THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Judge

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Appellate Case No. 2016-001112

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South Carolina Lottery Commission,.....Respondent,

v.

George S. Glassmeyer,.....Appellant.

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# FINAL BRIEF OF APPELLANT

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II. **Did the circuit court err in entering judgment on the pleadings against Appellant on the basis of so-called facts that were neither admitted nor alleged by Appellant in his answer and counterclaim?**

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VI. **Did the circuit court err in failing to dismiss the Respondent's claim seeking an injunction to prevent Appellant from seeking information where the Respondent's own complaint showed the Respondent has no standing to bring such a claim?**

## STATEMENT OF THE CASE

This is a case in which the Respondent, the South Carolina Lottery Commission (hereinafter "the Lottery Commission"), a public body, sued Appellant, George S. Glassmeyer (hereinafter "Glassmeyer"), a citizen of South Carolina, seeking a declaration that certain information Glassmeyer had sought through two requests made under the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.*, (hereinafter "FOIA") is exempt from mandatory disclosure under FOIA and requesting the issuance of a permanent injunction preventing Glassmeyer from seeking to obtain that information. (R. pp. 20-28.) The information concerned lottery winners who claimed prizes of or over a million dollars over a period of time, including their full names, addresses, telephone numbers, and forms of identification that they presented to the Lottery Commission to claim their lottery prizes. (R. pp. 21, 34.)

The Lottery Commission also sought an award of attorney's fees against Glassmeyer. (R. p. 28.)

Glassmeyer answered, denying that the Lottery Commission was entitled to any relief and asserting various defenses, among them that he was entitled to the dismissal of the Lottery Commission's claims for failure of the complaint to state facts sufficient to constitute a cause of action. (R. pp. 148-62.) Glassmeyer also pled counterclaims against the Lottery Commission, seeking a declaration that the Lottery Commission had violated FOIA, seeking an order directing the Lottery Commission to comply with FOIA with regard to his requests, and asserting a claim against the Lottery Commission for abuse of process. (R. pp. 156-58.) Glassmeyer's answer and counterclaim attached "a copy of a South Carolina Education Lottery Winner Claim Form that was authored

by and is (or at least at times material to this case was) used by the Lottery Commission for lottery winners to submit claims to the Lottery Commission." (R. pp. 155, 160-61.) The answer and counterclaim states that the "form specifically states that the information the lottery winner provides on the form may be subject to disclosure under FOIA[,]" and the form indeed states that. (R. pp. 156-60.) The information the form requires to be disclosed on it includes the information sought by Glassmeyer in his FOIA requests involved in this case. (R. p. 160.) The answer and counterclaim states that "if the information sought by the Defendant concerning the lottery winners at issue had at one time been private information exempt from disclosure under FOIA (which the Defendant denies), the lottery winners made that information not be in that category any more once they submitted the information on this form or one containing or accompanied by a similar disclosure." (R. p. 156.) The answer and counterclaim states that the "lottery winners knowingly, intelligently, and voluntarily relinquished any ability they may have had to claim that the subject information about them was exempt from disclosure under FOIA." (R. p. 156.) The attached Lottery Commission form states that a claimant who submits it releases the Lottery Commission from liability for disclosure of information about the claimant. (R. p. 160.)

Glassmeyer made written motions to dismiss and to strike the Lottery Commission's prayer for attorneys' fees. (R. pp. 165-70.) Those motions were denied by the Honorable Robert E. Hood. (R. p. 16.)

The case was set for a non-jury trial on December 5, 2014, before the Honorable L. Casey Manning. Glassmeyer submitted a memorandum concerning the issues in the case. (R. pp. 236-53.) Before trial began, the Lottery Commission made an oral motion

for judgment on the pleadings. (R. p. 218 ln. 5-7.) The Lottery Commission clarified that it sought declaratory relief under the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.*, rather than under FOIA, as its complaint indicated. (R. p. 27, p. 213 ln. 2-4.) Glassmeyer made an oral motion to dismiss the Lottery Commission's claims. (R. p. 218 ln. 20-21.) Glassmeyer also made an oral motion to strike the Lottery Commission's prayer for attorney's fees. (R. p. 226 ln. 16-18.) The transcript of the hearing shows that the Lottery Commission, after some apparent initial confusion, limited its motion for judgment on the pleadings to only its own claims, not Glassmeyer's counterclaims. (R. p. 229 ln. 8 through p. 230 ln. 1.) The Lottery Commission's counsel stated to the court that "our motion for judgment on the pleadings on – is as to our case in chief. It's not to his counterclaim." (R. p. 229 ln. 24 through p. 230 ln. 1.) No one made any motion of any sort directed at Glassmeyer's counterclaims.

Those motions were all that were heard that day. (R. p. 235 ln. 12-18.) The court took a break, stating "I want to try to think whether I just want to resolve this issue before we go forward or not" and "I don't know whether I want to hear your testimony today . . . I may just take what I have, make a decision on the legal issues and come back later if I have to." (R. p. 235 ln. 12-18.) No trial was held that day or any day in this case. No party ever presented any evidence.

On November 17, 2015, the court filed an order granting the Lottery Commission the declaratory and injunctive relief it sought. (R. pp. 11-12.) The circuit court "ORDERED that [Glassmeyer] is PERMANENTLY restrained and enjoined from seeking to obtain the (1) full names; (2) addresses; (3) telephone numbers; and

(4) forms of identification of all lottery winners and claimants." (R. p. 12.) The order states that it "concludes the above-captioned lawsuit[.]" (R. p. 12.)

The order did not address Glassmeyer's motions to dismiss and strike, and it did not address Glassmeyer's counterclaims. (R. pp. 1-12.) It did not discuss the procedural posture that led to it being granted at all. (R. pp. 1-12.) The order found as facts things that Glassmeyer neither stated in his answer and counterclaim nor admitted in response to the Lottery Commission's complaint. (R. pp. 1-12, 20-161.)

Glassmeyer moved to reconsider. (R. pp. 171-207.) The court denied his motion to reconsider by order filed May 17, 2016, stating that "[t]he Court properly ruled on Plaintiff's motion for judgment on the pleadings by granting judgment in Plaintiff's favor. Moreover, the Court properly denied the Defendant's motion to dismiss, and properly granted his motion to strike the Plaintiff's request for attorney's fees."[1] (R. p. 13, 15.)

This appeal followed.

## STATEMENT OF FACTS

Glassmeyer sent FOIA requests to the Lottery Commission seeking information concerning lottery winners who claimed prizes of or over a million dollars over a period of time, including their names, addresses, telephone numbers, the dates and gross amounts of their claims, and forms of identification that they presented to the Lottery Commission to claim their prizes. (R. p. 21.) The Lottery Commission, in response, adopted a new policy regarding responses to FOIA requests and, apparently, chose to

[1] While the November 17, 2015, order did not state that it ruled on Glassmeyer's motions at all, Glassmeyer notes that the Lottery Commission has not appealed Judge Manning's ruling that Glassmeyer's motion to strike the Lottery Commission's prayer for attorney's fees has been granted.

avoid compliance with Glassmeyer's FOIA requests as much as the Lottery Commission believed it could get away with doing. (R. pp. 21-24, 30-38.)

