

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 South Carolina Lawyers Weekly, )  
 By and through its principal, )  
 Dolan Publishing Company, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Scarlett Wilson, Solicitor of the Ninth )  
 Judicial Circuit, an elected public official, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-10575

**RECEIVED**

MAR 15 2016

**ORDER**

**SC Court of Appeals**

FILED  
 2016 FEB 10 PM 12:03  
 JULE J. ARMSTRONG  
 CLERK OF COURT  
 BY \_\_\_\_\_

This matter has come before this Court pursuant to the Defendant's Motion to Dismiss. This Court carefully considered the notions and memoranda filed by the parties prior to the hearing of the motions on January 7, 2016, in Charleston. Based upon the motion and memoranda and consideration of the argument at the hearing, this Court grants the Motion and dismisses this case. The reasons for this ruling are discussed below.

**BACKGROUND**

Plaintiff requested that the Defendant Wilson produce any records relating to disciplinary complaints against her or action taken against her as a member of the Bar. Ms. Wilson denied the request stating that she is not, personally, a "public body" under FOIA, that her personal records are not "public records," that they are exempt from disclosure and for the other reasons set forth in her response of July 28, 2015. Her letter noted that grievances had been filed against her by some people who disagree with her and that the Office of Disciplinary Counsel had recommended their dismissal. Accordingly, no formal charges have been filed against her.

*RWD/1*

## GROUNDS FOR DISMISSAL

At the outset, Ms. Wilson contends that she is not a “public body.” Under the Freedom of Information Act, rights to inspect or copy public records are limited to those of a “public body.” S.C. Code Ann. §30-4-30(a) (“[a]ny person has a right to inspect or copy any public record of a public body”). “Public body” means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined . . .” §30-4-20(a). Ms. Wilson contends that this rule applies to agencies rather than individuals. Ms. Wilson asserts that the documents that Lawyers Weekly seeks are those belonging to her, personally, rather than to the Solicitor’s Office. She contends that the Rules for Lawyer Disciplinary Enforcement governing those documents apply to lawyers rather than to public bodies citing Rule 2, RLDE, Rule 413, SCACR. A “lawyer” is “anyone admitted to practice law in this state . . .”

This Court need not reach this issue because even if Ms. Wilson were a public body subject to FOIA, the documents Lawyer’s Weekly seeks are not “public records” under that statute. Even if they were public records, they would also be exempt under FOIA. These grounds are discussed below.

Under FOIA, “[p]ublic record” includes all . . . documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. . . .” §30-4-20. The definition expressly states that “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.” RLDE Rule 12 closes the documents at issue to the public as discussed below.

Lawyers Weekly wrongly asserts that Rule 12 only limits the disclosure of documents by the Commission on Lawyer Conduct and the Office of Disciplinary Counsel. Instead, the Rule makes the documents at issue here non-public because formal charges have not been filed. RLDE Rule 12 of Rule 413 prohibits the Commission on Lawyer Conduct, the Office of Disciplinary Counsel and the Supreme Court and their staffs from revealing the existence of a complaint against lawyer "while the matter remains confidential," except as provided in that law. Copy attached along with 2015 amendment. During that period of confidentiality, the complaint is expressly non-public. Rule 12(b)(If formal charges are filed against the lawyer, the matter "shall become public 30 days after the filing of the answer" to the charges (emphasis added)). The Rule limits the circumstances under which the Commission on Lawyer Conduct is authorized to release the documents. Rule 12(c)(protection of person or public, violation of criminal law, etc.).

Whether the lawyer may release the documents during the period of confidentiality is discretionary with him or her. Rule 12(d) states that a lawyer "may reveal" the filing of a complaint by a client to establish good cause for withdrawal as counsel, and if the complaint is confidential, the Rule states that the "lawyer may elect to give opposing counsel notice of the motion only without revealing the existence of the complaint." (emphasis added). The court will seal the record or delete references to the complaint from the record if the lawyer requests that records related to the motion be sealed. Rule 12(d). More generally, the lawyer may sign a waiver for the Commission to release the complaint. Rule 12(c)(3). Accordingly, under the Rule, the Complaint and related documents are not public during the period of confidentiality, and the lawyer may not be compelled to disclose them. Therefore, Ms. Wilson may not be compelled to release the documents at issue.

