

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-000555

South Carolina Lawyers Weekly, by and through its principal,
Dolan Publishing Company. Appellant,

v.

Scarlett Wilson, Solicitor of the Ninth Judicial Circuit
An elected public official, Respondent,

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

1. Whether this Court needs to address the question of whether a solicitor is a “public body” under the Freedom of Information Act, and if so, whether a solicitor is a public body?
2. Whether the documents sought are confidential under RLDE Rule 12 of Rule 413, SCACR?
3. Whether the documents are exempt from disclosure under S.C. Code Ann. §§30-4-40(A)(2) and (4) due to the applicability of Rule 12?
4. Whether Ms. Wilson waived the confidentiality associated with the documents?

STATEMENT OF THE CASE

Appellant’s Complaint contends that the Solicitor violated the Freedom of Information Act by declining to comply with its request for documents. Record (R. p. *). (Complaint). Appellant’s FOIA request emailed to “Solicitor Wilson” was for “any records relating to any disciplinary complaints made against you or action taken with respect to you as a member of the bar.” R. p. * (Ex. A. to Complaint). The response stated that the Solicitor’s Office is a “public body” under FOIA §30-4-20(a), but that Ms. Wilson is not personally a public body. R. p. * (Ex. B. to Complaint). It said that her personal records regarding the matters requested are not public records under §30-4-20(c). The response further contended that even if otherwise covered by FOIA, the documents were exempt under §§30-4-40(a)(2) (information of a personal nature), (4) (matters exempt from disclosure by law and (7) (matters violative of attorney client privilege). The response also noted that the Office of Disciplinary Counsel had recommended dismissal of the charges against her and that she had never been found to have engaged in ethical misconduct.

Ms. Wilson moved to dismiss the Complaint on the same grounds noted above in the response to the FOIA request and also adding that the documents sought belonged to her in her personal capacity and were not records of the Office of the Solicitor. (R. p. *) At the oral argument concerning the Motion on January 7, 2016, in Charleston, the Court granted the Motion. R. pp. * (Tr. p. 13, l. 25 - p. 15, l. 25).

In his written order, the Honorable Markley Dennis found that he did not need to reach the issue of whether the Solicitor, herself, is a "public body" under §30-4-20(a) because the documents that Lawyer's Weekly seeks are not "public records" under §30-4-20(c). (R. p. *) (Order at p. 2, *et seq.*) He found that the documents were not public during the period of confidentiality under Rule 12 and that, even if they were "public," they are exempt from disclosure under §§30-4-40(a)(2) and (4). Judge Dennis ruled that Ms. Wilson did not waive confidentiality. By Order dated February 29, 2016, and filed March 8 (R. p. *), Judge Dennis denied Appellant's Motion for Reconsideration (R. p. *). This appeal then followed.

ARGUMENT

I

THE COURT NEED NOT REACH THE ISSUE OF WHETHER MS. WILSON IS A “PUBLIC BODY” SUBJECT TO FOIA BUT IF IT DOES DO SO, 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). This issue need not be reached because the documents that Appellant seeks are not public records under §30-4-20(c).

Should this Court want to address this issue, Ms. Wilson’s position that she is not a “public body” is well supported by the statute. She is not a “department” within the State. This rule applies to agencies rather than individuals. While, as noted by Ms. Wilson, the Solicitor’s Office is a public body subject to FOIA, Ms. Wilson, herself, is not a public body. This position is not hypertechnical. The documents that Lawyers Weekly seeks are not the records of the Solicitor’s Office, a public body, as to which the Solicitor is in charge. The records at issue are those belonging to Ms. Wilson, personally, rather than to the Solicitor’s Office. The Rules for Lawyer Disciplinary Enforcement governing those documents apply to lawyers, personally, rather than to public bodies. A complaint, under the RLDE is “information . . . that alleges . . . that a lawyer committed misconduct.” Rule 2, RLDE, Rule 413, SCACR. A “lawyer” is “anyone admitted to practice law in this state” Therefore, any complaint against Ms. Wilson is against her, individually, rather than a public body, and is not a record of the

Solicitor's Office.

II

THE RECORDS ARE NOT PUBLIC RECORDS UNDER §30-4-20(C) OR ARE EXEMPT FROM DISCLOSURE UNDER §§30-4-40(A)(2) AND (4)

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. Not only is Ms. Wilson, not a public body, the documents themselves are not public. 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 these records to the public as discussed below.

Lawyers Weekly wrongly asserts that the Rule 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.¹ 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 a lawyer “while the matter remains confidential,” except as provided in that law. 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.).

¹ Rule 12 of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR, contains similar provisions regarding the confidentiality of complaints against judges.

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.

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. (R. p. *). 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(a)(4) (“[m]atters specifically exempted from disclosure by statute or law”) and under 30-4-40(a)(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 Ms. Wilson.² 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.

Appellant claims that this application of Rule 12 impermissibly changes the statutory scheme of FOIA. To the contrary, FOIA contemplates such provisions in exempting matters from disclosure under §30-4-40(a) that constitute “(2) [i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. . . [and] (4) Matters specifically exempted from disclosure by statute or law.” As noted above, the Appellate Court Rules are rules of law and Rule 12 makes clear that the records are private unless disclosed under the provisions of the Rule. Accordingly, Rule 12 makes the documents non-public or at least makes them subject to §30-4-40’s exemptions for unreasonable invasions of personal privacy and matters exempt by law.

Appellant contends that the documents are not subject to §30-4-40(a)(2) as invasions of personal privacy because the response to the FOIA stated that the complaints had been filed by

² 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.

those who “disagree with her management of the Solicitor’s Office and in some cases with her handling of cases.” (R. p. *.) That the complaints may relate to Ms. Wilson’s work as Solicitor does not alter the fact that Rule 12 does not limit confidentiality according to whether the complaints relate to public or private work. Disciplinary complaints potentially subject a lawyer, in his or her personal capacity, to the processes of the Rules for Lawyer Disciplinary Enforcement. Rule 12 contains protections for lawyers therein as to confidentiality. They apply here regardless of the nature of the complaint. The complaints become public only as provided in the Rule. Moreover, even if the documents were not subject to the exemption for “personal privacy,” they are still exempt by law under §30-4-40(a)(4).

III

MS. WILSON DID NOT WAIVE CONFIDENTIALITY

Appellant contends that Ms. Wilson waived confidentiality by referring generally to the filing of grievances against her and their dismissal and doing so on Solicitor’s Office letterhead. 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). The general reference in the response 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, the response had no intent whatsoever to waive confidentiality when it invoked the Rules on Lawyer Disciplinary Enforcement and made quite clear that the Solicitor believed, and correctly so, that the documents sought are not public.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Orders of Judge Dennis.

Respectfully submitted,

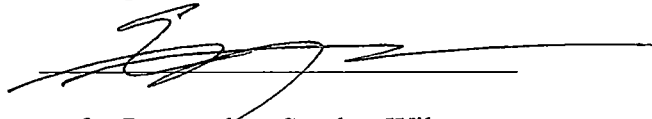
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