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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2014-002221

George S. Glassmeyer.....Respondent

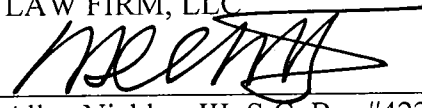
v.

City of Columbia.....Appellant.

APPELLANT'S PETITION FOR REHEARING

Appellant hereby petitions this Court for rehearing of each holding as issued in its *per curium* opinion filed August 24, 2016. This Petition is submitted pursuant to Rule 221(a), SCACR. For the reasons set forth in the memorandum in support filed herewith, it is respectfully submitted that each holding overlooks material facts and misapplies the law of this State.

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APPELLANT'S MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

PROCEDURAL POSTURE

In an unpublished *per curiam* opinion filed August 24, 2016, this Court affirmed and modified in part the decision of the Honorable Alison Renee Lee, Circuit Court Judge. For the following reasons, the opinion reflects a misapplication of controlling principles of law and in misconstruction of the record on appeal.

FACTUAL BACKGROUND

On April 3, 2013, Respondent George S. Glassmeyer ("Glassmeyer") submitted a FOIA request to Appellant City of Columbia ("City") requesting to inspect, among other items, "copies of any and all documents including, but not limited to statements, memoranda, emails, complaint, notes, and investigative reports relating to any alleged wrongdoing by [the former] police chief" and "copies of any and all documents relating to any and all disciplinary actions

imposed upon [the former] police chief.” The City responded by providing all requested materials except: (a) anonymous emails referring to alleged personal conduct; (b) unsolicited, unverified complaints referring to alleged personal conduct; and (c) third-party, unverified allegations of misconduct.

On July 10, 2013, Glassmeyer filed a non-jury complaint seeking a declaration that the City unlawfully failed to respond to his April 3, 2014 FOIA request, an injunction compelling disclosure of documents or information responsive to his FOIA request and an award of reasonable costs and attorney fees. The City filed an answer on July 16, 2013 denying any FOIA violation and requesting attorney’s fees and costs incurred in defense. On October 17, 2013, the City filed a motion for summary judgment. On October 18, 2013, Glassmeyer filed a motion for summary judgment and a motion to strike the City’s prayer for attorney fees.

The motions were heard on February 10, 2014 by the Honorable Alison Renee Lee. The City provided Judge Lee the withheld information for *in camera* review. Following submission of briefs, oral argument and review of withheld materials, by order issued July 23, 2014, Judge Lee entered the following findings:

- To withhold “public records under FOIA” an agency must prove that the information falls within one of fifteen exemptions in § 30-4-40; (R. p. 4)
- The materials withheld fall within the “broad definition of public records” set forth in § 30-4-40; (R. p. 5)
- Although the material withheld may relate to “off-duty” conduct, Glassmeyer has a legitimate interest in determining “whether the Department followed its own policies and investigated complaints, which is a matter of public interest” (R. p. 6)

- Glassmeyer “only seeks information regarding complaints of ‘alleged wrongdoing’ and ‘disciplinary action.’” (R. p. 7)
- Although the reasons were not given in the complaint, Glassmeyer claimed at the hearing that the City violated its [Police Department] manual by failing to investigate allegations set forth in various complaints against Scott. (R. p. 7)
- Glassmeyer bases this contention on the representation that “[t]he Internal Affairs Policy in the manual sets forth a requirement for the Department to conduct ‘an investigation of all citizen complaints including anonymous complaints.’” (R. p. 7)
- The Department policy “requiring an investigation militates in favor of the public’s interest in allegations and the reason why the Defendant chose not to investigate the allegations.” (R. p. 7)
- The focus of this case is not on the accusations themselves but the Department’s knowledge of the complaints and its response upon receipt. (R. p. 8)
- The case focuses not on the content of the allegations, but on what steps the Department took upon receipt of the information pursuant to its policies. (R. p. 8)

The City sought reconsideration of these findings and filed a timely appeal. The unpublished *per curiam* opinion issued on August 24, 2016 contains five holdings. As outlined below, these holdings erroneously apply Police Manual criteria to privately brought “complaints” and expand the scope of FOIA to include allegations of private conduct unrelated to public duties. Specifically:

Holding (1) “disagrees” with the City’s argument that FOIA does not apply because withheld documents refer to “the activities of a public official.” This holding ignores the

controlling law of this State that not all “activities” of public officials relate to their public office or duties.

