

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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OCT 04 2016

SC Court of Appeals

Unpublished Opinion No. 2016-UP-404
(S.C. Ct. App. Filed August 24, 2016)

George S. Glassmeyer.....Respondent,

v.

City of Columbia.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

1. Did the Court of Appeals err in finding that FOIA requires disclosure of records relating to the personal off-duty conduct of public employees?
2. Did the Court of Appeals err in finding the City failed to timely argue that no proper complaint was brought to the Police Department?
3. Did the Court of Appeals err in finding that the City's opposition to publication of "off-duty sexual activities" did not include *in camera* documents reportedly submitted to the Family Court?
4. Did the Court of Appeals err in applying Police Manual criteria to "complaints" not submitted to the Police Department?
5. Did the Court of Appeals err in restricting redaction of personal information to names and addresses of "third parties who are not governmental officials?"

STATEMENT OF THE CASE

In an unpublished *per curiam* opinion filed August 24, 2016, the Court of Appeals affirmed and modified in part the decision of the Honorable Alison Renee Lee, Circuit Court Judge holding that South Carolina Freedom of Information Act (“FOIA”) compels the disclosure (with some redactions) of anonymous emails, unsolicited unverified accusations, and third party allegations of conduct relating to the City of Columbia’s former police chief. The City’s petition for rehearing was denied on September 20, 2016. Due to unresolved issues concerning the intersection of private rights and public interests, the need for guidance as to the reach of FOIA as it relates to communications received by individual public officers and employees, and the permissibility of governmental bodies offering citizens options for presenting “public” complaints regarding the conduct of employees, the City respectfully submits this petition for *writ of certiorari* pursuant to Rule 242, SCACR.

FACTUAL BACKGROUND

On April 3, 2013, Respondent George S. Glassmeyer (“Glassmeyer”) submitted a FOIA request to the 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 **[former] police chief Randy Scott**” and “copies of any and all documents relating to any and all disciplinary actions imposed upon **[former] police chief Randy Scott.**” (Appx. p. 21) (Emphasis added)¹ 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. (Appx. pp. 24-25)

¹ Glassmeyer’s FOIA request did not seek information relating to any other individual.

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. (Appx. pp. 17-25) The City filed an answer on July 16, 2013 denying any FOIA violation and requesting attorney's fees and costs incurred in defense. (Appx. pp. 26-28) On October 17, 2013, the City filed a motion for summary judgment. (Appx. pp. 55-60) On October 18, 2013, Glassmeyer filed a motion for summary judgment and a motion to strike the City's prayer for attorney fees. (Appx. pp. 61-71)

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; (Appx. p. 6)
- The materials withheld fall within the "broad definition of public records" set forth in § 30-4-40; (Appx. p. 7)
- 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" (Appx. p. 8)
- Glassmeyer "only seeks information regarding complaints of 'alleged wrongdoing' and 'disciplinary action.'" (Appx. p. 9)

- 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. (Appx. p. 10)
- 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.’” (Appx. p. 9)
- 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.” (Appx. p. 9)
- The focus of this case is not on the accusations themselves but the Department’s knowledge of the complaints and its response upon receipt. (Appx. p. 10)
- 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. (Appx. p. 10)

The City sought reconsideration of these findings and filed a timely appeal. (Appx. pp. 130-151; 163-164) The unpublished *per curiam* opinion issued on August 24, 2016 contains five holdings. (Appx. pp. 219-222) 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. (Appx. p. 220)

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. (Appx. 220-221)

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.” (Appx. p. 221)

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. (Appx. pp. 221-222)

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. (Appx. p. 222)

As set forth below, each of these holdings should be reviewed and reversed by this Court.

STANDARD OF REVIEW

Glassmeyer’s complaint seeks declaratory and injunctive relief under FOIA. Both claims are non-jury. In an action tried at law without a jury, appellate review provides for the correction

of errors of law. Burton v. York County Sheriff's Dept., 358 S.C. 339, 346, 594 S.E.2d 888, 892 (Ct. App. 2004)

ARGUMENT ON QUESTIONS PRESENTED FOR REVIEW

1. **The Court of Appeals erred in finding that FOIA requires 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" *per curiam* 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.

For more than a decade, Burton has provided governmental bodies guidance for distinguishing between records relating to performance of public duties that must be disclosed under FOIA and documents involving private or "off-duty" activity that may be withheld. 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," the Court of Appeals 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 reversal 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 in this state informed the City that unsolicited allegations presented outside established channels for investigating complaints must be released under FOIA. To the contrary, compulsory disclosure prior to the challenged opinion has been confined to 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 afforded the employee notice and allowed the governmental body an opportunity to investigate before accusations were made public.²

If allowed to stand, *per curium* Holding (1) will undermine legitimate privacy interests and expand FOIA to require publication of personal information regardless of source or purpose. This holding circumvents the balancing of public and private interests central to FOIA. Additionally, the approach adopted by the Court of Appeals will expose those who wish to serve the public to unknowable mischief and perhaps manipulation by unscrupulous or misguided opponents. Finally, the *per curium* opinion offers no guidance to assist governmental bodies in appropriately responding to FOIA requests regarding "complaints" received by public officials and employees. For all of these reasons, Holding (1) should be reversed.