The Lottery Commission withheld a great deal of the information Glassmeyer requested. (R. pp. 34-38.) For some of the lottery winners at issue, the Lottery Commission provided Glassmeyer with the gross dollar amount of their claims, the dates of their claims, their home towns and states of residence, and the name of the lottery games they won. (R. pp. 34-38.) More than 15 days after Glassmeyer's request, the Lottery Commission provided him the same information for other lottery winners who fell within the scope of his request. (R. pp. 37-38.) The Lottery Commission decided it would not disclose the lottery winners' names, addresses, telephone numbers, and forms of identification to Glassmeyer. (R. pp. 23-24, 34-36.)

The Lottery Commission also sent letters to the lottery winners inviting them to sue the Lottery Commission (but not Glassmeyer) to attempt to prevent disclosure of information regarding them. (R. pp. 24, 31, 40, 45-51, 150-51.) Some lottery winners did so, though they did not make Glassmeyer, whose right to receive the information under FOIA was what was at issue, a party to those suits. (R. pp. 53-147, 150-51, 158.) The Lottery Commission consented to a permanent injunction against itself in one of those suits, and that injunction was ordered, by the same judge whose order is the subject of this appeal, largely as a result of the Lottery Commission's complicity and failure to defend the suit. (R. pp. 83-94, 132-47, 150-51.) The Lottery Commission wanted the plaintiffs in any such suits to win them. (R. pp. 150-51, 158.) To call those suits sham proceedings is charitable. (R. pp. 24, 31, 40, 45-51, 53-151, 158.)

Glassmeyer notified the Lottery Commission that he did not believe that that the Lottery Commission's responses complied with FOIA. (R. pp. 24, 41.) He then made a FOIA request seeking only the names of the lottery winners who claimed prizes of a million dollars or more. (R. pp. 24, 41.) The Lottery Commission did not respond to that request at all. (R. pp. 24, 150.)

Instead, the Lottery Commission sued Glassmeyer for making FOIA requests. (R. pp. 20-28.) It sought declaratory relief that it did not have to respond to Glassmeyer's FOIA requests and a permanent injunction to prevent Glassmeyer from asking for such information. (R. pp. 27-28.) It sought to have Glassmeyer be ordered to pay the Lottery Commission's attorney's fees incurred in suing him because he asked the Lottery Commission for some information. (R. pp. 28.)

## STANDARD OF REVIEW

Rule 12(c), SCRCP, provides for a judgment on the pleadings in a proper case. The standard of whether such a motion should be granted is the same as for a motion under Rule 12(b)(6), SCRCP, and the appellate court applies the same standard to the review of an order granting such a motion. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). In deciding a motion for judgment on the pleadings, the trial court may not consider matters outside the allegations of the pleadings. Falk, 341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234.

The ruling on a motion to dismiss under Rule 12(b)(6), SCRCP – and, thus, also on a motion for judgment on the pleadings – for failure to state facts sufficient to

constitute a cause of action must be based solely upon the allegations set forth in the complaint. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). Where the factual allegations of a complaint do not entitle a plaintiff to relief on any theory of the case, a 12(b)(6) motion is properly granted. Id. In deciding a 12(b)(6) motion, a court deems all of the complaint's well pleaded factual allegations as true for the purposes of deciding the motion; however, conclusions of law and other summary, conclusory allegations stated in the complaint are not deemed admitted for the motion's purposes. See Fields v. The Melrose Ltd. Partnership, 312 S.C. 102, 104, 439 S.E.2d 283, 284 (Ct. App. 1993); Carolina Winds Owners Ass'n. v. Joe Harden Builder, 297 S.C. 73, 76, 374 S.E.2d 897, 899 (Ct. App. 1988).

Similarly, "[a] motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim." Charleston County Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). "A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case." Stiles, 318 S.C. at 300. The question is whether in the light most favorable to the defendant asserting the counterclaim, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). The counterclaim should not be dismissed merely because the trial court doubts the counterclaiming defendant will prevail in the action. Id.

## ARGUMENT

To say that the court's order is procedurally incorrect is an understatement, to say the least. What is more, the order is frightening in the implications of its substance.

It granted a declaratory judgment to a government body in a suit that body brought simply because a citizen requested some information under FOIA, even though FOIA permits only a citizen of South Carolina to bring such a suit. S.C. Code Ann. § 30-4-100(a). It granted an injunction against a citizen that is shockingly broad, an injunction to which the Lottery Commission was not entitled and which serves no lawful purpose. Indeed, the injunction issued does not even serve the purposes for which the order states it was granted.

A legal principle to keep in mind in reviewing the substantive result reached in this case is that information covered by the exemptions from mandatory disclosure listed in S.C. Code Ann. § 30-4-40 are the *only* things that that a public body is permitted to withhold in response to a FOIA request. There are no other exemptions. What may be the worst thing *substantively* about the order is that it would permit a public body to *permanently* keep a citizen from even seeking information that is plainly outside the scope of any exemption to disclosure under FOIA. (R. pp. 11-12.)

A legal principle to keep in mind in reviewing the process by which the lower court reached its result in this case is that, on a motion for judgment on the pleadings, the court views the pleadings in the light most favorable to the non-moving party and must accept as true the factual allegations of the non-movant's pleading. See Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman's Ins., 302 S.C. 234. Further, no motion directed at Glassmeyer's counterclaims was before the court *at all*. (R. pp. 212-35.) What may be the worst two things *procedurally* about the order is that it has the effect of ruling against Glassmeyer on his counterclaims, without a trial, 1) not on the basis

of what he pled and 2) where no motion seeking judgment against Glassmeyer on his claims was before the court. (R. pp. 1-12, 212-35.)

## I. A summary list of problems with the order reveals deep flaws in the circuit court's decision.

1) All the Lottery Commission sought at the time was a motion for judgment on the pleadings, which was not directed at Glassmeyer's counterclaims, yet the order makes findings of fact as to things that Glassmeyer did not admit in his answer and counterclaim. (R. pp. 1-12.) Further, given the procedural posture of the case and the motions that were before the circuit court, the only result that could have been reached lawfully within those constraints was one that left Glassmeyer's counterclaims pending.

2) The order speaks of evidence and the failure to offer evidence, when each party's motions were the sort that had to assume the truth of the facts alleged by the other party and on which it would have been improper to offer evidence. See Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman's Ins., 302 S.C. 234.

3) The order makes numerous assertions of fact that, even if they could possibly be determined to be true as a matter of fact after a trial, were not alleged or admitted by Glassmeyer and are certainly not true *as a matter of law.* (R. pp. 4-11.)

4) The circuit court made a number of blanket statements as findings and conclusions that are either overbroad, erroneous, or both. Among them are:

    a. The order states that Glassmeyer submitted "a long line of FOIA requests" to the Lottery Commission (R. p. 1); however, Glassmeyer submitted three FOIA requests to the Lottery Commission in this case.

