THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2016-002056

George S. Glassmeyer,.....Respondent,

v.

City of Columbia,.....Petitioner.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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On August 24, 2016, the Court of Appeals filed an unpublished opinion, 2016-UP-404 ("Opinion"), affirming the lower court's decision dated July 23, 2014, mandating City of Columbia ("City") provide access to certain documents requested by George S. Glassmeyer ("Glassmeyer") pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (Rev. ed. 2007, as amended) ("FOIA").

On September 1, 2016, City filed a Petition for Rehearing pursuant to Rule 221(a), SCACR. The Court denied City's Petition for Rehearing on September 20, 2016. On October 4, 2016, City filed a Petition for Certiorari pursuant to Rule 242, SCACR. For the following reasons, City's Petition should be denied.

FACTS

On April 3, 2013, Glassmeyer submitted a written request to City pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (Rev. ed. 207, as amended) ("FOIA"), seeking documents pertaining to former City of Columbia Police Chief Randy Scott ("Scott"). (Appx. p. 72 at ¶ 3; p. 75.) Glassmeyer sought information related to Scott's request for a personal leave of absence that was submitted to the City on or about April 22, 2013, and Scott's subsequent resignation, effective May 1, 2013. (*Id.*; Appx. p. 106 at Nos. 1 and 2.)

With regard to Scott's request for a personal leave of absence and subsequent resignation, Glassmeyer requested the following documents:

a. A copy of the written request for a leave of absence submitted on or about April 2, 2013 by police chief Scott;

b. 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; and

c. Copies of any and all documents relating to any and all disciplinary actions imposed upon police chief Randy Scott.

(Appx. p. 72 at ¶ 3; p. 75.)

Within fifteen days of Glassmeyer's FOIA request, on April 5, 2013, City furnished Glassmeyer with a disk including some, but not all, responsive documents in its possession. (Appx. p. 73 at ¶ 4; pp. 76-77.) City stated that it had redacted alleged personal information from Scott's personnel file, citing FOIA's personal privacy exemption, S.C. Code Ann. § 30-4-30(c) (Rev. ed. 2007). (*Id.*)

City reported there were no documents that would have been responsive to several requests, including: (1) contract of employment; (2) internal affairs investigation(s); and (3) disciplinary action(s). (Appx. p. 73 at ¶ 5; pp. 76-77.)

On April 19, 2013, City supplemented its response to Glassmeyer's FOIA request. (Appx. p. 73 at ¶ 6; pp. 78-79.) Although City produced a significant number of additional responsive documents, it refused to produce certain requested documents which were in its possession, including:

(1) anonymous emails referring to Chief Scott's alleged personal conduct;

(2) unsolicited, unverified complaints referring to Chief Scott's alleged personal conduct; and

(3) third party, unverified allegations of misconduct by Chief Scott.

(Appx. p. 73 at ¶ 7; pp. 78-79.) City asserted that it was not producing these documents because they did "not qualify as public documents relating to the performance of public officials" and/or they contained "information of a personal nature where public disclosure would constitute an unreasonable invasion of personal privacy." (Appx. pp. 78-79 (*citing*

S.C. Code Ann. §§ 30-4-15 and 30-4-40(2)).)

On or about May 14, 2013, Glassmeyer submitted a second FOIA request for public records, requesting a "copy of the Columbia Police Department Policy and Procedure manual as it existed on July 1, 2012 and a copy of any and all subsequent amendments, additions, and deletions." (Appx. p. 73 at ¶ 8; p. 80.) In response, City provided a copy of its police department's Directives and Procedures Manual as well as certain updates to the Directives and Procedures Manual, effective January 2013. (Appx. p. 74 at ¶ 9; pp. 81-105.)

ARGUMENTS

I. NONE OF THE RULE 242, SCACR, CONSIDERATIONS GOVERNING REVIEW ARE PRESENT IN THIS CASE.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242, SCACR. Rule 242(b), SCACR lists several factors indicative of the "character of reasons" this Court grants certiorari. Although the list is not exhaustive and does not fully measure the breadth of this Court's discretion to grant review, the factors do provide guidance to appellants and the Court. Notably absent from City's Petition is any discussion of why this Court should grant certiorari based on the considerations governing review outlined in Rule 242 and, in fact, no "special or important reasons" are present in this appeal.