Holding (2) “agrees” with the trial court that the City did not timely raise an argument that withheld documents were not submitted to the Police Department in keeping with established procedures. This holding ignores the trial court specifying that the documents presented for *in camera* review were not presented through the City’s Police Department.

Holding (3) “finds” that the City abandoned its argument concerning disclosure of Family Court documents. This finding ignores argument presented by City regarding disclosure of information relating to “off-duty sexual activities.”

Holding (4) “finds” documents not exempt from disclosure due to the privacy exemption based upon a determination that the allegations fall within the definition of “complaints” in the City’s Police Manual. This finding ignores evidence in the record that no “complaints” were presented to the Police Department.

Holding (5) “holds” that the City should redact only the names of “third parties who are not governmental officials” as well as “personal identifying information such as personal telephone numbers and email addresses” without defining “third parties” or “governmental officials.” This holding compels disclosure of information beyond the scope of Glassmeyer’s FOIA request and could expose allegations regarding City employees other than the former police chief to public view.

As set forth below, each of these holdings requires reconsideration as provided by Rule 221(a), SCACR.

LEGAL ARGUMENT

1. **FOIA does not require disclosure of records relating to the personal off-duty conduct of public employees. (Holding 1)**

In rejecting the City's argument that the withheld documents did not deprive Glassmeyer information relating to "activities of their public officials" Holding (1) notably omits any reference to Burton v. York County Sheriff's Department, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) In Burton, the trial judge was faced with a similar request to compel records relating to public and personal conduct of law enforcement officers. Following an *in camera* review, the judge determined that "allegations relating to off-duty sexual practices and activities of the deputies is personal and private ..." 358 S.C. at 345, 594 S.E.2d at 891.

Finding only that the withheld documents "contain allegations against the former City of Columbia police chief during his time in that office and, thus regard the activities of a public official," this Court made no distinction between alleged off-duty, personal activity and claims that the former police chief was derelict in his public duties. This failure alone warrants reconsideration of Holding (1).

The manner in which law enforcement officers **prosecute their duties** may give rise to public interests that outweigh individual privacy. As recognized in Burton, however, FOIA is available to access information only "of legitimate or public interest." 358 S.C. at 532, 594 S.E.2d at 895. Simply stated, FOIA requires a link between the action complained of and the officers' law enforcement activities. No published decision by this Court or our Supreme Court informed the City that mere unsolicited allegations regarding an employee presented outside established channels for submitting complaints rendered the allegations matters for public concern sufficient to compel disclosure under FOIA. To the contrary, records subject to

disclosure prior to the *per curiam* opinion were contained in personnel files and investigative “reports.” Burton, *supra*; See also, City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 323 S.C. 384, 475 S.E.2d 747 (1966) (internal investigation report subject to redaction) This limitation affords the employee notice and allows the public body an opportunity to investigate before accusations are made public.¹

Unless reconsidered, Holding (1) will undermine legitimate privacy interests and expand this Court’s carefully crafted Burton decision. In addition, holding that personal information regardless of source or purpose must be disclosed upon request will expose those who wish to serve the public to unknowable mischief and perhaps manipulation by unscrupulous or misguided opponents. For all of these reasons, Holding (1) should be reconsidered and guidance provided concerning application of FOIA to “complaints” sent to public officials and employees.