(R. pp. 21, 24.) Three of something is not a long line; it is barely a line at all. The order tries to paint Glassmeyer as though he had engaged in abusive conduct in making FOIA requests of the Lottery Commission, but there is nothing in the record to indicate that he did. (R. pp. 1-12.)

b. "The release of a claimant's personal identifying information will result in an unreasonable invasion of a claimant's personal privacy. The release of such personal identifying information is not required by and would not further the purpose of the FOIA." That is not true, and it is certainly not true as a matter of law. (R. p. 5.)

c. "An individual's personal identifying information has nothing to do with the government operating in secret." (R. p. 5.) Really? Never? Categorically? Is the circuit court saying there can never be any overlap between information that tends to identify someone and information that tends to indicate whether government is operating in secret? That is not true, and it is certainly not true as a matter of law.

d. "A lottery claimant's identity as the recipient of those winnings does not pertain to government activity in secret and involves personal privacy and personal identifying information." (R. p. 5.) Is the circuit court saying there can never be any overlap between information that tends to identify someone as a lottery winner and information that tends to indicate whether government is operating in secret (as there would be if a lottery result were rigged)? That is not true, and it is certainly not true as a matter of law. Further, just because some information merely

implicates personal privacy or personal identifying information does not make it exempt from disclosure under FOIA. S.C. Code Ann. § 30-4-40.

e. "Disclosure of claimants' personal identifying information would invade the privacy of the claimants and their families, subject claimants and their families to unreasonable publicity, expose claimants and their families to threats against their safety, and otherwise be an unreasonable intrusion into the life and daily affairs of claimants." (R. p. 6.) That is not true, and it is certainly not true as a matter of law.

f. "The invasion of privacy that would result from the release of claimants' personal identifying information also would be unreasonable." (R. p. 6.) That is not true, and it is certainly not true as a matter of law.

g. The court apparently found as facts six alleged unfortunate reported incidents of crime against lottery winners. (R. pp. 6-7, 22.) Not only was it error to find these facts just because the Lottery Commission alleged them to be, no trial was had, so they could not be examined in an appropriate context even if they are true. How many lottery winners are there per year in, say, the United States? In South Carolina? Perhaps these six incidents represent tiny fractions of some very large numbers. They probably do represent a very small fraction of lottery winners. The circuit court prevented there from ever being a trial at which that might have been demonstrated.

h. The Lottery Commission "has demonstrated" – *how*, since there was no trial? – "that its claimants will suffer immediate, irreparable harm to their personal privacy and safety without the entry of a permanent injunction." (R. p. 7.) That is not true as a matter of fact and certainly not true as a matter of law. Further, even if this had been demonstrated, it would be irrelevant, since the Lottery Commission, not the lottery winners, is the plaintiff in this case.

i. "[T]he direct harm to the [Lottery Commission] from the release of its claimants' personal identifying information would be the likely erosion of public confidence in the lottery and the [Lottery Commission] and the reduction in the number of players, thereby harming the [Commission] and its ability to effectively carry out its mission[,]" and "the release of its claimants' person identifying information would also likely create legal exposure for the [Commission], thereby further harming the agency." (R. p. 9.) That is not true, and it is certainly not true as a matter of law. That is not the sort of thing that could be decided on the basis of the pleadings unless Glassmeyer admitted to the truth of such allegations in his responsive pleading, which Glassmeyer did not do. (R. pp. 20-28, 148-161.) Like so many other findings in the order, this appears to have been either plucked from the air or accepted on faith from the arguments made by Lottery Commission's counsel. Arguments of counsel are not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001);

Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). Further, *on what legal theory would the lottery claimants have any claim against the Lottery Commission for releasing their information under FOIA?* No such claim exists.

j. "[T]he potential harm to [Glassmeyer] is minimal, if at all, because he is able to confirm the legitimacy of lottery winnings and payouts and to ensure that the [Lottery Commission] is not acting in secret." (R. p. 10.) The law, in contrast to this finding, is that a violation of Glassmeyer's rights under FOIA "must be considered to be an irreparable injury for which no adequate remedy at law exists." S.C. Code Ann. § 30-4-100(a).

k. "And even though there were bald allegations and oblique, unsubstantiated references to public corruption made by [Glassmeyer] at the hearing on this matter, there is absolutely no evidence or any other credible information to suggest that the [Lottery Commission] has engaged in any corrupt activity, nor were there any allegations of any sort of corruption or improper conduct regarding the payment of claims raised by [Glassmeyer] in his counterclaim." (R. p. 10.) These were motions directed at the pleadings. It would have been outside the scope of the motions and indeed improper to attempt to offer evidence. Falk,

341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234. Further, it is not incumbent upon Glassmeyer to prove that there has been any corruption. He does not have to have a reason for wanting the information from the Lottery Commission. At trial, it would have been incumbent upon the Lottery Commission to prove an exemption to mandatory disclosure under FOIA. If the Lottery Commission is allowed to withhold its information in the absence of proving that an exemption applies, how would Glassmeyer be able to go about trying to discover *whether* there was any such corruption?

l. In paragraph 46 of the order, the circuit court alludes to the protection of claimants from disclosure about their personal information without their consent. (R. p. 11.) A look at the transcript of the motions hearing that resulted in this order reveals that Lottery Commission's counsel stated that the purpose of the Lottery Commission's form (a copy of which is attached to Glassmeyer's answer and counterclaim) that lottery winnings claimants submit is for the claimants to give informed consent. (R. p. 233 ln. 13-17.) Given what the form states, that informed consent is to the very disclosure the court apparently believes, somehow, that the lottery claimants have not consented. (R. p. 160.)

5) These findings were made in the absence of a factual record. This was reversible error.

6) The order does not address, and does not address the effect of, the fact (a fact for our purposes, as it was pled by Glassmeyer) that the claimants who claim

their lottery winnings from the Lottery Commission do so by completing a form that explicitly informs them that the information they submit may be subject to release under FOIA. (R. pp. 155-56, 160.) That form also releases the Lottery Commission from any liability to a claimant for disclosing information on the form pursuant to a FOIA request. (R. p. 160.)

7) Virtually throughout, the circuit court's order appears to equate "personal identifying information" with information that it would constitute an unreasonable invasion of personal privacy to disclose. (R. pp. 1-12.) These concepts are far from identical. Equating any information that serves to identify a person with the very different concept of information that it would constitute an unreasonable invasion of privacy to disclose is an error that appears to have infected the circuit court's entire analysis in this case. Plenty of information that serves to identify a person is not something it would constitute an unreasonable invasion of privacy to disclose.

8) Names and addresses are not very private information, anyway. Among their inherent purposes are to identify a person to those who do not know him well. What a person's name is and where he lives are not private matters, and certainly not inherently so. The circuit court appears to have ruled that names and addresses are the sort of *very* private information that falls under FOIA's unreasonable invasion of privacy exemption. This is error.

9) The scope of the injunction against Glassmeyer is frighteningly broad. The court did not enjoin him from obtaining certain information from the Lottery Commission. The court did not enjoin him from making FOIA requests of the

Lottery Commission for certain information. No, the court "ORDERED that Defendant is PERMANENTLY restrained and enjoined from seeking to obtain the (1) full names; (2) addresses; (3) telephone numbers; and (4) forms of identification of all lottery winners and claimants." (R. p. 12.) Period. Of all lottery winners and claimants, whether their status as such is known to Glassmeyer or not. Whether that information is sought from *any source*. Forever. This is certainly not a proper case for an injunction against Glassmeyer, but, even if it were, *this* injunction would be impermissibly broad.

10) All the Lottery Commission has to do if it determines that Glassmeyer has requested some exempt information it believes it may lawfully withhold is to respond to his FOIA request and tell him so. That is not irreparable harm, to anyone. That is writing a letter. The order fails to link up the harm it envisions in the absence of an injunction to how the issuance of the injunction is *necessary* to prevent that harm. The circuit court equated a perceived harm from *disclosure* of the information at issue with *asking for* the information at issue. That equation, however, does not make sense.

## II. The circuit court made factual determinations about disputed matters – and viewed them in a light unreasonably and impermissibly favorable to the Lottery Commission – without ever having held a trial, and the scope of the decision in the order exceeded the scope of the motions that were before the circuit court.