There are no novel questions of law presented here. *See* Rule 242(b)(1), SCACR. This is an action for declaratory judgment arising out of Glassmeyer's request for production of public records from City pursuant to the FOIA. City's appeal regards only the question of whether City wrongfully withheld documents and information from production in response to Glassmeyer's FOIA request pursuant to the personal privacy

exemption, S.C. Code Ann. § 30-4-40. Similar issues of law have been considered by our appellate courts on numerous occasions.[1] The rationale underlying the circuit court order and the Court of Appeals' opinion clearly and directly followed the mandates provided in the FOIA and did not implicate any novel issues of law or fact. Moreover, because this case involves a direct application of the South Carolina FOIA, there are no constitutional issues or federal questions involved. *See* Rule 242(b)(4)-(5), SCACR.

There is no dissent in the Court of Appeals' decision. *See* Rule 242(b)(2), SCACR. Rather, the decision was an unpublished *per curiam* opinion. Unpublished appellate decisions have no precedential value. Rules 220(a) and 268(d)(2), SCACR; *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 338 S.C. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2000). The Court of Appeals did not grant City's Petition for Rehearing or hear the appeal *en banc* pursuant to Rule 291, SCACR.

The Court of Appeals' Opinion does not conflict with any prior decisions of this Court. *See* Rule 242(b)(3), SCACR. City implies the Court of Appeals strayed from its own decision in *Burton v. York County Sherriff's Dept.*, 358 S.C. 339, 346, 594 S.E.2d 888, 892 (Ct. App. 2004), but as outlined below, the Court's decision in *Burton* is distinguishable.

The only Supreme Court decision City cites is *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1966). (*See*

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[1] *See Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984); *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996); *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004); *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); *New York Times Co. v. Spartanburg County Sch. Dist. No. 7*, 374 S.C. 307, 649 S.E.2d 28 (2007); *Evening Post Pub. Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011); *Perry v. Bullock*, 409 S.C. 137, 761 S.E.2d 251 (2014).

Petition at p. 6). City resorts to this case for the proposition that an "internal investigative report" may be "subject to redaction" in response to a FOIA request. (*Id.*). Glassmeyer does not dispute this legal proposition and the Court of Appeals' Opinion in no way conflicts with the Court's holding. City's assertion that "compulsory disclosure prior to the challenged opinion has been confined to personnel files and investigative 'reports,'" may be a correct understanding of extant law in light of *Columbia v. American Civil Liberties Union*; however, as stated by this Court in that same decision: "The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis." *Id.* at 387, 475 S.E.2d at 749 (citing *Newberry Publishing Co., Inc. v. Newberry County Comm'n on Alcohol and Drug Abuse*, 308 S.C. 352, 417 S.E.2d 870 (1992)). The Court of Appeals' Opinion in this case correctly applied the law and facts and determined based on circumstances presented here that production of the requested materials, with certain redactions, was appropriate and City's withholding of the information violated the FOIA.

City has failed to assert why any of the considerations governing this Court's review of a petition for writ of certiorari apply in this case. For the reasons outlined above, there are no special or important reasons for this Court to grant certiorari and the Petition should be denied.

II. FOIA APPLIES TO THE DOCUMENTS IN CITY'S POSSESSION.

The Court of Appeals correctly held that FOIA applies, over City's objection, because certain allegations in complaints provided to City refer to Randy Scott's activities during his time as City's police chief and therefore "regard the activities of a public official." Implicit in the Court's holding is the conclusion that the documents

Glassmeyer sought meet the FOIA's definition of "public records,"[2] which is not limited to documents regarding the activities of public officials. City claims the Opinion ignores controlling law of this state, including *Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), which, according to City, held not all activities of public officials relate to their public office or duties. (*See* Petition at pp. 5-6.)

