

22659

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
R. MARKLEY JENNIS JR., CIRCUIT COURT JUDGE
Trial Court Case No.: 2015-CP-10-5757
Appellate Case No. 2016-000555

RECEIVED
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SC Court of Appeals

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

Appellant,

vs.

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

Respondent.

RECORD ON APPEAL

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Certificate of Counsel

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

South Carolina Lawyers Weekly,
By and through its principal,
Dolan Publishing Company,

Plaintiff,

v.

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

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-10-5757

ORDER

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2016 FEB 10 PM 12:55

FILED

This matter has come before this Court pursuant to the Defendant's Motion to Dismiss. This Court carefully considered the notions and memoranda filed by the parties prior to the hearing of the motions on January 7, 2016, in Charleston. Based upon the motion and memoranda and consideration of the argument at the hearing, this Court grants the Motion and dismisses this case. The reasons for this ruling are discussed below.

BACKGROUND

Plaintiff requested that the Defendant Wilson produce any records relating to disciplinary complaints against her or action taken against her as a member of the Bar. Ms. Wilson denied the request stating that she is not, personally, a "public body" under FOIA, that her personal records are not "public records," that they are exempt from disclosure and for the other reasons set forth in her response of July 28, 2015. Her letter noted that grievances had been filed against her by some people who disagree with her and that the Office of Disciplinary Counsel had recommended their dismissal. Accordingly, no formal charges have been filed against her.

RWD 8/1

GROUND FOR DISMISSAL

At the outset, Ms. Wilson contends that she is not a "public body." Under the Freedom of Information Act, rights to inspect or copy public records are limited to those of a "public body." S.C. Code Ann. §30-4-30(a) ("[a]ny person has a right to inspect or copy any public record of a public body"). "'Public body' means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined . . ." §30-4-20(a). Ms. Wilson contends that this rule applies to agencies rather than individuals. Ms. Wilson asserts that the documents that Lawyers Weekly seeks are those belonging to her, personally, rather than to the Solicitor's Office. She contends that the Rules for Lawyer Disciplinary Enforcement governing those documents apply to lawyers rather than to public bodies citing Rule 2, RLDE, Rule 413, SCACR. A "lawyer" is "anyone admitted to practice law in this state . . ."

This Court need not reach this issue because even if Ms. Wilson were a public body subject to FOIA, the documents Lawyer's Weekly seeks are not "public records" under that statute. Even if they were public records, they would also be exempt under FOIA. These grounds are discussed below.

Under FOIA, "[p]ublic record" includes all . . . documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. . . ." §30-4-20. The definition expressly states that "other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act." RLDE Rule 12 closes the documents at issue to the public as discussed below.

EMD/2

Lawyers Weekly wrongly asserts that Rule 12 only limits the disclosure of documents by the Commission on Lawyer Conduct and the Office of Disciplinary Counsel. Instead, the Rule makes the documents at issue here non-public because formal charges have not been filed. RLDE Rule 12 of Rule 413 prohibits the Commission on Lawyer Conduct, the Office of Disciplinary Counsel and the Supreme Court and their staffs from revealing the existence of a complaint against lawyer "while the matter remains confidential," except as provided in that law. Copy attached along with 2015 amendment. During that period of confidentiality, the complaint is expressly non-public. Rule 12(b)(If formal charges are filed against the lawyer, the matter "shall become public 30 days after the filing of the answer" to the charges (emphasis added)). The Rule limits the circumstances under which the Commission on Lawyer Conduct is authorized to release the documents. Rule 12(c)(protection of person or public, violation of criminal law, etc.).

Whether the lawyer may release the documents during the period of confidentiality is discretionary with him or her. Rule 12(d) states that a lawyer "may reveal" the filing of a complaint by a client to establish good cause for withdrawal as counsel, and if the complaint is confidential, the Rule states that the "lawyer may elect to give opposing counsel notice of the motion only without revealing the existence of the complaint." (emphasis added). The court will seal the record or delete references to the complaint from the record if the lawyer requests that records related to the motion be sealed. Rule 12(d). More generally, the lawyer may sign a waiver for the Commission to release the complaint. Rule 12(c)(3). Accordingly, under the Rule, the Complaint and related documents are not public during the period of confidentiality, and the lawyer may not be compelled to disclose then. Therefore, Ms. Wilson may not be compelled to release the documents at issue.

This reading is in accord with an Opinion of the Office of the Attorney General which determined that complaints and related documents were not subject to FOIA. *Ops. Atty. Gen.* June 24, 1981, No. 81-60, 1981 WL 96586. Although the Opinion predated the current RLDE, the pertinent parts of FOIA remain the same. That Opinion determined that disciplinary files are not "public records" under §30-4-20(c) because they are "records which by law are required to be closed to the public" under the former Rule on Disciplinary Procedure section 20A. As noted in that Opinion, "[t]he rules of the South Carolina Supreme Court carry the force and effect of law. See, §§30-4-20(c). 40-5-20 and 40-5-50" The Opinion further concluded that the files would also be exempt from disclosure under section 30-4-40(4) ("[m]atters specifically exempted from disclosure by statute or law") and under 30-4-40(2) ("unreasonable invasion of privacy").

Although the FOIA request at issue in the Opinion was directed to the former Board of Commissioners, the conclusion would be the same as to the Ms. Wilson.¹ The documents are not public because no formal charges have been filed, and even if they were, they are exempt from disclosure. The records are closed to the public under Rule 12 and may not be opened under FOIA as set forth in the definition of public record. Nothing in this Rule or FOIA indicates that a person may make a FOIA request of a lawyer to produce complaints closed to the public under Rule 12. Such documents are even beyond the power of a Judge to release under the above provisions of that Rule.

¹ Although this Opinion is not binding upon this Court, it "should not be disregarded without cogent reason." *S.C. Dept. of Social Services v. Johnson*, 688 S.E.2d 588, 593, 386 S.C. 426, 436 (S.C.App.,2009) quoting *Price v. Watt*, 280 S.C. 510, 513 n. 1, 313 S.E.2d 58, 60 n. 1 (Ct.App.1984). *Johnson* found that referencing an opinion of the Attorney General "instructive" as to the application of a statute. That Opinion regarding FOIA is certainly consistent with the state of the law today and instructive on the issue.

The Complaint contends that Ms. Wilson waived confidentiality by referring generally to the filing of grievances against her and their dismissal. Nothing in Rule 12 creates a waiver of confidentiality except, as noted above, when the Lawyer signs a waiver for the Commission on Lawyer Conduct to release documents. Rule 12(c)(3). Ms. Wilson's general reference in her letter to Lawyers Weekly is not a waiver under Rule 12 and does not alter the non-public nature of the documents under Rule 12. "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 415 S.E.2d 384, 387, 307 S.C. 339, 344 (S.C.,1992). Certainly, Ms. Wilson's letter had no intent whatsoever to waive confidentiality when she invoked the Rules on Lawyer Disciplinary Enforcement in her response letter and made quite clear that she believed, and correctly so, that the documents sought are not public.

Even if the documents were "public records," they are exempt from disclosure. Under §30-4-40(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. . .

(4) Matters specifically exempted from disclosure by statute or law.

The Complaints and related documents are expressly exempt under Rule 12, and therefore are exempt from disclosure under §30-4-40(a)(4). This conclusion was reached by the above Attorney General's Office Opinion, and it is still the law.

Further, the disclosure of the records would also be an unreasonable invasion of personal privacy under §30-4-40(a) because Rule 12 protects against disclosure of complaints against a lawyer unless formal charges are made and none were filed here. The provisions of Rule 12

ENCL 5

directing a court to take steps to prevent disclosure when a lawyer is withdrawing from representation, certainly indicate an intent to make the matter private.

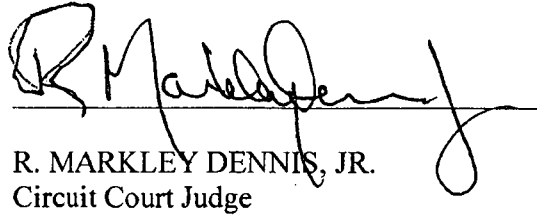
CONCLUSION

Plaintiff seeks documents of Ms. Wilson that are beyond the scope of FOIA and are expressly non-public under the Appellate Court rules. Therefore, this case must be dismissed.

For all of the foregoing reasons, IT IS ORDERED THAT the Defendant's Motion to Dismiss be granted and that the Motion for Summary Judgment of the Plaintiffs be denied.

AND IT IS SO ORDERED.

February 9, 2016
Charleston, South Carolina


R. MARKLEY DENNIS, JR.
Circuit Court Judge

RMD/6

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

South Carolina Lawyers Weekly,
By and through its principal,
Dolan Publishing Company,

Plaintiff(s)

vs.