The circuit court ended Glassmeyer's counterclaims without ever having held a trial or even a hearing on a motion about them. (R. p. 12.) The Lottery Commission's motion for judgment on the pleadings was not directed at Glassmeyer's counterclaims. The Lottery Commission's counsel stated to the court that "our motion for judgment

on the pleadings on – is as to our case in chief. It's not to his counterclaim." (R. p. 229 ln. 24 through p. 230 ln. 1.) Glassmeyer has never had any opportunity to be heard with regard to his counterclaims. No motion directed at them was before the court. The circuit court exceeded the scope of the motions that were before it by rendering a decision that ended the case, including the counterclaims, altogether. (R. p. 12.)

At a minimum, "due process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property." LaSalle Bank Natl. Assn. v. Davidson, 386 S.C. 276, 279, 688 S.E.2d 121, 122-23 (2009) (quoting State v. Brown, 178 S.C. 294, 300, 182 S.E. 838, 841 (1935)).

Furthermore, the circuit court's order is replete with factual findings that are statements of things that Glassmeyer did not admit in response to the Lottery Commission's complaint and did not allege himself. (R. pp. 1-12.) In deciding a motion for judgment on the pleadings made by Glassmeyer's opponent, the circuit court was not permitted to look outside what Glassmeyer pled. See Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman's Ins., 302 S.C. 234. The circuit court made a decision on the factual merits of the case that exceeded the narrow bounds of what was before the court at the time.

The circuit court's order is reversible error. The circuit court thumbed its nose at the procedural rules and standards applicable to motions directed at the pleadings. It is incumbent upon this court to reverse.

## III. The Lottery Commission lacks standing in this case, and the court should have dismissed the Lottery Commission's claims.

"Standing refers to '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" Powell ex rel. Kelley v. Bank of America, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting Black's Law Dictionary 1413 (7th ed. 1999)). Standing goes to the question of a party's right to bring a proceeding. Baird v. Charleston Cnty., 333 S.C. 519, 530 & 530 n. 7, 511 S.E.2d 69 (1999). It is fundamental that only a party with standing may maintain an action. See id.

Standing "consists of the following three elements" as noted by the South Carolina Supreme Court:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Sea Pines Assn. for the Protection of Wildlife, Inc. v. S.C. Dept. Natural Resources, 345 S.C. 594, 601, 550 S.E.2d 287 (2001) (internal quotation and quotation-related punctuation marks omitted). "The first element requires *the plaintiff* to suffer an injury in fact, or a particularized harm." Id. (emphasis added).

Because FOIA controls declaratory judgment claims that fall within the scope of FOIA, the Lottery Commission lacks standing to bring the declaratory judgment claim on which the circuit court gave it victory. FOIA similarly prevents a non-citizen public body, such as the Lottery Commission, from seeking injunctive relief about a

FOIA request. Because the Lottery Commission could suffer no harm of any sort in the absence of an injunction like the one it obtained in this case, the Lottery Commission lacks standing to prosecute its claim for injunctive relief as well.

It was reversible error for the circuit court to grant any relief to the Lottery Commission on its claims at all.

**a. The Lottery Commission lacks standing under FOIA, since only South Carolina citizens, not parts of the government, may bring suit under FOIA.**

FOIA provides a remedy only to South Carolina citizens, as S.C. Code Ann. § 30-4-100(a) allows only a citizen of this state, which is not what the Lottery Commission is, to seek an injunction or declaratory relief concerning an issue of FOIA compliance. The General Assembly provided the following in S.C. Code Ann. § 30-4-100(a):

> Any *citizen of the State* may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

(Emphasis added.)

The Lottery Commission acknowledges and alleges in its complaint that it is a public body and part of the government of South Carolina and that Glassmeyer is the party who is a citizen of South Carolina. (R. p. 20.) The Lottery Commission is "a

public commission and an instrumentality of the State." S.C. Code Ann. § 59-150-30. It is a part of the government of the State of South Carolina. Id.

The complaint prays for a judgment to declare that the Lottery Commission's release of information such as the name, complete address, telephone numbers and forms of identification submitted to Lottery Commission by lottery winners would be an unreasonable invasion of the winners' personal privacy and thus may be withheld under FOIA under S.C. Code Ann. § 30-4-40(a)(2). (R. p. 27.) The Lottery Commission clarified that it is seeking this relief under the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.* That is fatal to the Lottery Commission's declaratory judgment claim, because FOIA defines the scope of who may seek a declaratory judgment about the application of FOIA to a set of facts. S.C. Code Ann. § 30-4-100(a).

"The general rule of statutory construction is that a specific statute prevails over a more general one." Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995). "Generally, specific laws prevail over general laws, and later legislation takes precedence over earlier legislation." Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993); State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993) (same). Where there is a conflict between statutes, the more recent and specific legislation controls. Porter v. S.C. Pub. Serv. Comm'n., 327 S.C. 220, 224 n. 3, 489 S.E.2d 467, 469 n. 3 (1997). "A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." Gardner v. Biggart,

308 S.C. 331, 333, 417 S.E.2d 858, 859 (1992) (quoting Hay v. S.C. Tax Comm'n, 273 S.C. 269, 273, 255 S.E.2d 837, 840 (1979)).

Here, S.C. Code Ann. § 30-4-100(a) is more specific than the Uniform Declaratory Judgments Act. The Declaratory Judgments Act provides generally that "[a]ny person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30. FOIA, on the other hand, limits those who "may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter" to "citizen[s] of the State[.]" S.C. Code Ann. § 30-4-100(a). In so doing, "[t]he legislature has specifically conferred standing upon any *citizen of South Carolina* to bring a FOIA claim against a public body for declaratory or injunctive relief, or both." Freemantle v. Preston, 398 S.C. 186, 195, 728 S.E.2d 40, 45 (2012) (emphasis added). The word "citizen" is not given a specific definition in FOIA, so we turn to its normal and customary meaning. See Branch v. City of Myrtle Beach, 340 S.C. 405, 409–10, 532 S.E.2d 289, 292 (2000) ("When faced with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning."). Webster's defines *citizen* as "a member of a state or nation who owes allegiance to it by birth or naturalization and is entitled to certain rights, as the right to vote, etc." Webster's New World Dictionary & Thesaurus 105 (1996); accord Black's Law Dictionary 100 (2d Pocket Ed. 2009) ("citizen, *n.*, 1. A

person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges.") The word *citizen* comes from the Latin *civis*, "townsman." Webster's, *supra* at 105.

Two reported decisions in South Carolina have featured public bodies as plaintiffs in actions that sought a declaratory judgment under FOIA. City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 323 S.C. 384, 475 S.E.2d 747 (1996); South Carolina Tax Commission v. Gaston Copper Recycling Corporation, 316 S.C. 163, 447 S.E.2d 843 (1994). Neither of those decisions discuss any issue concerning the standing of a public body to bring such a suit; hence, neither case holds that a public body may bring an action under FOIA. Id. "Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). Accordingly, the question appears to be a novel one under South Carolina case law; however, application of the principles of statutory construction reveals that the Lottery Commission, which is a part of the government of South Carolina, is not a citizen and cannot bring a suit under FOIA. While the exact limits of who or what is a citizen for FOIA purposes may include a private corporation, see, e.g., Evening Post Publishing Co. v. Berkeley Cnty. Sch. Dist., 392 S.C. 76, 83, 708 S.E.2d 745 (2011), it is not logical that the term *citizen* was intended by the General Assembly to include a part of the government, which is what the Lottery Commission is. This would not be consistent with the general understanding of the word *citizen*. Further, allowing government bodies to bring suits under the Declaratory Judgments Act to make an end-

run around FOIA's restriction of declaratory relief actions to citizens would run counter to a specific limitation (to citizens) imposed by the General Assembly. See S.C. Code Ann. § 30-4-100(a). That would upend the canons of statutory construction, and for no good reason. See Atlas Food Sys., 319 S.C. at 558.