2. The Court of Appeals erred in finding that the City failed to timely argue 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. The documents provided for *in camera* review identify

² Glassmeyer's FOIA request is dated April 3, 2013. (Appx. p. 21) 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. (Appx. p. 112) He did not return to active duty and resigned from employment effective May 1, 2013. (Appx. p. 116)

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. (Appx. pp. 35-41)

Before the trial judge, the City addressed Glassmeyer's argument that the Police Department should have opened an internal affairs investigation over anonymous allegations and threats of a 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." (Appx. p. 36, 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. (Appx. p. 38, lines 5-15)

In summary, both the trial court and the Court of Appeals 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 on appeal demonstrating the variety of sources available for submitting complaints to the Police Department were and are subject to review by way of judicial notice. (Appx. pp. 137-151; 215-217; 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. (Appx. p. 41, line 1- p. 42, line 7; p. 49, line 6- p. 50, 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. For this reason,

Holding (2) should be reviewed and reversed.

3. The Court of Appeals erred in finding that the City's opposition to publication of "off-duty sexual activities" did not include *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 (Appx. p. 35, line 15-p. 38, line 15; see also, 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) (Appx. pp. 177, 179, 214) 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 *per curium* Holding (5).

Glassmeyer, the trial court and the Court of Appeals 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 publishing alleged off-duty personal conduct of any employee or officer where no dereliction of duty is involved. For these reasons, the Court should reverse *per curium* Holding (3).

4. The Court of Appeals erred in applying Police Manual criteria to "complaints" not submitted to the Police Department. (Holding 4)

As pointed out to the trial court and the Court of Appeals, there exist clear guidelines for presenting complaints regarding police activity. These published guidelines direct citizens to various alternatives available through the City's Police Department. Throughout this

proceeding, however, Glassmeyer has argued that the City "had an express obligation to investigate *any* complaint it received." (Respondent's Return to Petition for Rehearing p. 4, *citing* Appx. p. 74 at ¶ 9; p. 102 at Sect. 6, Chap. 2, ¶ 1.0 ("Directive")) (Appx. p. 240) The directives relied upon in support of this position, however, are confined to reports presented to "City of Columbia Police Department." (Appx. pp. 81-105)

The guideline offered by Glassmeyer in support of his FOIA request is Section 02, Chapter 06 (Internal Affairs) of the City of Columbia Police Department Manual. (Appx. pp. 102-105) This section of the manual 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 cited 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. (Appx. pp. 137-151) Nothing in the Police Department Manual offered by Glassmeyer or contained elsewhere in the record compels individual City employees or elected officials to forward for police investigation communications received from third parties, whether verbal, written or electronic.

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)." (Appx. p. 23)

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) (Appx. p. 10) 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. (Appx. pp. 22-23) Applying the Police Manual to matters not presented to the Department constitutes error that requires reversal of *per curium* Holding (4).

5. The Court of Appeals erred in restricting redaction of personal information to names and addresses of "third parties who are not governmental officials." (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." (Appx. p. 21, Complaint Exhibit A) No other City employee or official is named in the request or complaint. (Appx. pp. 17-25) 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 judicial review. Emails presented in unredacted form for *in camera* examination refer to alleged conduct, present accusations and offer opinions about employees other than the former police chief. Exposure of allegations regarding these individuals expands the scope of Glassmeyer's complaint, 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 reversed.

CONCLUSION

For all the reasons presented to the trial court, on appeal, in support of rehearing and herein, the unpublished *per curiam* opinion issued on August 24, 2016 dangerously expands the scope of FOIA to compel disclosure of unsolicited allegations regarding public employees regardless of the nature, source or recipient. It is respectfully submitted that FOIA was not intended by the General Assembly to provide disgruntled individuals a public forum to voice anonymous opinions or accusations.

Individuals genuinely concerned about the activities of the City's former police chief, including Glassmeyer, had multiple avenues available to request investigation of his conduct. None of these avenues were undertaken. Additionally, there is no evidence that the City prevented any individual from making public complaints about its officers, agents or employees.

In this context, the City acted appropriately and in keeping with the published decisions in this State concerning balancing private and public interests. The City therefore requests that this Court exercise the opportunity to review, correct and guide by granting this petition.

Respectfully submitted,

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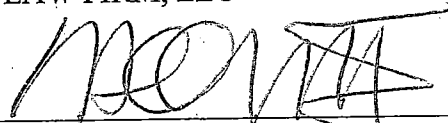
City of Columbia.....Petitioner.

CERTIFICATION OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, counsel for Petitioner hereby certifies that a Petition for Rehearing was duly and timely filed with the South Carolina Court of Appeals in this action on September 1, 2016. This Petition for Rehearing was denied by Order of the Court of Appeals filed September 20, 2016.

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SC Court of Appeals

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Petition for Writ of Certiorari by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

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This 4th day of October, 2016.

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October 4, 2016

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
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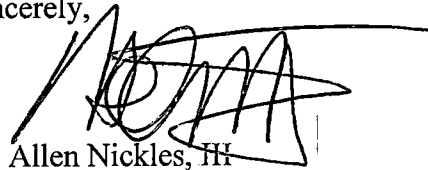
SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed please find a copy of the City of Columbia's Petition for Writ of Certiorari filed with the Supreme Court in the above matter today.

Sincerely,



W. Allen Nickles, III

WAN/pfb

Enclosure

cc: Kirby D. Shealy, Esquire (w/out attachment)
Lyndey Ritz Zwingelberg, Esquire (w/out attachment)
File #13-213