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

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP - 10-

5757

FILED
2015 OCT 26 PM 2:11
JULIE J. ARISTARONG
CLERK OF COURT

Submitted By: Desa Ballard
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Telephone #: 803.796.9299
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Other:
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service@desaballard.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

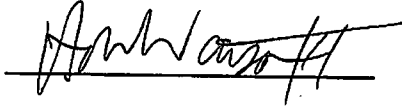
NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -NI-
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☒ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660) | | |

ROA 008

☐ Sexual Predator (510)

Submitting Party Signature:



Date: 10-21-15

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Lawyers Weekly,)

By and through its principal,)

Dolan Publishing Company,)

PLAINTIFF)

VS.)

Scarlett Wilson, Solicitor)

Of the Ninth Judicial Circuit,)

An elected public official,)

DEFENDANT)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Case No. 2015-CP-10-_____

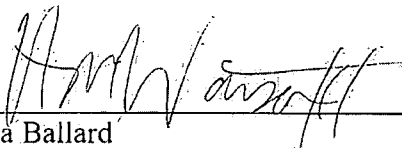
SUMMONS

(Non-Jury)

FILED
2015 OCT 26 PM 2:17
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint on the plaintiff's counsel at her office at P.O. Box 6338, West Columbia, South Carolina 29171, within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.



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ATTORNEYS FOR PLAINTIFF

October 21, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Lawyers Weekly,)
By and through its principal,)
Dolan Publishing Company,)

PLAINTIFF)

VS.)

Scarlett Wilson, Solicitor)
Of the Ninth Judicial Circuit,)
An elected public official,)

DEFENDANT)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Case No. 2015-CP-10-_____

COMPLAINT

(Non-Jury)

SUIT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF UNDER THE
FREEDOM OF INFORMATION ACT

FILED
2015 OCT 26 PM 2:18
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff, seeking relief from this court, complains against the Defendant and alleges:

1. Plaintiff is a corporation organized and existing under the laws of a State other than South Carolina which publishes a variety of newspapers for subscribers, some of which are distributed in South Carolina.
2. Defendant is an elected official of the State of South Carolina, serving as Solicitor of the Ninth Judicial Circuit, elected by the electorate of the Ninth Judicial Circuit. She is a full-time employee of the State of South Carolina and has such duties as are assigned to her by law in the State of South Carolina, including the duty to receive and administer county funds within her circuit.
3. In order to hold her elected office, defendant is required to be a member of the South Carolina Bar, licensed to practice law in South Carolina.

4. On information and belief, defendant does not maintain a private practice of law and has no private clients. Any legal services she provides are provided as a public officer of the State.
5. Defendant is a public official and her office constitutes a "public body" as defined by the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. §§ 30-4-10, *et seq.* (Rev. 2007).
6. FOIA states its purpose expressly with § 30-4-15:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter 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.

7. On information and belief, Defendant is required by S.C. Code Ann. § 30-4-20 to maintain all books, papers, and other documentary materials regardless of physical form or characteristics prepared, owned, or used in the possession of or retained by a public body.
8. Any records received by Defendant from the Office of Disciplinary Counsel or the Commission on Lawyer Conduct which relate to her conduct as a public official are required to be maintained in accordance with the Public Records Act of South Carolina and as such are "public records."
9. On or about July 10, 2015, Plaintiff made request to Defendant to inspect and copy any records relating to any disciplinary complaints made against her or

action taken with respect to her as a member of the [South Carolina] bar. A copy of the FOIA request is attached hereto and incorporated by reference as **Exhibit A**.

10. The records requested by Plaintiff are "public records" under the FOIA, and by law they must be made available for inspection and copying by persons requesting such, unless the records, or portions of the records, are exempt from mandatory disclosure by law.
11. Defendant answered the request, acknowledged that the FOIA required that her office maintain public records and permit inspection by the public, subject to exceptions set forth therein. A copy of Defendant's FOIA response is attached hereto and incorporated by reference as **Exhibit B**.
12. Defendant's answer to the request was on her official letterhead, not personal letterhead maintained by her privately, and on information and belief was prepared either by her or someone acting on her behalf who is an employee of the State or County. As a result, the document provided to Plaintiff as Exhibit B is a public document as defined under state law.
13. Notwithstanding the FOIA requirement that public records be made available for inspection and copying, Defendant refused the request for public records she is required to have maintained.
14. Defendant set forth four purported exemptions to justify her refusal to produce the public documents requested.

15. Reason one was that "Ms. Wilson is not personally a 'public body'. Likewise her personal records regarding such matters are not included under the definition of a 'public record' of a 'public body' as contemplated by Section 30-4-20." That reason is incorrect and does not provide an applicable exemption from disclosure pursuant to Plaintiff's lawful request.
16. Defendant is a public official whose only legal services are provided in her capacity as a public official. She does not provide legal services in private matters. Any documents from the Office of Disciplinary Counsel and/or the Commission on Lawyer Conduct received by her relate wholly to her conduct in her capacity as a public official and are thus public documents.
17. The public has an interest in being informed regarding regulatory complaints made against public officials, including those who are elected directly by the electorate, and the disposition thereof.
18. By virtue of her holding public office, any documents prepared by Defendant to respond to any inquiries from the Office of Disciplinary Counsel, using her public office resources and/or staff, and/or prepared on official letterhead of her office, are public documents subject to FOIA. Similarly, such documents as relate to her performance as a public official are public documents subject to FOIA.
19. Reason two advanced by Defendant to support her refusal to comply with the FOIA request was that Rule 12 of the Rules on Lawyer Disciplinary Enforcement (Rule 413, SCACR) provide confidentiality of the requested materials. That reason is unjustified and based on an improper application of the cited rule, which does not provide an exemption from disclosure for defendant.

20. The only limitation on disclosure provided by Rule 12 relates to staff and officials with the Office of Disciplinary Counsel and/or the Commission on Lawyer Conduct, which are offices of the South Carolina Supreme Court. The South Carolina Supreme Court is charged by state constitution with the obligation to regulate the practice of law and the conduct of practitioners who are licensed to practice law.
21. Reason two also asserted that the information sought was of a personal nature and therefore exempt from disclosure pursuant to § 30-4-40(a)(2). That reason is likewise incorrect and does not provide an exemption from disclosure for the reasons discussed regarding her first claimed exemption.
22. Reason three asserted that denial was premised on the request having been made for matters specifically exempted from disclosure by statute or law, citing to § 40-4-40(a)(4). In making that assertion, Defendant did not reference any statute or law which purportedly acted as a specific exemption from disclosure for the requested public documents. Notwithstanding that deficiency, that reason is incorrect and does not provide an exemption from disclosure as no such statute or law is applicable.
23. Reason four asserted that disclosure of the requested public documents would violate the attorney-client privilege, citing to § 30-4-40(a)(7). No explanation was provided as to what "client" was involved, or the nature and extent of any supposed confidential communications of a professional nature between attorney and client, as would be necessary to even potentially constitute a privileged

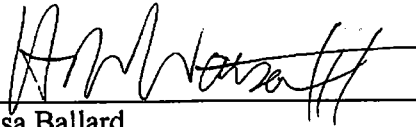
communication. Thus none of the documents requested are protected by attorney-client privilege.

24. After refusing to disclose the actual documents requested, defendant nevertheless described the nature and content of at least some of the documents, referencing the existence of grievances that had been filed against her "at the behest of disgruntled criminal defense lawyers who disagree with her management of the Solicitor's Office and in some cases dealing with her handling of cases."
25. Defendant's statement acknowledges that she has documents in her possession that are responsive to the FOIA request. Any documents received by Defendant which relate to her handling of the management of her office and in the handling of closed cases would be public documents under FOIA.
26. Defendant went further, however, and indicated that "the South Carolina Office of Disciplinary Counsel thoroughly investigated these matters and recommended dismissal of all of these charges. Furthermore, Independent Investigative Panels of the Commission on Lawyer Conduct considered these matters and have *never* found that she engaged in any ethical misconduct."
27. In so doing, Defendant waived any claim to confidentiality or inability to disclose the records themselves that she might have otherwise been able to assert as to the public documents sought in the FOIA request.
28. The exemption asserted by Defendant for denying Plaintiff's request for access to public records in its possession is at variance with the exemptions from mandatory disclosure permitted under the FOIA for law enforcement and public

safety agencies, S.C. Code Ann., section 30-4-40(a)(3), and in disregard of decisions of the Supreme Court of South Carolina and the South Carolina Court of Appeals construing those statutory exemptions.