Also, the Uniform Declaratory Judgments Act was enacted in 1948, as noted in Williams Furniture Corp. v. So. Coatings & Chem. Co., 216 S.C. 1, 56 S.E.2d 576, 577 (1949). FOIA was enacted in 1978. FOIA is the more recent statute, so its provision stating that it is "[a]ny *citizen of the State* [who] may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce" it, S.C. Code Ann. § 30-4-100(a), controls over broader, less specific, and older language in the Uniform Declaratory Judgments Act. Porter, 327 S.C. at 224 n. 3; Langley, 313 S.C. at 403; Sullivan, 310 S.C. at 314.

Further, embodied in FOIA "is the principle of an open, transparent system of government, vital to maintaining an informed electorate and preventing the secret exercise of power with its potential corruption." Disaboto v. S.C. Assn. of Sch. Administrators, 404 S.C. 433, 439, 746 S.E.2d 329, 332 (2013). It would fit poorly with the legislative mandate that the provisions of FOIA "must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings" for the law to permit the government operated by those officials to bring suit against a person because he has made a FOIA request. S.C. Code Ann. § 30-4-15. FOIA is to be liberally construed to carry out the purpose mandated by the legislature. Campbell v. Marion Cnty. Hosp. Dist., 354 S.C. 274, 281,

580 S.E.2d 163, 166 (Ct. App. 2003). FOIA exists to make government information accessible to the public at a minimum of cost, expense, and delay. S.C. Code Ann. § 30-4-15. It does *not* exist so that a government public body may use litigation as a club against those whose FOIA requests it does not like. See id.

Permitting government entities to bring suits against those who make FOIA requests would have the chilling effect of discouraging citizens from making such requests; thus, it would run counter to FOIA's purpose and its interpretive mandate. See id. Such would not be "a reasonable and practical construction consistent with the purpose and policy expressed in the statute." Gardner, 308 S.C. at 333.

Because only a citizen of South Carolina may bring an action seeking declaratory or injunctive relief about the application of FOIA, the Lottery Commission, which is a part of South Carolina government and is not a citizen, may not do so. S.C. Code Ann. § 30-4-100(a). It was reversible error for the circuit court to rule otherwise. The circuit court should have denied the Lottery Commission's motion for judgment on the pleadings and granted Glassmeyer's motion to dismiss the Lottery Commission's claims.

**b. The Lottery Commission lacks standing to seek an injunction where the claimed "harm" it seeks to have the court prevent would not be harm of any kind to the Lottery Commission, and the Lottery Commission was not entitled to an injunction.**

Absent specific authority deviating from the general rule (such as that for citizen suits under S.C. Code Ann. § 30-4-100), the standard for the issuance of a permanent injunction is substantially the same as that for the issuance of a preliminary injunction, except that the plaintiff must show actual success on the merits rather than a likelihood of success on the merits. Amoco Prod. Co. v. Village of Gambell, 480

U.S. 546 n. 12 (1987). The party must show that 1) he has succeeded on the merits, 2) he will suffer immediate, irreparable harm unless the injunction is issued, and 3) he has no adequate remedy at law. Id.

The facts alleged in the complaint could not establish that the Lottery Commission has suffered or is likely to suffer irreparable harm. The Lottery Commission's complaint alleges no injury or threatened injury to the Lottery Commission. (R. pp. 20-28.) In its complaint, the Lottery Commission states "[b]ecause of [Glassmeyer]'s relentless efforts to obtain personal information related to South Carolina lottery winners, [the Lottery Commission] believes that there is a significant, immediate risk of irreparable harm to the personal privacy and safety of lottery winners and their families in South Carolina without the entry of injunctive relief." (R. p. 26.) What the Lottery Commission alleges to be the irreparable harm would be the disclosure of information that is identifying information of lottery winners, who are not the Lottery Commission. (R. pp. 25, 26.) The Lottery Commission has failed to allege that *it* would suffer *any* harm absent an injunction. (R. pp. 20-28.) The Lottery Commission has not alleged that *it* has suffered an injury or is in danger of suffering a prospective injury concerning the matters subject of this case. (R. pp. 20-28.) Regardless of the merits of the underlying question about how private the information involved is, the Lottery Commission's claim for injunctive relief must fail, when the law is applied, because the Lottery Commission cannot seek an injunction to prevent threatened harm to someone else. Amoco Prod. Co., 480 U.S. 546 n. 12.

There was nothing before the court in anyone's pleadings giving any indication that the Lottery Commission or even lottery winners will suffer irreparable harm without an injunction. No public body of South Carolina suffers harm simply by performing its legislated responsibilities under FOIA. A public body may even be compensated for its efforts in searching for and compiling the requested information under FOIA. See S.C. Code Ann. § 30-4-30(b). If a FOIA request is denied, no search for or compilation of the information is even done. The notion that the Lottery Commission would somehow be harmed by disclosing the information, as the order found, does not make sense. (R. p. 9.) Why, the lottery claimants have even released the Lottery Commission from any liability for disclosing information about them in response to a FOIA request. (R. p. 160.)

If proven, the facts alleged in the complaint could not establish that the Lottery Commission has no adequate remedy at law. Without an injunction, other citizens may make FOIA requests seeking information from the Lottery Commission along the same lines as that requested by Glassmeyer. The Lottery Commission's adequate remedy at law is to receive such requests and deny them if the Lottery Commission believes the information requested is exempt from disclosure under FOIA. Assuming, for the sake of argument, that the Lottery Commission could even have standing to assert a claim based upon a perceived harm suffered by an unidentified group of lottery winners, the Lottery Commission still stands in a unique position to protect lottery winners as the administrator of the South Carolina Education Lottery and a public body under FOIA: simply deny a written request for what Lottery Commission deems is exempt information and then, if the requesting citizen brings a lawsuit, defend on that basis.

Assuming the Lottery Commission is correct to deny the request, that takes care of it. There is no allegation in the Lottery Commission's complaint or statement in the court's order that the statutorily prescribed procedure for litigating a FOIA claim (which is being circumvented here) is defective or insufficient. (R. pp1-12, 20-28.)

The circuit court should have denied the Lottery Commission's motion for judgment on the pleadings and granted Glassmeyer's motion to dismiss the Lottery Commission's claim seeking an injunction. That the opposite result was reached here is reversible error.

## IV. The lower court erred in issuing a shockingly broad injunction that prevents Glassmeyer from simply even asking for this sort of information.

The injunction the court imposed on Glassmeyer is extremely broad in scope. It would be too broad even if *an* injunction were proper (which it of course is not). An injunction should never be issued that is broader in scope than what is necessary to stop the harm it is designed to prevent. Goldberg v. Trakas, 206 F.Supp. 867 (E.D.S.C. 1962); see Gibbs v. Kimbrell, 311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993) (injunction precluding violation of covenants should not extend beyond date that covenants would expire by their terms).

Here, the circuit court "ORDERED that Defendant is PERMANENTLY restrained and enjoined from seeking to obtain the (1) full names; (2) addresses; (3) telephone numbers; and (4) forms of identification of all lottery winners and claimants." (R. p. 12.) It applies to all lottery winners and claimants, whether their status as such is known to Glassmeyer or not. (R. p. 12.) Glassmeyer could unwittingly run afoul of this injunction. It applies regardless of the source from which that

information is sought. (R. p. 12.) A lottery winner could contact Glassmeyer and want to give him this information, but would Glassmeyer dare ask for it, lest he violate the circuit court's order? Not the way the order is written. Further, this injunction lasts forever, so that, no matter what else ever happens, no matter how much the situation changes, Glassmeyer will be bound never to ask for any of this information, from any source, under any circumstances, for the rest of his days. (R. p. 12.)