City argues *Burton* and the "FOIA require a link between the action complained of and the law officers' law enforcement activities." (Petition at p. 6.) However, City cites no FOIA provision supporting this proposition. To the contrary, the FOIA is clear that a public body cannot withhold information sought by a citizen *unless* the information falls into one of the fifteen exemption categories contained within § 30-4-40, or is otherwise exempt from disclosure under other FOIA provisions. S.C. Code Ann. § 30-4-40 (Rev. ed. 2007). This Court confirmed in *Evening Post Pub. Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005), that if a document does not fall within one of the enumerated exemptions, it cannot be withheld. Nothing in the FOIA permits a public body to withhold documents based on its subjective view that the documents do not "regard the 'activities of their public officials,'" as City suggests.

As City acknowledges, *Burton* does not even deal with the threshold issue of whether documents are "public records" within the meaning of the FOIA, but rather, whether documents meeting the FOIA's definition of "public records" contain "information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy." S.C. Code Ann. § 30-4-40(a)(2) (2007). *Burton*, 358 S.C. at 352, 594 S.E.2d at 895. The Court of Appeals appropriately applied

[2] S.C. Code Ann. § 30-4-20(c) (Rev. ed. 2007).

Burton to its fourth holding, which affirmed the lower court's decision that the documents are not exempt from disclosure due to the FOIA's privacy exemption.

In addition to lacking any legal foundation, City's argument that the requested documents do not "regard the 'activities of . . . public officials'" is substantively meritless. (*See* Appellant's Brief at Appx. p. 175 (citation omitted); Petition at pp. 5-6.) The gravamen of Glassmeyer's FOIA request was to copy or inspect complaints received by City regarding alleged wrongdoing of its public officials. (Appx. pp. 67-70.) Alleged wrongful conduct or violations of the law by former police chief Scott that were undisputedly within City's possession unquestionably pertain to "activities" of a "public official," as the Court of Appeals concluded in its Opinion.

City's suggestion that because the documents at issue were not "contained in [City's] personnel files" or connected to any "investigative report" prepared by City, the documents were not "public records" is nonsensical and contrary to the FOIA. (Petition at p. 6.); *see* S.C. Code Ann. § 30-4-20(c) (Rev. ed. 2007).) Pursuant to its own policies and procedures, City had an express obligation to investigate *any* complaint it received. (Appx. p. 74 at ¶ 9; p. 102 at Sect. 6, Chap. 2 ¶ 1.0 ("Directive").) There is no dispute the documents were in City's possession at the time of Glassmeyer's FOIA request. (*See* Petition at FN 2.) City's failure or refusal to place the documents in Scott's personnel file and follow its own written policy by refusing to conduct a formal investigation provides City no legal protection. Choosing to ignore one's own procedures does not create a loophole around FOIA's requirements.

III. CITY'S ARGUMENT THAT THE WITHHELD DOCUMENTS WERE NOT PRESENTED TO THE CITY THROUGH ESTABLISHED PROCEDURES WAS UNTIMELY.

The Court of Appeals appropriately affirmed the lower court's decision rejecting City's argument that no proper complaint was brought to the Police Department sufficient to initiate a formal investigation. City's argument was first raised to the lower court in its Motion to Alter or Amend. (Appx. pp. 134-135.) The lower court recognized that City's arguments had not been previously presented to it and were therefore waived. (Appx. pp. 14-15.) *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) ("[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not") (citation omitted).

In its Petition, City implies the lower court could have inferred the complaints were not filed through the proper or recommended channels based on the "source and the recipient" of the documents submitted to the lower court for *in camera* review. (Petition at pp. 6-7.) However, South Carolina law is clear that to preserve an issue for appeal, a party must *make an argument* with "sufficient specificity to inform the trial court of the point being urged." *Allegro, Inc. v. Scully*, 400 S.C. 33, 44, 733 S.E.2d 114, 120 (Ct. App. 2012) (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (internal quotations omitted)). A party cannot rely upon a Court to discern what arguments might be available to it that are not expressly raised. Moreover, the lower court must rule on the issue for it to be preserved. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument that has been presented on that ground." *Id.* at 142, 587 S.E.2d at 694 (citation omitted).

The purpose behind Rule 59(e) is to allow a party to correct misapplications of law or fact or to preserve legal issues for appeal. *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). "[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the great importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Id.* at 779-780 (citation omitted). Issue preservation rules are designed to give the lower court a fair opportunity to rule on the issues, and thus provide the appellate courts with a platform for meaningful review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quotation omitted).