29. Defendant's wrongful denial of Plaintiff's request for access to public records is a wrongful denial of requests by citizens for access to public records in the possession of Defendant. The very format of Defendant's response confirms the public nature of the documents sought, and the need for public disclosure instead of selective, arbitrary disclosure of portions thereof.
30. Plaintiff is informed and believes that it is entitled to an order declaring that Defendant's denial of Plaintiff's request for access to public records for the reason stated is a violation of the FOIA.
31. A violation of the FOIA is an irreparable injury for which no adequate remedy at law exists, and Defendant's violation establishes the appropriate threshold for injunctive relief pursuant to S.C. Code § 30-4-100.
32. Plaintiff is informed and believes that it is entitled to an order permanently enjoining and restraining Defendant from continuing to violate the FOIA by asserting exemptions from mandatory disclosure that are not authorized by law, and failing and refusing to provide Plaintiff access to the public records it seeks in this action.
33. Plaintiff is informed and believes that in the event it prevails in whole or in part it is entitled to recover reasonable attorney fees and costs associated with this action.

WHEREFORE, Plaintiff prays that this Court find that Defendant has violated the South Carolina Freedom of Information Act by wrongfully denying access to public records in its possession; enter an order declaring that Defendant has violated the Freedom of Information Act, and that such a violation constitutes an irreparable injury for which no adequate remedy at law exists; enter an order permanently enjoining and restraining Defendant from continuing to violate the Freedom of Information Act by asserting exemptions from mandatory disclosure not contained in the Freedom of Information Act, and from continuing to withhold from Plaintiff those public records requested by it; award Plaintiff its reasonable attorney fees and the costs of this action; and grant such other relief as may be appropriate.



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ATTORNEYS FOR PLAINTIFF

October 21, 2015

From: Phillip Bantz
Sent: Friday, July 10, 2015 9:37 AM
To: wilsons@scsolicitor9.org
Subject: FOIA Request

Solicitor Wilson,

This is a request under South Carolina's Freedom of Information Act for an opportunity to inspect and copy any records relating to any disciplinary complaints made against you or action taken with respect to you as a member of the bar. The FOIA provides you with 15 working days to issue a written response to this request.

Respectfully,

Phillip Bantz
Staff Writer
North Carolina Lawyers Weekly
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Phone (843) 723-3800 ext 4529
Fax (843) 719-4588

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

To: Phillip Bantz
From: Solicitor's Office, Ninth Judicial Circuit
Re: FOIA Request Response
Date: July 28, 2015

We are in receipt of your FOIA request and hereby respond within the mandated period.

The South Carolina Freedom of Information Act (FOIA) requires that this office, as a public body, make available to the public, upon request, any "public record" kept during the normal course of our business (with exceptions expressed in the statute). See S.C. Code Ann. §30-4-30 (1976).

While broad in scope, the South Carolina's outlines several specific exceptions to its mandate of disclosure. S.C. Code Ann. §30-4-40(a)(4) states that "matters specifically exempted from disclosure by statute or law" are exempt from FOIA disclosure.

Your request is hereby denied on the following grounds. Your request is regarding Scarlett Wilson's personal status as a member of the South Carolina Bar. While the Solicitor's Office is a "public body" and subject to FOIA, Ms. Wilson is not personally a "public body." Likewise, her personal records regarding such matters are not included under the definition of a "public record" of a "public body" as contemplated by §30-4-20 (1976).

Even if Ms. Wilson and these records were considered "public," we invoke the following exemptions.

- §30-4-40(a)(2) / Rule 413, SCACR Lawyer Disciplinary Enforcement, Rule 12 (*Information of a Personal Nature / Access to Disciplinary Enforcement*)
- §30-4-40(a)(4) (*Matters specifically exempted from disclosure by statute or law*)
- §30-4-40(a)(7) (*Material that would violate attorney-client relationships*)

In the last year a number of grievances have been filed against Ms. Wilson by or at the behest of disgruntled criminal defense lawyers who disagree with her management of the Solicitor's Office and in some cases with her handling of cases. The South Carolina Office of Disciplinary Counsel thoroughly investigated these matters and recommended dismissal of all of these charges. Furthermore, Independent Investigative Panels of the Commission on Lawyer Conduct considered these matters and have *never* found that she engaged in any ethical misconduct. Moreover, she has never been sanctioned or disciplined.

ROA 021



STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Lawyers Weekly, etc.,)

Plaintiff,)

vs.)

Scarlett Wilson, Solicitor, etc.,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-5757

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Desa Ballard, Esquire

Harvey M. Watson, III, Esquire, Bar No. _____

Address:

Ballard & Watson

Post Office Box 6338

West Columbia, SC 29171

Phone: 803-796-9299

Fax 803-796-1066

E-mail: desab@desaballard.com

harvey@desaballard.com

Other: _____

Defendant's Attorney:

J. Emory Smith, Bar No. 5262

[counsel for Judges]

Address:

Office of the Attorney General

P.O. Box 11549

Columbia, SC 29211

Phone: 803-734-3680 Fax 803-734-3677

E-mail: esmith@scag.gov

Other: See attached sheet

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss

Estimated Time Needed: 15 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$** _____

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

South Carolina Lawyers Weekly,
By and through its principal,
Dolan Publishing Company,

Plaintiff,

v.

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

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-10-5757

MOTION TO DISMISS

Without waiving any jurisdictional or other defenses to this complaint, the Defendant Scarlett Wilson, Solicitor, moves for the dismissal of the Complaint herein pursuant to Rule 12(b)(1) and(6), SCRCF, in that, this Court lacks jurisdiction over the subject matter, and Plaintiff has failed to state facts sufficient to constitute a cause of action because the request at issue is not subject to the Freedom of Information Act (S.C. Code Ann. §30-4-10, *et seq*) and enforceable for reasons that include the following:

1. The request at issue was made of the Solicitor in her official capacity but the documents sought belong to Ms. Wilson in her personal or individual capacity.
2. For the purposes of this request, at least, the Solicitor is not a "public body" under §30-4-20(a).
3. The documents sought are not records of the Office of the Solicitor.
4. The documents sought are not "public records" under §30-4-20(c).
5. The documents sought are confidential under RLDE Rule 12, SCACR Rule 413.
6. Even if, *arguendo*, the documents were public records, they would be exempt from

disclosure under §30-4-40(a)(2)(unreasonable invasion of personal privacy) and §30-4-40(a)(4)(exempt from disclosure by law) because of the applicability of Rule 12 of Rule 413.

7. Even if, *arguendo*, the documents were public records, any information therein which would violate attorney-client privilege or work product would be exempt from disclosure pursuant to §30-4-(a)(7).

For the foregoing reasons, the Defendant respectfully requests that this case be dismissed.

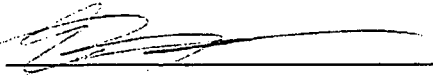
Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

Office of the Attorney General
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(803) 734-3677 (Fax)
esmith@scag.gov

BY: 

November 20, 2015

Counsel for the Solicitor

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
South Carolina Lawyers Weekly,	)	
By and through its principal,	)	
Dolan Publishing Company,	)	MEMORANDUM IN OPPOSITION TO
	)	MOTION TO DISMISS
PLAINTIFF	)	
	)	
vs.	)	
	)	
Scarlett Wilson, Solicitor	)	
Of the Ninth Judicial Circuit,	)	
An elected public official,	)	
	)	
DEFENDANT	)	

Plaintiff South Carolina Lawyers Weekly, by and through its principal Dolan Publishing Company respectfully submits this Memorandum in Opposition to Motion to Dismiss. For the reasons set forth below, Defendant's Motion to Dismiss should be denied. This case presents novel issues of law and is not appropriate for determination on motion to dismiss.

INTRODUCTION

This is a suit pursuant to the S. C. Freedom of Information Act, S.C. Code Ann. §§ 30-4-10, *et seq.* Defendant is named in her capacity as a public official. *See* Paragraph 5 of the complaint in this action:

5. Defendant is a public officer and her office constitutes a "public body" as defined by the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. §§ 30-4-10, *et seq.* (Rev. 2007).

Defendant moved for dismissal pursuant to Rule 12(b)(1), asserting that this court lacks subject matter jurisdiction over the action, and Rule 12(b)(6), failure to state a cause of action. The motion does not set forth any legal authority for its position. It simply denies that defendant



is a public official, and, for some reason, this case should not be allowed to proceed. The subject matter jurisdiction issue is not addressed in the motion. Defendant's motion must be denied.