The order further fails to connect the harm it envisions in the absence of an injunction to how the issuance of this or any injunction is needed to prevent that harm. The court appears to have equated a perceived harm from *disclosure* of the information at issue with *asking for* the information. This supposed "harm," though, is something that the court's order relates to the Lottery Commission's disclosure of the information, not to Glassmeyer seeking the information – yet the latter is what the court has enjoined. (R. p. 12.) Asking for the information, which is the enjoined activity, is not what causes or even could cause the "harm" perceived by the court. (R. pp. 1-12.)

The circuit court erred reversibly in issuing a sweepingly broad injunction that does not even address the so-called "harm" it states that it is imposed to prevent.

## V. The circuit court erred in concluding that the Lottery Commission was entitled to the declaratory judgment it sought. The information requested does not fall within any FOIA disclosure exemption (and certainly is not exempt as a matter of law), and neither the Lottery Commission nor the circuit court can create a new exemption.

The few exemptions to a public body's obligation of mandatory disclosure of information requested under FOIA are listed in S.C. Code Ann. § 30-4-40. At issue in this case is the following:

> (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. Information of a personal nature shall include, but not be limited to, information as to gross receipts contained in applications for business licenses and information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap. This provision must not be interpreted to restrict access by the public and press to information contained in public records.
>
> . . .
>
> (b) If any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of this chapter.

S.C. Code Ann. § 30-4-40(a)(2)& (b).

Under FOIA, "the exemptions should be narrowly construed to not provide a blanket prohibition of disclosure in order to 'guarantee the public reasonable access to certain activities of the government.'" Evening Post, 392 S.C. at 83 (quoting Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996)). "The burden of proving that an exemption exists lies with the government." Id. "The determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and the nonexempt material disclosed." Id. at 82.

The analysis of a case involving the potential application of FOIA's unreasonable-invasion-of-personal-privacy exemption involves balancing an individual's privacy interest against the need or desire of the public generally to have access to the type of information in question. Burton v. York County Sheriff's Dept., 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004). The interest in the information that is subject of the inquiry is not that of the individual requester, it is the public's "general interest" in being able to access information of the type at issue. Id. The reason that the particular citizen who made the request wants the information is usually irrelevant. See id.; S.C. Code Ann. §§ 30-4-40, -50.

The balancing under this test is not done on equally weighted scales. The test is, and is supposed to, favor the inapplicability of the exemption. See Evening Post, 392 S.C. at 83; Fowler, 322 S.C. at 468. FOIA is to be liberally construed to carry out the purpose mandated by the legislature, which is essentially citizens' open access to information about the activities of their government in all areas. S.C. Code Ann. § 30-4-15; Campbell, 354 S.C. at 281. The scales are weighted more heavily in favor of this openness than they are toward privacy concerns. See id. After all, for the unreasonable-invasion-of-personal-privacy exemption to apply, the public body has to prove not just that the information is of a personal nature and not just that disclosing it would constitute an invasion of privacy; rather, the public body must prove that disclosure of the information would – not just *could*, but necessarily *would* – result in an *unreasonable* invasion of personal privacy. S.C. Code Ann. § 30-4-40(a)(2).

If the material sought by a FOIA request is not exempt from disclosure under S.C. Code Ann. § 30-4-40, the public body receiving the request must disclose the

information, period. S.C. Code Ann. § 30-4-30(a) & (c). The requesting citizen has a *right* to get the information. S.C. Code Ann. § 30-4-30(a).

The information the circuit court decided the Lottery Commission is authorized to withhold is not information that is exempt from disclosure under FOIA. (R. pp. 1-12.) The information sought by Glassmeyer was not "[i]nformation of a personal nature where the public disclosure thereof would constitute *unreasonable invasion* of personal privacy." S.C. Code Ann. § 30-4-40(a)(2) (emphasis added).

The only right a person has regarding privacy under the South Carolina Constitution is the right to be free from *unreasonable invasions* of privacy, not even all invasions of privacy. S.C. Const. art. I, § 10 ("Searches and seizures; invasions of privacy"). "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained." Id.

Past case law has not shed much light on this provision of the South Carolina constitution. In 2015, however, our state Supreme Court decided State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), in which the Court stated that physical intrusions into "the privacy interests in one's home are precisely what our state constitutional provision was intended to protect." Id. at 71 n. 7. Not only does providing the information in dispute here not cause any physical intrusion into a lottery claimant's home or even tend to do so, the information sought by Glassmeyer was not about what is going on in a lottery claimant's house but simply an address for the person, where

that house is (or was at the time the claim form was filled out). (R. pp. 21, 34, 160.) Providing the information subject of this case is nowhere near as intrusive as what Counts determined to be an unreasonable invasion of privacy. Id. It is the kind of information typically found in a phone book.

Glassmeyer expects that the Lottery Commission will rely at least in part on the Court of Appeals' recent opinion in Glassmeyer[2] v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015), probably primarily for the contention that disclosure of the lottery claimants' names and addresses would constitute an unreasonable invasion of their personal privacy. It would be wrong to do so. The decision in that case ought to be overruled.

Information of a "personal nature," standing alone, is not what is exempt from mandatory disclosure in response to a FOIA request under S.C. Code Ann. § 30-4-40(a)(2). For the exemption to apply, the invasion of personal privacy that would accompany disclosure of the information would have to so heavily outweigh the public's substantial interest in being able to know the activities of its government that the disclosure necessarily *would* "constitute unreasonable invasion of personal privacy." S.C. Code Ann. § 30-4-40(a)(2).

The sweeping City of Columbia holding, which seems to bolster a reading that a person's name and address are within this exemption, runs counter to the scant South Carolina case law we have that deals with this exemption. In Society of Professional Journalists v. Sexton, 324 S.E.2d 313, 316 (1984), our Supreme Court held that death certificates, which contain much more information of a personal nature than that sought

[2] Glassmeyer recognizes the oddity of his being a party in both that case and this one, but they are otherwise unrelated.

by Glassmeyer in this case or in City of Columbia, did not fall within the unreasonable-invasion-of-personal-privacy exemption. In ACLU, the Court rejected the proposition that "internal investigation reports of law enforcement agencies are *per se* exempt because they contain personal information." 323 S.C. 384. In Burton, 358 S.C. 339, the Court of Appeals held that allegations concerning the sexual practices of off-duty deputy sheriffs constituted the sort of information that could fall within this exemption. Names and addresses do not make the cut of the unreasonable-invasion-of-personal-privacy exemption. This is no more than what may usually be found in a telephone book. Names and addresses are too public, not private enough.

No decision of the South Carolina Supreme Court has considered whether information provided by those who voluntarily submit an application or claim to the government in an attempt to obtain a government employment position (or, as here, government funds) falls within the unreasonable-invasion-of-personal-privacy exemption.