Even if there were some merit to City's contention, the lower court did not know the appropriate or recommended procedure for filing complaints until City filed its Motion to Alter or Amend the lower court's order granting summary judgment to Glassmeyer. Prior to City's Motion to Alter or Amend, the only documents in the record were the complaints that were submitted by the City for *in camera* review and the City's Directives and Procedures Manual, which Glassmeyer introduced. (Appx. p. 60; pp. 81-105.) As City pointed out, the Directives and Procedures Manual stated: "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. Complaints may also be submitted on-line via the Police Department website." (Appx. p. 102 at Sect. 2, Chap. 6 ¶ 3.0.) The Directives and Procedures Manual also provided: "Complaints received by mail by the Office of the

Chief or Internal Affairs will be handled as *any other complaint*." (Appx. p. 103 at Sect. 2, Chap. 6 ¶ 4.1 (emphasis added).) City did not submit into the record any published instructions for submitting a complaint until filing its Motion to Alter or Amend. (Appx. p. 134 (referencing Attachment B at Appx. pp. 143-145).)[3]

Moreover, City's assertion that because there are recommended procedures for filing complaints, any complaints submitted to the City *outside* of the recommended method can simply be ignored without further investigation or inquiry was properly rejected by the Court of Appeals. City's own Directives and Procedures Manual makes clear it is "require[d] [to] investigate[] . . . all citizen complaints, including anonymous complaints." (Appx. p. 74 at ¶ 9; p. 102 at § 1.0 ("Directive").) There is no stated exception to this rule and there is no authorized procedure for City to ignore complaints that it receives outside of its own recommended avenues.

Even assuming that City properly ignored the complaints it received, those complaints do not therefore fall outside the definition of "public record" for FOIA purposes, *see* S.C. Code Ann. § 30-4-20(c) (Rev. ed. 2007), as City has suggested at every stage of this litigation. (Appx. p. 33, lines 23-24; p. 34, line 14 – p. 35, line 9; Appellant's Final Brief at Appx. pp. 175-176.) This entire line of argument is a red herring.

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[3] Even more absurd, City's published instructions suggest a citizen intending to file a grievance should, but is not required to, "[w]rite a letter to either the Chief of Police or the Internal Affairs Division." (Appx. p. 134 (referencing Attachment B at Appx. pp. 143-145).) A citizen intending to complain about the police chief himself, as is the case here, should not be constrained to file a grievance with the subject or someone under his supervision.

IV. CITY ABANDONED ITS ARGUMENT CONCERNING FAMILY COURT DOCUMENTS.

Throughout the case, City argued the documents requested by Glassmeyer were subject to the personal privacy exemption of the FOIA, S.C. Code Ann. § 30-4-40(a)(2) (Rev. ed. 2007). Glassmeyer argued complaints of impropriety made by third parties should not be considered "[i]nformation of a personal nature where public disclosure thereof would constitute unreasonable invasion of personal privacy." *Id.* Rather, such complaints were mere representations or allegations made by others, whether true or untrue, regarding violations of the law or City policy by City employees.

During the hearing on the parties' cross motions for summary judgment, City admitted some of the complaints were publicly available documents, including court records. (Appx. p. 35, line 15 – p. 36, line 25; p. 38, lines 5-15; Appellant's Brief at Appx. p. 179, n. 5.) The lower court noted in its Summary Judgment Order that "copies of records from family court proceedings . . . are available to the public unless sealed." (Appx. p. 7 (*citing Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006)).) "Therefore, there can be no level of privacy expected in those specific documents." (*Id.*)

On appeal, City referenced in footnote 5 of its Final Brief to the Court of Appeals that it "provided [Glassmeyer] the civil action number of the [family court] proceedings in question." (*See* Appellant's Brief at Appx. p. 179, n. 5.) In its Opinion, the Court of Appeals concluded City abandoned its argument concerning disclosure of the family court documents because it failed to provide any citation to legal authority. Our appellate courts have made clear that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on

appeal. *State v. Jones*, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 555 (Ct. App. 2011) ("issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"). City cited no case law or other authority for its argument (*see* Appellant's Brief at Appx. p. 179, FN 5), and indeed, under appellate precedent, abandoned its argument.[4]

Even if City were not deemed to have abandoned its argument on appeal, the argument was appropriately rejected by the Court of Appeals on the merits. City's footnote implies that providing Glassmeyer with the family court action number is the equivalent of fulfilling the statutory mandate to provide public records. While furnishing such information might allow Glassmeyer to verify whether documents in City's possession were actually filed in court, Glassmeyer would have no ability to confirm which specific documents were in City's possession. Nothing in the FOIA allows a public body to meet its obligations to the public merely by pointing a citizen to another repository where the records may be found.