FACTUAL BACKGROUND

Plaintiff is a news organization which publishes and distributes South Carolina Lawyer's Weekly, a weekly newspaper reporting on legal events of interest in South Carolina and elsewhere. Plaintiff submitted a request under FOIA to the Defendant on July 10, 2015. (See Exhibit A to Complaint). Defendant answered the request on her official letterhead on July 28, 2015. (See Exhibit B to Complaint). In her response, she acknowledged that FOIA "requires this office, as a public body, make available to the public, upon request, any 'public record' kept during the normal course of business..." She went on to assert that the documents sought belonged to her in her individual capacity. Even if that were so, by answering the FOIA complaint on her official letterhead, using public resources, Defendant acknowledged it was a public matter, and waived any argument about her status as a private individual.

PROCEDURAL HISTORY

The summons and complaint was filed on October 26, 2015. Rather than answer the complaint, Defendant, represented by the Office of the South Carolina Attorney General, filed this motion to dismiss on November 20, 2015. The issues raised by the Attorney General, on behalf of the Defendant, include the same grounds set forth by the Defendant in her response to the FOIA request dated July 28, 2015.

ARGUMENT

The South Carolina Attorney General is a Constitutional Officer of the State. South Carolina Constitution Article VI, Section 7. He is required by statute to provide a defense to "any officer or employee of the State. . ." among others if the "act [which forms the basis of the claim

is] done or omitted in the course of his employment. . .” S.C. Code § 1-7-50. Before doing so, the Attorney General or his designee is required to conduct an investigation to satisfy himself that the public employee was “acting in good faith, without malice and in the course of his employment” before providing a defense. S.C. Code § 1-7-60.

While the information learned by the Attorney General during the investigation is confidential, S.C. Code § 1-7-70, the fact that the AG is appearing for the defendant may be considered to be a judicial admission that defendant is a public employee and the subject matter of the suit falls within her public duties. See United States v. Blood, 806 F.2d 1218, 1221 (4th Circuit 1985) (“generally statements by an attorney concerning a matter within his employment maybe admissible against the retaining client”); see also Meyer v. Berkshire Life Ins. Co., 372 F.3d 261, 264-65 (4th Cir. 2004) (“judicial admissions are not... limited to affirmative statements that a fact exists. They also include intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusions of law.”)¹

Setting aside the fact of representation by the Attorney General, the Defendant herself made herself a public officer for purposes of the inquiry raised here when she responded to the FOIA request using public resources. See Exhibit B to Complaint. Weston v. Carolina Research & Development Foundation, 303 S.C. 398, 401 S.E.2d 161 (1991) (defendant’s receipt of public funds “is sufficient grounds alone to find the organization is a ‘public body’ under FOIA, regardless of any other factors.”)

Lastly, a determination of whether the Defendant is a “public officer” and therefore subject to FOIA cannot be decided on a motion to dismiss. Instead, “a judicial determination” that [a litigant] is subject to FOIA “can only be resolved after the parties have engaged in discovery.”

¹ Blood and Meyer are cited in the South Carolina Court of Appeals’ unpublished decision in McCray v. Valle, Unpublished Opinion No. 2014-UP-313 (August 6, 2014).

Disabato v. South Carolina Association of School Administrators, 404 S.C. 433, 746 S.E.2d 329, 334 (2013).

The court's obligation is to strictly construe the FOIA "in favor of disclosure." Perry v. Bulloch, 409 S.C. 137, 761 S.E.2d 251 (2014). Defendant claims she is not a public figure for purposes of a FOIA request, yet she answered the FOIA request using public resources. At a minimum, a motion to dismiss must be denied. It may well be that her status as a public figure has already been admitted and can be determined as a matter of law, especially when all inferences are drawn in favor of the non-movant. That need not be decided at this point, but denial of the motion to dismiss is appropriate and necessary at this time.

CONCLUSION

For the reasons set forth above, South Carolina Lawyer's Weekly, by and through its principal Dolan Publishing Company, respectfully requests this Court deny Defendant's Motion to Dismiss.

Respectfully submitted,



Desa Ballard
Harvey M. Watson III

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ATTORNEY FOR PLAINTIFF

January 4, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
South Carolina Lawyers Weekly,	)	Case No. 2015-CP-10-5757
By and through its principal,	)	
Dolan Publishing Company,	)	
	)	
Plaintiff,	)	
	)	MEMORANDUM IN SUPPORT OF
v.	)	MOTION TO DISMISS
	)	
Scarlett Wilson, Solicitor of the Ninth	)	
Judicial Circuit, an elected public official,	)	
	)	
Defendant.	)	
_____	)	

This action should be dismissed because it seeks personal, confidential records of Scarlett Wilson through the Freedom of Information Act, but that law applies to public agencies, not individuals, and excludes records that by law are closed to the public such as those sought by Lawyers Weekly.

BACKGROUND

Plaintiff requested that Ms. Wilson produce any records relating to disciplinary complaints against her or action taken against her as a member of the Bar. Complaint, ¶ 9, and Attachment A to Complaint. Ms. Wilson denied the request because she is not, personally, a “public body” under FOIA, because her personal records are not “public records,” because they are exempt from disclosure and for the other reasons set forth in her response of July 28, 2015. Exhibit B to Complaint. Her letter noted that grievances had been filed against her by some people who disagree with her and that the Office of Disciplinary Counsel had recommended their dismissal. Accordingly, no formal charges have been filed against her.

ARGUMENT

I

MS. WILSON IS NOT A "PUBLIC BODY" SUBJECT TO FOIA

Under the Freedom of Information Act, rights to inspect or copy public records are limited to those of a "public body." S.C. Code Ann. §30-4-30(a) ("[a]ny person has a right to inspect or copy any public record of a public body"). "'Public body' means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined . . ." §30-4-20(a). This rule applies to agencies rather than individuals. While, as noted by Ms. Wilson, the Solicitor's Office is a public body subject to FOIA, Ms. Wilson, herself, is not a public body. The documents that Lawyers Weekly seeks are those belonging to Ms. Wilson, personally, rather than the Solicitor's Office. The Rules for Lawyer Disciplinary Enforcement governing those documents apply to lawyers rather than to public bodies. A complaint, under the RLDE is "information . . . that alleges . . . that a lawyer committed misconduct." Rule 2, RLDE, Rule 413, SCACR. A "lawyer" is "anyone admitted to practice law in this state . . ." Therefore, any complaint against Ms. Wilson is against her, individually, rather than a public body, and is not a record of the Solicitor's Office.

II

The Records Sought Are Confidential and Non-Public

Under FOIA, "[p]ublic record" includes all . . . documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. . . ." §30-4-20. Not only is Ms. Wilson, not a public body, the documents themselves are not public. The definition expressly states that "other records which by law are

required to be closed to the public are not considered to be made open to the public under the provisions of this act.” RLDE Rule 12 closes these records to the public as discussed below.

Lawyers Weekly wrongly asserts that the Rule only limits the disclosure of documents by the Commission on Lawyer Conduct and the Office of Disciplinary Counsel. Instead, the Rule makes the documents at issue here non-public because formal charges have not been filed.¹ RLDE Rule 12 of Rule 413 prohibits the Commission on Lawyer Conduct, the Office of Disciplinary Counsel and the Supreme Court and their staffs from revealing the existence of a complaint against lawyer “while the matter remains confidential,” except as provided in that law. Copy attached along with 2015 amendment. During that period of confidentiality, the complaint is expressly non-public. Rule 12(b)(If formal charges are filed against the lawyer, the matter “shall become public 30 days after the filing of the answer” to the charges (emphasis added)). The Rule limits the circumstances under which the Commission on Lawyer Conduct is authorized to release the documents. Rule 12(c)(protection of person or public, violation of criminal law, etc.).

Whether the lawyer may release the documents during the period of confidentiality is discretionary with him or her. Rule 12(d) states that a lawyer “may reveal” the filing of a complaint by a client to establish good cause for withdrawal as counsel . . .” and if the complaint is confidential, the Rule states that the “lawyer may elect to give opposing counsel notice of the motion only without revealing the existence of the complaint.” (emphasis added). The court will seal the record or delete references to the complaint from the record if the lawyer requests that records related to the motion be sealed. Rule 12(d). More generally, the lawyer may sign a waiver for the Commission to release the complaint. Rule 12(c)(3). Accordingly, under the

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

Rule, the Complaint and related documents are not public during the period of confidentiality, and the lawyer may not be compelled to disclose then. Therefore, Ms. Wilson may not be compelled to release the documents at issue.