Legislative intention as to what information does fall within this exemption can be seen by looking at FOIA as a whole. FOIA provides in a section regarding "matters declared public information" that "home addresses and home telephone numbers of employees and officers of public bodies revealed in response to a request pursuant to [FOIA] may not be used *for commercial solicitation purposes*." S.C. Code Ann. § 30-4-50 (emphasis added). FOIA also deems as exempt from disclosure "information relating to public records which include the name, address, and telephone number . . . of an individual or individuals who are handicapped or disabled *when the information is requested for person-to-person commercial solicitation of handicapped persons*

solely by virtue of their handicap." S.C. Code Ann. § 30-4-40(a)(2). The natural interpretation to take from this is that the General Assembly intended that home addresses and telephone numbers are the type of information that, under ordinary circumstances, are required to be disclosed in response to a FOIA request. At least two other states' appellate courts have held that home addresses, while "information of a personal nature," were not exempt from disclosure under those states' freedom of information acts. Webb v. Shreveport, 371 So.2d 316 (La. App. 1979); Warden v. Bennett, 340 So.2d 977 (Fla. Dist. Ct. App. 1976).

In City of Columbia, the decision relied on inapposite statutory schemes that have also been interpreted according to their own bodies of jurisprudence, different from the principles that underlie South Carolina's body of FOIA case law. These were the U.S. Freedom of Information Act, 5 U.S.C. § 552, *et seq.* ("US FOIA"), and the Michigan Freedom of Information Act, M.C.L.A. § 15.231, *et seq.* ("Michigan FOIA"). Both US FOIA and Michigan FOIA differ from South Carolina's FOIA in their wording and their interpretation. Indeed, the Supreme Court of South Carolina has unambiguously stated that "federal case law interpreting the US FOIA is not binding in this state because the exemptions contained in [US FOIA] are more expansive than those contained in South Carolina's FOIA." Newberry Pub. Co., Inc. v. Newberry County Commn. On Alcohol & Drug Abuse, 308 S.C. 352, 354 n. 4, 417 S.E.2d 870, 872 n. 4 (1992). Cases interpreting US FOIA and Michigan FOIA should not be seen as persuasive authority in a case about South Carolina's FOIA. See id. The City of Columbia decision should not have relied on such authority.

The Court of Appeals' opinion in City of Columbia conflicts with Burton, Society of Professional Journalists, and Meetze v. Associated Press, 230 S.C. 330, 336 (1956), all of which hold that "one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest." The information in City of Columbia that was at issue was of public interest, just as the information sought in this case is, *because it has the potential to reveal corruption*, among other reasons.

But even if none of that persuades the court, the court should note a big difference between the facts of City of Columbia and the instant case: in the instant case, the individuals who submitted their information to the government did so on a form that explicitly told them that the information might be disclosed in response to a FOIA request. (R. pp. 155-56, 160.) Being informed of that, they chose to submit the information anyway. (R. pp. 155-56, 160.) They gave up any right to claim that disclosure of that information in response to a FOIA request would constitute an unreasonable invasion of their personal privacy. (R. pp. 155-56, 160.) They could have kept any right they might have had to assert such a position; however, they took the money instead. (R. pp. 155-56, 160.)

"The right of privacy is not an absolute right. Some limitations are essential for the protection of right of freedom of speech and of the press and the interests of the public in having free dissemination of news and information." Meetze, 230 S.C. at 336. "At some point, the public interest in obtaining information becomes dominant over the individual's desire for privacy. It has been said that the truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private

nature in which the public has a legitimate interest." Id. at 337 (citing 41 Am.Jur. Privacy § 14); accord Society of Professional Journalists, 324 S.E.2d at 315.

"A person may by his acts, achievements or mode of life become a public character and lose to some extent the right of privacy that would otherwise be his. There are times when one, whether willing or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion and the publication of his connection with such occurrence is not an invasion of his right of privacy." Meetze, 230 S.C. at 337.

The lottery claimants did not have to provide this information to the Lottery Commission. (R. pp. 155-56, 160.) They chose to. (R. pp. 155-56, 160.) They chose to do so under circumstances that made it abundantly clear to them that, whatever privacy interests they might have in that information that would allow it to be shielded from disclosure under FOIA were privacy interests they were giving up. (R. pp. 155-56, 160.)

The Lottery Commission did not advance any argument at the hearing that it is authorized to withhold the information sought by Glassmeyer under S.C. Code Ann. § 30-4-40(a)(4), which exempts from disclosure under FOIA "[m]atters specifically exempted from disclosure by statute or law[,]" and the circuit court did not find that. (R. pp. 212-35.) Glassmeyer thus presents this argument out of an abundance of caution.

The Family Privacy Protection Act provides that, "[e]xcept as provided in Sections 30-2-320 and 30-2-330 of this article, a public body, as defined in Section 30-1-10(B), may not ... (e) intentionally communicate or otherwise make available to the

general public an individual's social security number or a portion of it containing six digits or more or other personal identifying information." S.C. Code Ann. § 30-2-310(a)(1)(e). "'Personal identifying information,' as used in this section, has the same meaning as "personal identifying information" in Section 16-13-510, except that it does not include electronic identification names, including electronic mail addresses, or parent's legal surname before marriage." S.C. Code Ann. § 30-2-310(a)(1)(e).

The text of S.C. Code Ann. § 16-13-510 provides that "personal identifying information" means the first name or first initial and last name in combination with and linked to any one or more of the following data elements that relate to a resident of this state, when the data elements are neither encrypted nor redacted: (1) social security number; (2) driver's license number or state identification card number issued instead of a driver's license; (3) financial account number, or credit card or debit card number in combination with any required security code, access code, or password that would permit access to a resident's financial account; or (4) other numbers or information which may be used to access a person's financial accounts or numbers or information issued by a governmental or regulatory entity that uniquely will identify an individual. The term does not include information that is lawfully obtained from publicly available information, or from federal, state, or local government records lawfully made available to general public. S.C. Code Ann. § 16-13-510(D).

By redacting the driver's license numbers and, possibly, the street addresses of the lottery winners and providing all the other information Glassmeyer requested, including the lottery winners' names, the Lottery Commission could have avoided any

issue about compliance with S.C. Code Ann. § 30-2-310(a)(1)(e). (R. p. 224 ln. 20 through p. 225 ln. 22.)

While the Lottery Commission's reliance (in its letter responses – not in its argument to the circuit court) on these statutes in denying Glassmeyer's early request for names in conjunction with other information was erroneous, any reliance on these statutes in not complying with Glassmeyer's final request for only the names of lottery winners was entirely inapplicable. (R. pp. 34-35.) Further, the Lottery Commission appears to have abandoned this as a basis for not providing the requested information, as it did not argue this in the circuit court. (R. pp. 212-35.)

The circuit court erred in ruling for the Lottery Commission on its declaratory judgment claim and erred in failing to grant Glassmeyer's motion to dismiss that claim.

## VI. The lower court erred in ruling against Glassmeyer on his counterclaims.

The most plain reason why Glassmeyer's counterclaims should survive is because no one made any motion for any sort of judgment on them and they have not yet been tried. Further, the counterclaims would have survived a motion to dismiss in any event. Viewing the pleadings in the light most favorable to Glassmeyer, one must counclude that Glassmeyer's answer and counterclaim states a valid claim for relief for violation of FOIA and a valid claim for abuse of process.

**FOIA violation claim.** Glassmeyer's answer and counterclaim attaches "a copy of a South Carolina Education Lottery Winner Claim Form that was authored by and is (or at least at times material to this case was) used by the Lottery Commission for lottery winners to submit claims to the Lottery Commission[,]" as discussed above. (R. pp. 155-56, 160.) "A copy of any plat, photograph, diagram, document, or other

paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached thereto." Rule 10(c), SCRCP.