2. The City timely argued that no proper complaint was brought to the Police Department. (Holding 2)

In argument to the trial court, the City repeatedly invited the judge to examine the material presented for *in camera* review. As this Court is aware, the documents withheld identify both the source and the recipient. While the sources of emails are fictitious, the recipients are identified by name. None of the identified recipients are members of the City of Columbia Police Department and none of the documents were delivered to the Police Department. (R. pp. 33-39)

Before the trial judge, the City addressed argument that the Police Department should have opened an internal affairs investigation over anonymous allegations and threats of a

¹ Glassmeyer’s FOIA request is dated April 3, 2013. (R. p. 19) Emails submitted for *in camera* review are dated March 15, 24, 26, 27 and April 6, 2013. The former police chief went on leave April 1, 2013. (R. p. 110). He did not return to active duty and resigned from employment effective May 1, 2013. (R. p. 114)

disgruntled husband and that it “should have created records so that [Glassmeyer] could get his hands on them.” The City specifically noted that FOIA does not require “the City of Columbia or any other agency of government to create records.” (R. p. 34, lines 8-17) The City further argued that documents “delivered either to the city manager or to the mayor with a threat that if action was taken against the police chief, that the person involved . . . would make the information available to the media . . .” neither compelled an investigation nor supported disclosure under FOIA. (R. p. 36, lines 5-15)

In summary, both the trial court and this Court were made aware that the allegations relating to the former police chief were not directed to the Police Department. Moreover, the records provided to the trial court and this Court indicating the variety of sources available for submitting complaints to the Police Department were and are subject to review by way of judicial notice. (R. pp. 135-149; 158-159; Appellant’s Final Reply Brief pp. 3-5) Accordingly, the City preserved its objections relating to “failure to investigate” both at the trial and appellate levels. (R. p. 39, line 1- p. 40, line 7; p. 47, line 6- p. 48, line 25) The policies and procedures offered by way of judicial notice were additional facts properly presented in support of an argument to the trial court and preserved for appellate review rather than a “new argument” advanced for the first time on motion for reconsideration. (R. pp. 131-160) For this reason, Holding (2) should be reconsidered.

3. The City’s argument concerning “off-duty sexual activities” includes *in camera* documents reportedly submitted to the Family Court. (Holding 3)

Throughout argument to the trial court and on appeal, the City addressed the “domestic records” contained in the withheld documents. See, for example (R. p.33, line 19; p. 36, lines 5-15; Appellant’s Final Brief, p. 8 addressing “off-duty sexual activities and p. 10, fn. 5, referring

to family court records; Appellant's Final Reply Brief, p. 2, referring to personal relationships and off-duty conduct) A finding that the City "abandoned" its objection to the disclosure of allegations contained in domestic proceedings is neither supported by review of the whole record nor consistent with Holding (5).

Glassmeyer, the trial court and this Court were on notice of concerns expressed by the City regarding disclosure of documents involving a domestic dispute between non-employees. The City correctly determined that it should not be a party to blackmail in disclosing this information to the public. Although the *per curium* opinion calls for redaction of references to third parties, there is no rationale offered in Holding (3) or elsewhere for making public alleged off-duty personal conduct of any employee or officer where no dereliction of duty is involved. For these reasons, the Court should reconsider Holding (3).

4. Like the trial court order, the *per curium* opinion improperly applied Police Manual criteria to "complaints" not submitted to the Police Department. (Holding 4)

In support of his FOIA request, Glassmeyer relied upon Section 03, Chapter 06 (Internal Affairs) of the City of Columbia Police Department Manual. (R. pp. 100-103) This policy provides, in relevant part:

The Department requires an investigation of all citizen complaints, including anonymous complaints, against the Department or its personnel. (Paragraph 1.0)

The Internal Affairs Unit will post a brochure in a public location in every police station or substation that outlines the procedures the public will follow in lodging a complaint against the Department or its employees. (Paragraph 3.0)

The Internal Affairs Unit shall be responsible for maintaining accurate records of all complaints against the Department or its personnel. (Paragraph 3.1)

Complaints received by mail by the Office of the Chief or Internal Affairs will be handled as any other complaint. (Paragraph 4.1)