This reading is in accord with an Opinion of the Office of the Attorney General which determined that complaints and related documents were not subject to FOIA. *Ops. Atty. Gen.* June 24, 1981, No. 81-60, 1981 WL 96586 (copy attached). Although the Opinion predated the current RLDE, the pertinent parts of FOIA remain the same. That Opinion determined that disciplinary files are not “public records” under §30-4-20(c) because they are “records which by law are required to be closed to the public” under the former Rule on Disciplinary Procedure section 20A. As noted in that Opinion, “[t]he rules of the South Carolina Supreme Court carry the force and effect of law. See, §§30-4-20(c). 40-5-20 and 40-5-50” The Opinion further concluded that the files would also be exempt from disclosure under section 30-4-40(4) (“[m]atters specifically exempted from disclosure by statute or law”) and under 30-4-40(2) (“unreasonable invasion of privacy”).

Although the FOIA request at issue in the Opinion was directed to the former Board of Commissioners, the conclusion would be the same as to the Ms. Wilson.² The documents are not public because no formal charges have been filed, and even if they were, they are exempt from disclosure. The records are closed to the public under Rule 12 and may not be opened under FOIA as set forth in the definition of public record. Nothing in this Rule or FOIA indicates that a person may make a FOIA request of a lawyer to produce complaints closed to the public under

² Although this Opinion is not binding upon this Court, it “should not be disregarded without cogent reason.” *S.C. Dept. of Social Services v. Johnson*, 688 S.E.2d 588, 593, 386 S.C. 426, 436 (S.C.App.,2009) quoting *Price v. Watt*, 280 S.C. 510, 513 n. 1, 313 S.E.2d 58, 60 n. 1 (Ct.App.1984). *Johnson* found that referencing an opinion of the Attorney General “instructive” as to the application of a statute. That Opinion regarding FOIA is certainly consistent with the state of the law today and instructive on the issue.

Rule 12. Such documents are even beyond the power of a Judge to release under the above provisions of that Rule.

The Complaint contends that Ms. Wilson waived confidentiality by referring generally to the filing of grievances against her and their dismissal. Nothing in Rule 12 creates a waiver of confidentiality except, as noted above, when the Lawyer signs a waiver for the Commission on Lawyer Conduct to release documents. Rule 12(c)(3). Ms. Wilson's general reference in her letter to Lawyers Weekly is not a waiver under Rule 12 and does not alter the non-public nature of the documents under Rule 12. "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 415 S.E.2d 384, 387, 307 S.C. 339, 344 (S.C.,1992). Certainly, Ms. Wilson's letter had no intent whatsoever to waive confidentiality when she invoked the Rules on Lawyer Disciplinary Enforcement in her response letter and made quite clear that she believed, and correctly so, that the documents sought are not public.

III

EVEN IF THE COMPLAINT WERE PUBLIC RECORDS, THEY WOULD BE EXEMPT FROM DISCLOSURE UNDER §30-4-40(A)(4)(EXEMPT FROM DISCLOSURE BY LAW) AND §30-4-40(A)(2)(UNREASONABLE INVASION OF PERSONAL PRIVACY) DUE THE APPLICABILITY OF RULE 12 .

Under §30-4-40(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. . .

(4) Matters specifically exempted from disclosure by statute or law.

The Complaint and related documents are expressly exempt under Rule 12, and therefore are exempt from disclosure under §30-4-40(a)(4), even if, *arguendo*, they were public records.

This conclusion was reached by the above Attorney General's Office Opinion, and it is still the law.

Further, the disclosure of the records would also be an unreasonable invasion of personal privacy under §30-4-40(a) because Rule 12 protects against disclosure of complaints against a lawyer unless formal charges are made and none were filed here. The provisions of Rule 12 directing a court to take steps to prevent disclosure when a lawyer is withdrawing from representation, certainly indicate an intent to make the matter private.

IV

EVEN IF, *ARGUENDO*, THE DOCUMENTS WERE PUBLIC RECORDS, ANY INFORMATION THEREIN WHICH WOULD VIOLATE ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT WOULD BE EXEMPT FROM DISCLOSURE PURSUANT TO §30-4-(A)(7).

This ground need not be reached unless, *arguendo*, the documents were found to be subject to FOIA. Any privileged documents or privileged information in documents would have to be redacted.

CONCLUSION

Plaintiff seeks documents of the Solicitor that are beyond the scope of FOIA and are expressly non-public under the Appellate Court rules. Therefore, this case must be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

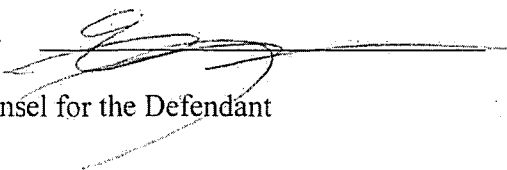
ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

[Signature block continues next page]

J. EMORY SMITH, JR.
Deputy Solicitor General
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(803) 734-3677 (Fax)
esmith@scag.gov

BY:


Counsel for the Defendant

January 4, 2016

 KeyCite Red Flag - Severe Negative Treatment

Enacted Legislation Amended by 2015 SOUTH CAROLINA COURT ORDER 0018 (C.O. 0018),

Code of Laws of South Carolina 1976 Annotated
South Carolina Appellate Court Rules
IV. Rules Governing the Practice of Law
Rule 413. Rules for Lawyer Disciplinary Enforcement
III. General Provisions

Rule 413, SCACR, Lawyer Disciplinary Enforcement, Rule 12

RULE 12. ACCESS TO DISCIPLINARY INFORMATION

Currentness

(a) **General Rule.** Except as otherwise provided in these rules or ordered by the Supreme Court, the members of the Commission, the staff of the Commission, disciplinary counsel, the staff of disciplinary counsel, the members of the Supreme Court and the staff of the Supreme Court shall not in any way reveal the existence of the complaint, while the matter remains confidential, except to persons directly involved in the matter and then only to the extent necessary for a proper disposition of the matter. A violation of this provision may be punished as a contempt of the Supreme Court.

(b) **When Misconduct Proceedings Become Public.** When formal charges are filed regarding allegations of misconduct, the formal charges, any answer, and all other documents related to the proceedings that were filed with or issued by the Commission following the filing of the formal charges shall become public 30 days after the filing of the answer or, if no answer is filed, 30 days after the expiration of the time to answer under Rule 23. Thereafter, except as otherwise provided by these rules or the Supreme Court, all subsequent records and proceedings relating to the misconduct allegations shall be open to the public inclusive of a letter of caution or admonition issued after the filing of formal charges. If allegations of incapacity are raised during the misconduct proceedings, all records, information, and proceedings relating to these allegations shall be held confidential.

(c) **Permissive Disclosure by Commission.** The Commission may, however, disclose information at any stage of the proceedings:

(1) when the chair, vice-chair or a panel of the Commission has determined that there is a need to notify another person to protect that person or to notify a government agency in order to protect the public or the administration of justice;

(2) to appropriate law enforcement officials when the chair, vice-chair or a panel of the Commission determines that it is in possession of reliable information indicating that a person has violated the criminal laws of this State, any other state, the District of Columbia, or the United States;

(3) upon waiver in writing by the lawyer;

(4) to persons from whom and entities from which it appears that a lawyer has misappropriated monies or other property when the chair or vice-chair or a panel of the Commission has determined that the disclosure of the information will tend to prevent further misappropriation or likely facilitate restitution, recovery, or compensation from the Lawyers' Fund for Client Protection, insurance coverage, title insurance, or other sources; or,

(5) to the appropriate disciplinary authority in any jurisdiction in which a lawyer is admitted to practice law or has applied for admission to practice law concerning a matter where there is evidence the lawyer committed misconduct under lawyer or judicial disciplinary rules of that jurisdiction or where a lawyer receives any sanction under Rule 7(b).

(d) Disclosure Necessary for Withdrawal as Counsel. When it is necessary to obtain the permission of a tribunal to withdraw from representation, a lawyer may reveal the fact that the client filed a complaint with the Commission to help establish good cause for withdrawal. If the motion to be relieved includes a reference to the existence of a complaint which is confidential under this rule, the lawyer may elect to give opposing counsel notice of the motion only, without revealing the existence of the complaint. If the lawyer's motion to be relieved is accompanied by a request that the records relating to the motion be sealed, the tribunal shall take steps to prevent disclosure of the existence of the complaint to any other person. After deciding the motion to be relieved, the tribunal shall insure that either the record is sealed or that all references to the complaint are deleted from the record available to the public. No members of the tribunal or its staff who learn of the existence of the complaint shall reveal that fact to any other person.

(e) Protective Orders. In order to protect the interests of a complainant, witness, third party, or respondent, the chair of the hearing panel may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted in a manner to preserve the confidentiality of the information that is the subject of the application.

(f) Work Product and Deliberations. Disciplinary counsel's work product, Commission deliberations, and records of the Commission's deliberations shall not be disclosed.