The proponent of a FOIA claim does not have to plead around an exemption to mandatory disclosure under FOIA to state a claim. See Evening Post, 392 S.C. at 83 (quoting Fowler v, 322 S.C. at 468). "The burden of proving that an exemption exists lies with the government." Id. "The determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and the nonexempt material disclosed." Id. at 82. Glassmeyer pled that the way the Lottery Commission responded (and failed to respond) to his FOIA requests violated FOIA. (R. pp. 156-57.)

In the light most favorable to Glassmeyer, as the counterclaiming party, the allegations of the answer and counterclaim support Glassmeyer's contention that the lottery prize claimants, having provided information to the Lottery Commission on a form that apprises them that the information about themselves they give on the form may be subject to disclosure under FOIA, have made that information such that providing it to a person making a FOIA request would not constitute an unreasonable invasion of their privacy. (R. pp. 155-57, 160.) (As discussed above, disclosure of that information would not be an unreasonable invasion of personal privacy, anyway.) Also, the attachments to the Lottery Commission's complaint reveal that Glassmeyer's last FOIA request to the Lottery Commission simply sought the names of lottery winners who had won prizes of one million dollars or more. (R. p. 41.) If the circuit court had applied the law, it could not have said as a matter of law that disclosing these names would amount to an unreasonable invasion of privacy, particularly since the

lottery claimants had submitted their names on the form discussed above. (R. pp. 41, 155-56, 160.)

**Abuse of process claim.** The elements of abuse of process are 1) an ulterior purpose and 2) a willful act in the use of the process not proper in the regular conduct of the proceedings. See, e.g., Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 486, 413 S.E. 2d 9, 11 (1991). "Our courts have noted that an abuse of process action may lie if a party prosecutes an entire lawsuit for collateral purposes." D.R. Horton, Inc. v. Wescott Land Co., LLC, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2002) (citing Food Lion, Inc. v. United Food & Commercial Workers Int'l. Union, 351 S.C. 65, 73, 567 S.E.2d 251, 255 (Ct. App. 2002)). In such a case, acts furthering the suit or other process satisfy the "willful act" requirement. See Broadmoor Apts., 306 S.C. at 487 (filing lis pendens constituted willful act where purpose of filing was to gain collateral objective). While the "willful act" often takes the form of a coercive act, coercion is not a necessary component of this element. See id.

Glassmeyer alleged the following:

> The Plaintiff has acted with an ulterior purpose in bringing this lawsuit against the Defendant, such including to discourage him from seeking information from the Plaintiff under FOIA.
>
> The collateral objective of coercing the Defendant into making no more FOIA requests for information about lottery winners from the Plaintiff was the Plaintiff's objective in bringing this lawsuit.
>
> The Plaintiff has acted with an ulterior purpose in inviting the other lawsuits discussed above to be brought against it and in its conduct in those suits, particularly when it had and has no intention of opposing the claims of the plaintiffs in those suits and in fact desired and desires that those plaintiffs win those suits.

> The collateral objective of bolstering its position so as to attempt a better outcome in the instant case and to be in a better position to coerce the Defendant into making no more FOIA requests for information about lottery winners from the Plaintiff was the Plaintiff's objective in in inviting the other lawsuits discussed above to be brought against it and in its conduct in those suits.
>
> The Plaintiff's actions are a willful abuse of process.
>
> The Defendant has been damaged by the Plaintiff's abuses of process.

(R. pp. 157-58.)

Speaking of a circuit court order in another suit the Lottery Commission attached to its complaint and attempted to use to bolster its case, Glassmeyer alleged the following:

> Answering the allegations of paragraph 16 of the Complaint, the Defendant admits that the referenced order states what it states but denies that the order has any effect on the Defendant's rights to receive the information he has requested from the Plaintiff under FOIA. The Defendant further denies that the existence of the order in any way provides or contributes to the Plaintiff having grounds to bring the instant suit. The order is apparently the product of collusive conduct or what is tantamount to collusion. As shown by attachments to the Plaintiff's own Complaint, the Plaintiff invited the lawsuit that resulted in the order, as well other lawsuits, including those reflected by pleadings attached to the complaint, by asking the plaintiffs in those suits to sue the Plaintiff and seek the relief sought in those cases. The Plaintiff wanted and wants the plaintiffs in those lawsuits to win those suits. The Plaintiff did not and does not plan to substantively oppose the relief sought by the plaintiffs in those lawsuits. Those lawsuits do not and did not represent actual live controversies; rather, the Plaintiff (the defendant in those suits) desired and desires the same outcome sought in those suits by the plaintiffs therein. To the extent the order purports to adjudicate the

> Defendant's right to receive the information he has requested from the Plaintiff under FOIA, the order is void and of no effect; the Defendant was not a party to the suit that produced the order, and no one in that suit advocated for the Defendant's rights or position as to the matters involved in that suit. The same is true for all the other suits invited by the Plaintiff in this regard. Further, the order reaches an incorrect conclusion and makes incorrect findings, likely as a result of the Plaintiff's failure to actually defend the suit that created the order.

(R. pp. 150-51.)

That meets the elements of abuse of process. Viewed in the light most favorable to Glassmeyer, the allegations indicate that the Lottery Commission invited the other lawsuits in order to capitulate to them and create at least one order to use in trying to bolster its position against Glassmeyer. (R. pp. 24, 31, 40, 45-51, 53-151, 157-58.) Viewed in the light most favorable to Glassmeyer, the allegations indicate that the Lottery Commission brought this case to punish Glassmeyer, cow him into submitting to the Lottery Commission's unlawful position on FOIA, and make him refrain from asking for the information he sought. (R. pp. 150-51, 157-58.) Looking at the pleadings favorably to Glassmeyer, all of this was done by the Lottery Commission with the aim of avoiding its responsibilities under FOIA and suppressing Glassmeyer's rights under FOIA (R. pp. 150-51, 157-58.)

Glassmeyer's counterclaims would have survived a motion directed at the way they were pled, if someone had made one. It was reversible error for the court to issue a *de facto* dismissal of Glassmeyer's claims.

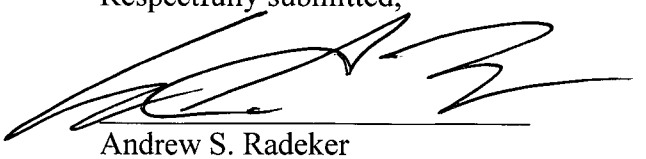
## VII. The lower court circumvented the legislative process to create, in essence, a new FOIA exemption, which is exactly what the Lottery Commission wants.

What the Lottery Commission really wants is a new FOIA exemption, one concerning lottery winners. To create such an exemption is not the job of the circuit court or this court, and to do so indeed runs counter to what a court's duties are. Changes in the law should be sought from the General Assembly. The question of whether the law should be changed to create such an exemption is one for the branch of government that concerns itself with promulgating and changing laws, not the one whose province is "to say what the law is." Marbury v. Madison, 5 U.S. 137, 138 (1803); accord State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) (discussing separation of powers).

## CONCLUSION

This is a lengthy brief, but the circuit court's order is rife with error, and its errors often compound each other. This court should reverse the circuit court, dismiss the Lottery Commission's claims against Glassmeyer, and remand Glassmeyer's claims for trial.

Respectfully submitted,



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November 22, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Judge

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Appellate Case No. 2016-001112

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South Carolina Lottery Commission,.....Respondent,

v.

George S. Glassmeyer,.....Appellant.

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CERTIFICATE OF COUNSEL

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I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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