfied and any legitimate public interest may be served by confirmation that the withheld information was not presented for departmental investigation.

An order compelling disclosure of the withheld information will exceed the legislative purpose expressed in FOIA and expose public employees to potential embarrassment upon submission of personal invective. Such disclosure will render meaningless the "public purpose" aspect of FOIA and expose personal information to private curiosity in a manner unsupported by statutory guidance or judicial precedent.

For these reasons and those set forth in Appellant's brief, Glassmeyer is not entitled to review or publish the information submitted for *in camera* review.

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CERTIFICATE OF COUNSEL

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

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