(g) Permissive disclosure by the parties. Either party may disclose in proceedings before a hearing panel statements and other evidence, gathered prior to the matter becoming public after the filing of formal charges, that were subject to discovery under Rule 25 to the extent admissible under South Carolina Rules of Civil Procedure or South Carolina Rules of Evidence.

(h) Disclosure to Lawyers Helping Lawyers. Commission counsel, disciplinary counsel, or a member of the staff of the Commission or disciplinary counsel, may disclose the existence of a complaint to a representative of the South Carolina Bar Lawyers Helping Lawyers Committee regarding the lawyer's need for treatment for substance abuse or a mental health issue. Disclosure under this rule shall be limited to the existence of the complaint and the issue(s) of concern and shall not reveal the nature or details of the complaint unless such disclosure is necessary for the committee to proceed.

Credits

[Adopted effective January 1, 1997. Amended effective March 6, 1997; September 1, 2003; January 1, 2010; January 28, 2013; October 9, 2013; November 12, 2014.]

<For annotated materials relating generally to Rule 413, see annotations contained in SC R A CT RULE 413 Rule 34.>

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Appellate Court Rule 413, Lawyer Disciplinary Enforcement, Rule 12, SC R A CT RULE 413 Rule 12

Current with amendments received through October 1, 2015.

End of Document

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2015 SOUTH CAROLINA COURT ORDER 0018 (C.O. 0018)

COURT RULES

NOTICE: Rules and related materials supplied by the courts are included in this database. Because all changes may not have been supplied, the court clerk should be consulted to determine current rules. Stricken material is indicated by Text .

SC ORDER 0018

C.O. 0018

COURT RULES

Effective: Effective November 12, 2015 to Effective November 12, 2015

STATE OF SOUTH CAROLINA
APPELLATE COURT RULES

Effective November 12, 2015

The Supreme Court of South Carolina

Re: Proposed Rule Revisions Submitted by the Office of Commission Counsel

Appellate Case No. 2015-000504

ORDER

On behalf of the Commission on Lawyer Conduct and the Commission on Judicial Conduct, the Office of Commission Counsel has submitted a number of proposed rule amendments to various South Carolina Appellate Court Rules that involve lawyer and judicial discipline and the Rules of Professional Conduct.

We grant the proposed amendments that: (1) add Commission Counsel to the persons who may communicate with Disciplinary Counsel regarding a matter; (2) clarify that the Commission on Lawyer Conduct or the Commission on Judicial Conduct may direct Disciplinary Counsel to disclose certain information; and (3) delete an incorrect reference in the comments to Rule 3.5, RPC, Rule 407, SCACR. We decline to adopt the remainder of the proposed rule amendments.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rules 407, 413, and 502, SCACR, as set forth in the attachment to this order.

These amendments are effective immediately.

Columbia, South Carolina

November 12, 2015

Rule 11, RLDE, Rule 413, SCACR, is amended to provide:

<< SC R A CT RULE 413 Rule 11 >>

RULE 11. EX PARTE CONTACTS

Members of the Commission and Commission counsel shall not engage in ex parte communications regarding a case, except that before making a determination to file formal charges in a case pursuant to Rule 19(d)(4), Commission counsel and members

of the investigative panel assigned to that case may communicate with disciplinary counsel as required to perform their duties in accordance with these rules, and the chair and vice-chair may entertain requests for permissive disclosure pursuant to Rule 12(c) made by disciplinary counsel without notice to the lawyer. Where disciplinary counsel makes a request to the chair or vice-chair pursuant to either Rule 12(c) or 19(b) without notice to the lawyer, the request shall so state and set forth the reason that notice is not being given. Ex parte communications shall include any communication which would be prohibited by Section 3B(7) of the Code of Judicial Conduct, Rule 501, SCACR, if engaged in by a judge.

Rule 11, RJDE, Rule 502, SCACR, is amended to provide:

<< SC R A CT RULE 502 J DISC ENF Rule 11 >>

RULE 11. EX PARTE CONTACTS

Members of the Commission and Commission counsel shall not engage in ex parte communications regarding a case, except that before making a determination to file formal charges in a case pursuant to Rule 19(d)(4), Commission counsel and members of the investigative panel assigned to that case may communicate with disciplinary counsel as required to perform their duties in accordance with these rules and the chair and vice chair may entertain requests for permissive disclosure pursuant to Rule 12(c) made by disciplinary counsel without notice to the judge. Where disciplinary counsel makes a request to the chair or vice chair pursuant to either Rule 12(c) or 19(b) without notice to the judge, the request shall so state and set forth the reason that notice is not being given. Ex parte communications shall include any communication which would be prohibited by Section 3B(7) of the Code of Judicial Conduct, Rule 501, SCACR, if engaged in by a judge.

Rule 12(c), RLDE, Rule 413, SCACR, is amended to provide:

<< SC R A CT RULE 413 Rule 12 >>

(c) **Permissive Disclosure by Commission.** The Commission may, however, disclose information, or direct disciplinary counsel to disclose information, at any stage of the proceedings:

...

Rule 12(c), RJDE, Rule 502, SCACR, is amended to provide:

<< SC R A CT RULE 502 J DISC ENF Rule 12 >>

(c) **Permissive Disclosure by Commission.** The Commission may, however, disclose information, or direct disciplinary counsel to disclose information, at any stage of the proceedings:

...

Comment 1 to Rule 3.5, RPC, Rule 407, SCACR, is amended to provide:

<< SC R A CT RULE 407 RPC Rule 3.5 >>

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct, Rule 501, SCACR, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. The South Carolina version of paragraph (a) differs from the Model Rule in its reference to a "member of the jury venire" rather than "prospective juror" since any person technically could be the latter.

SC ORDER 15-0018

End of Document

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1981 S.C. Op. Atty. Gen. 86 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-60, 1981 WL 96586

Office of the Attorney General

State of South Carolina

Opinion No. 81-60

June 24, 1981

***1 SUBJECT: Public Information; Complaints Against Attorneys**

A grievance file of the Board of Commissioners on Grievances and Discipline is not public information unless the proceeding has been made public at the request of the respondent attorney or the investigation is predicated upon a conviction of the attorney for a crime or upon public discipline imposed upon the attorney in another jurisdiction.

TO: Board of Commissioners on Grievances and Discipline

QUESTION PRESENTED:

Whether materials from the files of the Board of Commissioners on Grievances and Discipline must be made available to the complaining party or other interested person under the Freedom of Information Act?

OPINION:

The South Carolina 'Freedom of Information Act' (FOIA), provides in Section 30-4-30 of the 1976 Code that '[a]ny person has the right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40 . . .'. A 'public body' is defined as 'any department of the State, any state board, commission, agency and authority, any public or governmental body . . .', Section 30-4-20(a), 1976 Code. The Board of Commissioners on Grievances and Discipline would fall within this definition and, therefore, the FOIA would be applicable to the Board.¹ The question, therefore, is whether: (1) the Board's grievance files are 'public records'; and/or (2) are they exempt from disclosure under Section 30-4-40.

Section 30-4-20(e), in defining 'public records', provides, *inter alia*, that:

Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, and other records which by law are required to be closed to the public shall not be deemed to be made open to the public under the provisions of this chapter. . . . (Emphasis added.)

In this regard, the South Carolina Supreme Court's Rule on Disciplinary Procedure, Section 20A, provides:

All records and proceedings involving allegations of misconduct by an attorney shall be confidential and shall not be disclosed unless:

(1) The Respondent shall in writing request that they be public;

(2) The investigation is predicated upon a conviction of the respondent for a crime or upon public discipline imposed upon the Respondent in another jurisdiction, in which case the entire file pertaining to the crime or the public discipline, other than the work product and internal memoranda of the disciplinary agency, shall be public.

The rules of the South Carolina Supreme Court carry the force and effect of law. See, Sections 40-5-20 and 40-5-50, 1976 Code. Therefore, since Section 20 closes the Board's grievances files to the public, such files are not 'public records' within the meaning of Section 30-4-20(c).

Furthermore, it should be noted that Section 3-4-40(2) and (4) exempts from disclosure:

(2) Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of privacy, including, but not limited to, information as to gross receipts contained in application for business licenses.

*2 (4) Matters specifically exempted from disclosure by statute or law.

It would appear that grievance files would be exempt under these provisions even if they were 'public records'.

Richard B. Kale, Jr.

Senior Assistant Attorney General

Footnotes

1 The federal 'Freedom of Information Act, 5 U.S.C. § 551, et seq., is not applicable, since the Board of Commissioners on Grievances and Discipline is not an agency of the United States Government as defined in 5 U.S.C. § 551(1).