RANDY/3

This reading is in accord with an Opinion of the Office of the Attorney General which determined that complaints and related documents were not subject to FOIA. *Ops. Atty. Gen.* June 24, 1981, No. 81-60, 1981 WL 96586. Although the Opinion predated the current RLDE, the pertinent parts of FOIA remain the same. That Opinion determined that disciplinary files are not “public records” under §30-4-20(c) because they are “records which by law are required to be closed to the public” under the former Rule on Disciplinary Procedure section 20A. As noted in that Opinion, “[t]he rules of the South Carolina Supreme Court carry the force and effect of law. See, §§30-4-20(c), 40-5-20 and 40-5-50 . . . .” The Opinion further concluded that the files would also be exempt from disclosure under section 30-4-40(4) (“[m]atters specifically exempted from disclosure by statute or law”) and under 30-4-40(2) (“unreasonable invasion of privacy”).

Although the FOIA request at issue in the Opinion was directed to the former Board of Commissioners, the conclusion would be the same as to the Ms. Wilson.<sup>1</sup> The documents are not public because no formal charges have been filed, and even if they were, they are exempt from disclosure. The records are closed to the public under Rule 12 and may not be opened under FOIA as set forth in the definition of public record. Nothing in this Rule or FOIA indicates that a person may make a FOIA request of a lawyer to produce complaints closed to the public under Rule 12. Such documents are even beyond the power of a Judge to release under the above provisions of that Rule.

---

<sup>1</sup> Although this Opinion is not binding upon this Court, it “should not be disregarded without cogent reason.” *S.C. Dept. of Social Services v. Johnson*, 688 S.E.2d 588, 593, 386 S.C. 426, 436 (S.C.App.,2009) quoting *Price v. Watt*, 280 S.C. 510, 513 n. 1, 313 S.E.2d 58, 60 n. 1 (Ct.App.1984). *Johnson* found that referencing an opinion of the Attorney General “instructive” as to the application of a statute. That Opinion regarding FOIA is certainly consistent with the state of the law today and instructive on the issue.

RWD/A

The Complaint contends that Ms. Wilson waived confidentiality by referring generally to the filing of grievances against her and their dismissal. Nothing in Rule 12 creates a waiver of confidentiality except, as noted above, when the Lawyer signs a waiver for the Commission on Lawyer Conduct to release documents. Rule 12(c)(3). Ms. Wilson's general reference in her letter to Lawyers Weekly is not a waiver under Rule 12 and does not alter the non-public nature of the documents under Rule 12. "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 415 S.E.2d 384, 387, 307 S.C. 339, 344 (S.C.,1992). Certainly, Ms. Wilson's letter had no intent whatsoever to waive confidentiality when she invoked the Rules on Lawyer Disciplinary Enforcement in her response letter and made quite clear that she believed, and correctly so, that the documents sought are not public.

Even if the documents were "public records," they are exempt from disclosure. Under §30-4-40(a), "[a] public body may but is not required to exempt from disclosure the following information: . . .

(2) Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. . .

(4) Matters specifically exempted from disclosure by statute or law.

The Complaints and related documents are expressly exempt under Rule 12, and therefore are exempt from disclosure under §30-4-40(a)(4). This conclusion was reached by the above Attorney General's Office Opinion, and it is still the law.

Further, the disclosure of the records would also be an unreasonable invasion of personal privacy under §30-4-40(a) because Rule 12 protects against disclosure of complaints against a lawyer unless formal charges are made and none were filed here. The provisions of Rule 12

RMS/5

directing a court to take steps to prevent disclosure when a lawyer is withdrawing from representation, certainly indicate an intent to make the matter private.

**CONCLUSION**

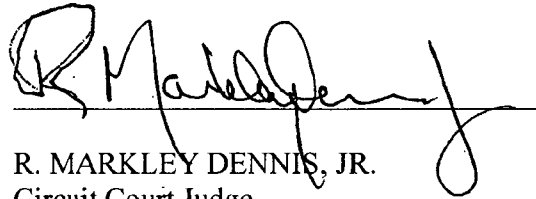
Plaintiff seeks documents of Ms. Wilson that are beyond the scope of FOIA and are expressly non-public under the Appellate Court rules. Therefore, this case must be dismissed.

For all of the foregoing reasons, IT IS ORDERED THAT the Defendant's Motion to Dismiss be granted and that the Motion for Summary Judgment of the Plaintiffs be denied.

AND IT IS SO ORDERED.

February 9, 2016

Charleston, South Carolina



R. MARKLEY DENNIS, JR.  
Circuit Court Judge

*RMD/6*