The Internal Affairs policy places citizens on notice that reports of wrongdoing on the part of police officers may be made in person, by telephone, in writing, electronically, and anonymously. The procedures for making such reports are available to the public through various sources identified at trial and on appeal. (R. pp. 135-149)

Individuals and organizations seeking to make allegations of impropriety involving members of the City's Police Department may do so. As established in the record, none of the requested materials were submitted to the Internal Affairs Unit. Instead, all established procedures for reporting and investigating allegations of misconduct were bypassed. FOIA is limited to production of records. The City's response to Glassmeyer's inquiry revealed that there were no records of "internal affairs investigation(s) or disciplinary action(s)." (R. p. 21)

As noted above, the trial court held that the public's interest in this matter is confined to the "steps the Department took upon receipt of the information **pursuant to its policies.**" (Emphasis added) (R. p. 8) There being no report, anonymous or otherwise, **pursuant to Department policies**, there is no legitimate basis for compelling disclosure of the information identified in the City's FOIA response and provided for *in camera* review.

Glassmeyer and others had the right to question whether the Department investigated alleged actions of the former police chief. This question was answered on April 5, 2013. (R. pp. 20-21) Applying the Police Manual to matters not presented to the Department constitutes error that requires reconsideration of Holding (4).

5. The *per curium* opinion fails to confine disclosure to the items identified in Glassmeyer's FOIA request and complaint and violates privacy interests of third parties. (Holding 5)

In Holding (5) the *per curium* opinion calls for redaction of "the names of third parties who are not governmental officials, as well as personal identifying information such as personal telephone numbers and email addresses." While this redaction is consistent with privacy interests protected in Glassmeyer v. City of Columbia, 414 S.C. 231, 223, 777 S.E.2d 835, 841 (Ct. App. 2015), it appears to require disclosure of nonresponsive information, thereby infringing privacy interests of third parties.

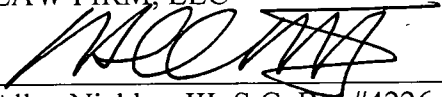
Glassmeyer's FOIA request and complaint seek documents identified as: "Copies of any and all documents including but not limited to, statements, memoranda, emails, complaints, notes, and investigative reports relating to any alleged wrongdoing by police chief Randy Scott." (R. p. 19, Complaint Exhibit A) No other City employee or official is named in the request or complaint. (R. pp. 15-23) Accordingly, any redaction must include references to all City employees or officials other than Mr. Scott. To require disclosure of reference to any other individual would exceed the scope of appellate review. Moreover, emails presented in unredacted form for *in camera* review refer to alleged conduct or present "complaints" about employees other than the former police chief. Exposure of allegations regarding these individuals exceeds the scope of this proceeding, infringes on the privacy interests of third parties and serves no legitimate public purpose. S.C. Code Ann. § 30-4-40(a)(2) For these reasons, Holding (5) should be reconsidered.

CONCLUSION

For the reasons stated above, Appellant requests that this Court reconsider its *per curiam* opinion filed August 24, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Appellant's Petition for Rehearing and Memorandum in Support of Petition for Rehearing by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

Kirby D. Shealy, III, Esquire
Lyndey Ritz Zwingelberg, Esquire
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1501 Main Street, 5th Floor
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This 1st day of September, 2016.

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By:



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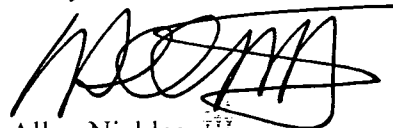
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

**RE: George Glassmeyer v. City of Columbia(2)
Appellate Case No.: 2014-002221**

Dear Ms. Kitchings:

Enclosed for filing, please find Appellant's Motion for Rehearing, Memorandum in Support and Certificate of Service in the above matter. Please file the required number of copies and return the extra, clocked-in copies in the self-addressed, stamped envelope provided. A check in the amount of \$25.00 is enclosed for the filing fee.

Sincerely,



W. Allen Nickles, III

WAN/pfb

Enclosures

cc: Kirby D. Shealy, Esquire
Lyndey Ritz Zwingelberg, Esquire
File #13-213