1981 S.C. Op. Atty. Gen. 86 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-60, 1981 WL 96586

End of Document

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

South Carolina Lawyers Weekly,)
By and through its principal,)
Dolan Publishing Company,)

PLAINTIFF)

vs.)

Scarlett Wilson, Solicitor)
Of the Ninth Judicial Circuit,)
An elected public official,)

DEFENDANT)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2015-CP-10-5757

MOTION FOR RECONSIDERATION

FILED
2016 FEB 29 PM 12:15
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Plaintiff moves this Court for an order reconsidering its order in this case dated February 9, 2016, filed February 10, 2016, and received by counsel for Plaintiff on February 18, 2016. Pursuant to Rule 59(e), it is respectfully asserted that the court's order is in error for the following reasons:

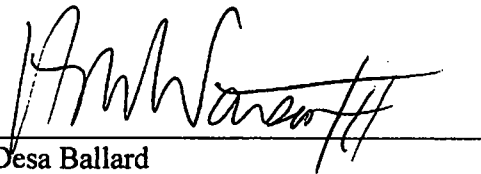
1. The trial judge verbally ruled that the Defendant was a public body, and the written order expressly disclaims any ruling on that issue. While the ruling is not final until the written order is issued, Plaintiff believes the court intended to include this finding in its ruling.
2. The court erred in including in its written order, as a basis for granting the Defendant's motion, a discussion of Rule 12 of the Rules of Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR. That was not part of the court's preliminary verbal ruling and Defendant is informed and believes that the court did not intend its written ruling to address Rule 12, RLDE.

3. The court erred in concluding that S.C. Code Ann. § 30-4-40(a)(2) provided the Defendant with an exclusion from a request under the Freedom of Information Act. It was undisputed that the subject matter of the documents requested did not relate to Defendant's personal conduct, but instead addressed her conduct in her capacity of a public official. Therefore, the cited exclusion did not apply.
4. The signed order erred in concluding that Rule 12, RLDE prohibited disclosure of the requested documents in a Freedom of Information request. Rule 12's confidentiality provisions only apply to officers and employees of the Commission on Lawyer Conduct and the Office of Disciplinary Counsel. The restriction is not intended or effective in shielding any documents not otherwise subject to disclosure or making them "confidential." Rule 12 is not intended to, and does not, have any effect on a FOIA production request.
5. The trial court erred in failing to find that Defendant waived any confidentiality that might have been available to her, either via Rule 12, RLDE or any statutory provision. The written response to the Plaintiff's FOIA request constituted a waiver of confidentiality of the subject matter because the Defendant disclosed selected information regarding the character and content about the documents requested. Having selectively disclosed the contents of the requested documents, Defendant has waived any right to rely upon an exclusion that would otherwise be available by rule or statute.
6. The court erred in ruling that the documents sought were "beyond the scope of FOIA" and were "expressly non-public under the Appellate Court Rules."
7. The court erred in failing to grant summary judgment in favor of the Plaintiff, based on

the admissions contained in the FOIA documents and pleadings.

8. The court erred in ruling that the documents requested by the Plaintiff were personal documents of the Defendant, because the Defendant responded to the request in her official capacity with official support, thereby acknowledging that the materials requested were held by her in her public capacity.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. M. Watson III", is written over a horizontal line.

Desa Ballard
Harvey M. Watson III

BALLARD & WATSON
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

ATTORNEY FOR PLAINTIFF

February 25, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

South Carolina Lawyers Weekly, By and
through it's principal, Dolan Publishing
Company

Plaintiff,)

vs.)

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

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-5757

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney:

Desa Ballard, Bar No. 498

Address:

Ballard & Watson, Attorneys at Law
PO Box 6338 West Columbia, SC 29171
Phone: (803)796-9299 Fax _____
E-mail: desab@desaballard.com Other: _____

Defendant's Attorney:

J. Emory Smith, Jr., Bar No. 5262

Address:

Office of the Attorney General
PO Box 11549 Columbia, SC 29211
Phone: (803)734-3680 Fax _____
E-mail: esmith@scag.gov Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

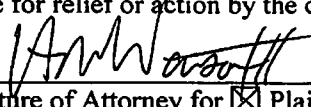
Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

2-25-16
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ 25.00

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached
order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED – AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
South Carolina Lawyers Weekly,	)	CASE NO. 2015-CP-10-5757
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
Scarlett Wilson,	)	
	)	
DEFENDANT.	)	
	)	

January 7, 2016

Charleston, South Carolina

B E F O R E:

The Honorable R. Markley Dennis

A P P E A R A N C E S:

Desa Ballard, Esquire
For the Plaintiff

J. Emory Smith, Esquire
For the Defense

Phyllis Norton, CVR-Master, *Nationally Certified Verbatim Court Reporter*
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

ROA 049

1 THE COURT: Are both sides here on South Carolina
2 Lawyers Weekly versus Scarlett Wilson?

3 MS. BALLARD: Yes, Your Honor.

4 THE COURT: Okay. Good. Come forward. All memorandum
5 filed in conjunction with this memorandum incorporated fully
6 for purposes of review and each one may rely on their
7 respective positions.

8 MS. BALLARD: Thank you, Your Honor. Desa Ballard for
9 the plaintiff.

10 THE COURT: Thank you, Ms. Ballard.

11 MR. SMITH: And Emory Smith for the defendants, Your
12 Honor.

13 THE COURT: Thank you, Mr. Smith. Good to see both of
14 you again. Okay.

15 Mr. Smith, I think this is your motion; is it not?

16 MR. SMITH: It is, Your Honor. Your Honor, Lawyers
17 Weekly submitted a Freedom of Information Act request of
18 Solicitor Wilson for any documents related to the attorney
19 disciplinary complaints made against her. She responded.
20 Denied the request for reasons that are similar to those
21 that I have included in our motion to dismiss.

22 THE COURT: Right.

23 MR. SMITH: She also related that the grievances have
24 been filed against her by people who disagree with her. The
25 Office of Disciplinary Counsel has recommended their

1 dismissal. No formal charges have been filed against her.

2 We believe that this request is not proper under FOYA
3 for a number of reasons. First of all, FOYA applies to
4 public bodies and Ms. Wilson is not a public body. She is
5 an officer ---

6 THE COURT: But you would agree with me she is an
7 officer representative of the Solicitor's Office and is the
8 solicitor?

9 MR. SMITH: She is, Your Honor. But these are personal
10 documents of hers. They are not documents of the
11 Solicitor's Office.

12 THE COURT: Well, let me ask a question. Because I
13 noted that. Do these not relate to her performing her
14 duties as a solicitor though?

15 MR. SMITH: Well, Your Honor, we don't have the
16 complaints before us so ---

17 THE COURT: I understand ---

18 MR. SMITH: --- we don't know.

19 THE COURT: I understand that.

20 MR. SMITH: I have not seen them myself, Your Honor.
21 But I think it would not matter because ---

22 THE COURT: Well ---

23 MR. SMITH: --- under the ---

24 THE COURT: Well, let me just state this. Obviously
25 maybe this is a wrong assumption on my part and you can

1 please correct me, but if it went to the Office of
2 Disciplinary Counsel it had to be in her role as an
3 attorney.

4 She can't practice law in any capacity I don't
5 believe other than the solicitor, so that is my assumption
6 that that -- that it would be in conjunction with that.

7 MR. SMITH: Well, it may, Your Honor. But our position
8 would be that it does not make a difference as a matter of
9 law ---

10 THE COURT: Yeah, I ---

11 MR. SMITH: --- because that rule applies to lawyers in
12 their individual capacities. And if there was an intent to
13 make those documents public simply because that lawyer is
14 also a public official then it can say so, but it does not.

15 It closes them to the public. It makes them non
16 public. It is not just a matter of whether the Commission
17 on Lawyer Conduct and the Office of Disciplinary Counsel and
18 the Supreme Court are restrained. It is non public, period.

19 THE COURT: And the reason I asked the questions, I
20 don't disagree with your argument concerning the nature of
21 the Office of Disciplinary Counsel; my point was I didn't --
22 I think for purposes -- this is a motion to dismiss, number
23 one, so it is based on the pleadings I assume.

24 MR. SMITH: Yes.

25 THE COURT: So I really and truly don't see any problem

1 because I think it is the officer and that may well be
2 proper for a FOYA. Just because she is a solicitor and an
3 individual I don't think doesn't -- didn't -- doesn't stop
4 me from ordering it.

5 Getting to the next level though the next level is what
6 it is about. And that is where I focus my -- in reading
7 your memorandum that to me is the part that I would like you
8 to focus on is to whether or not that is really public
9 matter or whether or not that is -- is it not privileged ---
10 private matters until certain things occur. That is what I
11 understand.