V. THE DOCUMENTS ARE NOT EXEMPT FROM DISCLOSURE UNDER THE FOIA'S PRIVACY EXEMPTION.

The documents Glassmeyer requested are not exempt from disclosure under the FOIA's privacy exemption, S.C. Code Ann. § 30-4-40(a)(2) (Rev. ed. 2007) on the basis that (i) Scott did not have a reasonable expectation of privacy in the documents withheld, and (ii) even if he did, the interests of the public, including Glassmeyer, outweighed

[4] Furthermore, City cites no legal authority in its Petition for Rehearing on this issue.

Scott's privacy interests where the City failed to investigate the allegations it received.

In its Petition, City contests the Court of Appeals' conclusion that the interests of the public outweighed any privacy interests in the requested materials. (Petition at pp. 8-9.) It repeats its argument that no citizen can have an interest in City's failure to investigate the allegations because City did not receive the complaints through recommended channels. (Petition at pp. 5-6.) For the reasons stated above (*supra* at § II), and in Respondent's Brief, City's position is untenable and was appropriately disregarded by the Court of Appeals. The Court of Appeals properly applied the balancing test articulated in *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), finding that the public interest in understanding why City would fail to investigate complaints it received, in contravention of its own written policies, outweighs whatever privacy interests Scott might have in the withheld documents.[5]

VI. THE COURT OF APPEALS' REQUIREMENT THAT CITY REDACT NAMES OF THIRD PARTIES, NOT GOVERNMENT OFFICIALS, AS WELL AS PERSONAL IDENTIFYING INFORMATION IS REASONABLE.

Although the Court of Appeals' Opinion affirmed the lower court's ruling mandating that City provide access to the documents Glassmeyer requested, it modified the lower court's ruling by permitting City to "redact the names of third parties who are not governmental officials, as well as the personal identifying information such as personal telephone numbers and email addresses." (Opinion (citing S.C. Code Ann. §

[5] Although the trial court expressly held Scott had no privacy interest in those withheld documents that may appear in family court files, it left open the question of whether Scott had any privacy interest in the remaining documents. (Appx. p. 7.) The Court of Appeals did as well.

30-4-40(b)(2007); *Glassmeyer v. City of Columbia*, 414 S.C. 213, 223, 777 S.E.2d 835, 841 (Ct. App. 2015)).) In its Petition, City argues the Court of Appeals erred by compelling disclosure of information beyond the scope of Glassmeyer's FOIA request which, City argues, "could expose allegations regarding City employees other than the former police chief to public view." (Petition at pp. 1 FN 1, 10-11.)

The Court of Appeals' holding requiring City to produce the requested documents and redacting personal information, such as names of *private* third-parties and their identifying information, was reasonable. For the same reasons the public has a legitimate interest in knowing why City failed to investigate former Police Chief Scott following City's receipt of allegations of wrongdoing, the public has an interest in knowing why City failed to investigate any other public officials named in the allegations. City's bald assertion that "[e]xposure of allegations regarding [other public] individuals . . . infringes on the[ir] privacy interests . . . and serves no legitimate public purpose," (Petition at p. 11) lacks any substantive support and was appropriately ignored by the Court of Appeals.

CONCLUSION

For these reasons, this Court should deny City's Petition for Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify I served Respondent's Return to Petition for Writ of Certiorari upon the City of Columbia, by depositing copies of the documents in the United States Mail, postage prepaid, on October 25, 2016, addressed to its attorney of record, W. Allen Nickles, III, Esquire, at 1122 Lady Street, Suite 610, Columbia, South Carolina 29201.

Victoria Moody – Paralegal