12 MR. SMITH: Well, our proposition would be that
13 regardless of whether it is about her duties as a solicitor
14 or not, a claim could be made against a lawyer ---

15 THE COURT: Sure.

16 MR. SMITH: --- for conduct that occurs outside of the
17 practice of law ---

18 THE COURT: I understand.

19 MR. SMITH: --- such as lawyer's commission of a
20 crime ---

21 THE COURT: Correct.

22 MR. SMITH: --- unrelated to the practice of law. But
23 our position is that FOYA closes -- exempts from the
24 definition of public documents, public records, those
25 documents that are closed to the public as a matter of law.

1 And grievous complaints until formal charges are made and
2 they are answered in the 30 days that run are non public
3 under the rule.

4 It is not just that these -- that the Office of
5 Disciplinary Counsel can't release it; it is non public. It
6 is within the discretion of the lawyer himself or herself as
7 to whether they are released before then.

8 If a lawyer is representing a client who has made a
9 complaint against him or her and that lawyer believes that
10 he or she should withdraw from representations the lawyer
11 doesn't have to let opposing counsel see that complaint. He
12 can just simply make that request. He can ask the judge to
13 seal the record.

14 THE COURT: I assure you I am familiar with that one.
15 Because it happens not frequently but it is not a rarity in
16 a criminal case to have someone especially in appointed
17 counsel's situation. So I see that frequently. I
18 understand that.

19 MR. SMITH: So regardless of what these complaints are
20 about - and as I noted the solicitor has said that the
21 dismissal had been recommended, there's no formal charges -
22 they are closed to the public. They are non public under
23 that rule. And FOYA says that documents that are closed to
24 the public as a matter of law that rule is a law are not
25 public records under FOYA. It is also specific ground for

1 exemption under that rule too. We have got a 1981 Attorney
2 General's Office opinion ---

3 THE COURT: Right.

4 MR. SMITH: --- that I attached ---

5 THE COURT: Yeah.

6 MR. SMITH: --- that reached the same conclusion. It
7 is not about a solicitor but about the fact that these
8 complaints were not subject to FOYA.

9 If the legislature had disagreed with that
10 interpretation, or the Supreme Court, they could have
11 modified either the rule or the FOYA statute. And that has
12 not occurred since then. That has been the rule since then.
13 I am not aware of any instance in which a public official
14 has been required by FOYA to produce complaints against
15 them.

16 So our position is is that they are closed to the
17 public by this rule, they are not public records under the
18 FOYA statute, and that because these are records personal to
19 her this -- she is an officer, is not a public body under
20 that rule. That just applies to agencies. Personal records
21 of hers are not records of the agency and so therefore it is
22 not subject to FOYA.

23 THE COURT: Okay. Thank you, Mr. Smith.

24 MR. SMITH: And if I may just briefly.

25 THE COURT: Sure.

1 MR. SMITH: Just a few points in Ms. Ballard's
2 memorandum.

3 THE COURT: Well, why don't you do this. I will allow
4 you to respond to hers. You don't have to address that now.
5 I will give you a chance to reply to Ms. Ballard's argument.
6 Ms. Ballard.

7 MR. SMITH: Thank you, Your Honor.

8 THE COURT: Be delighted to hear from you.

9 MS. BALLARD: Thank you very much, Your Honor.

10 THE COURT: Yes, sir.

11 MS. BALLARD: I would refer you to the complaint
12 itself ---

13 THE COURT: Okay.

14 MS. BALLARD: --- which attached is Exhibit B was Ms.
15 Wilson's response to the FOYA request that was served upon
16 her by the -- by my client, South Carolina Lawyers Weekly.

17 Her response is dated July 28th, 2015. And she
18 specifically says that the grievances that have been filed
19 against her - I am reading from the final paragraph - had to
20 do, quote, with her management of the Solicitor's Office and
21 in some case -- in some cases with her handling of cases,
22 unquote.

23 THE COURT: Okay.

24 MS. BALLARD: So Ms. Wilson has acknowledge that the
25 documents about which complaints were filed related to ---

1 THE COURT: I don't -- I really don't have to --
2 because I don't have personal a problem -- if the only issue
3 was whether or not she is a public body there is no question
4 what I would do. I mean I think she is. Okay?

5 MS. BALLARD: Yes, Your Honor.

6 THE COURT: For purposes of a FOYA request.

7 MS. BALLARD: Yes, Your Honor.

8 THE COURT: What I would like for you to address is
9 really the nature of what you are seeking. And I just --
10 how -- how -- how do you -- how it is you are entitled to
11 that?

12 MS. BALLARD: I will be happy to address that, Your
13 Honor.

14 THE COURT: Okay.

15 MS. BALLARD: Ms. Wilson is relying on Rule 12 of the
16 Rules of Lawyer Disciplinary Enforcement. And as much as
17 Emory and I have great respect for each I think he is
18 misconstruing Rule 12.

19 Rule 12 has no application to the lawyer herself. Rule
20 12 by its very definition only addresses restrictions that
21 are on the Supreme Court, the Commission on Lawyer Conduct,
22 and the Office Of Disciplinary Counsel.

23 By definition any lawyer against whom a complaint is
24 filed at any stage of the proceedings can buy a Billboard on
25 26 and publish the fact that a grievance has been filed

1 against them. The individual lawyers are under no
2 prohibition whatsoever to reveal the existence of a
3 grievance with them.

4 THE COURT: Well, I don't quarrel with that. I mean we
5 have already stated I see that, as I have already alluded
6 to, frequently and have heard a number of them.

7 But it is the content that we are talking about. It is
8 not just that the grievance was filed. It is what was
9 filed. And that is the part that I -- I just don't know how
10 that is subject to a FOYA.

11 MS. BALLARD: Well, if it had to do with her management
12 of the Solicitor's Office she is an elected official and by
13 virtue of her status as a lawyer also being an elected
14 official if she is doing something for a private client I
15 think that is a different matter; but if she has had a
16 complaint filed against her arising out of her public duties
17 that she performs not as a private lawyer but as an elected
18 public official, by definition those documents have to be
19 public. She answered this FOYA request on her official
20 letterhead.

21 THE COURT: Oh, I understand that.

22 MS. BALLARD: She used State resources or County
23 resources, depending on how they are funded, to answer this
24 question.

25 And she actually in addition to saying you can't have

1 these documents she then went on to say by the way they
2 exist and this is what they are about.

3 So even if she has any protection under FOYA she has
4 waived the protection under FOYA by disclosing that portion
5 of the proceedings that she felt like she could disclose
6 which were favorable to her without disclosing the entire
7 content of the public documents that we are requesting.

8 The other point that I made in my memo, Your Honor, is
9 that the Attorney General's Office is required before they
10 appear on behalf of a public official to investigate the
11 matter. And the Attorneys General's Office is prohibited
12 from appearing in front of -- or representing any public
13 official unless they have determined that the conduct in
14 question arose in the course and scope of her official
15 duties. So the fact that the Attorney General's Office is
16 even here representing the solicitor ---

17 THE COURT: Well, we really don't need to stress that
18 because I have already said I don't question what it is. I
19 mean ---

20 MS. BALLARD: Well, if she is a public official ---

21 THE COURT: Yeah.

22 MS. BALLARD: --- and these documents were received by
23 her related to complaints about her conduct as a public
24 official I think that answers the question.

25 THE COURT: Well, I appreciate that. And you and I may

1 have to agree to disagree.

2 MS. BALLARD: Thank you, Your Honor.

3 THE COURT: All right. I don't quarrel with that. I
4 think we need -- I mean I have read the Attorney General's
5 opinion and if necessary we may be framing an issue that
6 needs to be addressed.

7 I understand there is certainly -- I think I mentioned
8 it yesterday about my family has been involved, my father
9 specifically in wanting to do things in - I will use the
10 proper term - executive session, when they really didn't
11 need to be.

12 It just lends itself to the suspicion and really
13 jumping to conclusions that people do that you are hiding
14 something. And I understand that.

15 But by the same token there are certain things that I
16 think at least as I see them need to be preserved until the
17 court tells me otherwise. And that will be matters that are
18 filed with the Office of Disciplinary Counsel that were
19 dismissed. And I -- I mean we have the same situation.

20 And so if the court wants to say yep lawyer you are
21 protected but if you could go and you are off and you assume
22 an office - it is a public office - that protection doesn't
23 continue. Because that is what you are saying really in
24 essence.

25 I understand you think she by her actions she has

1 waived it. I don't think by disclosing that a grievance has
2 been filed that is permitted. As I recall when I was
3 practicing you used to not could say that even.

4 MS. BALLARD: That is true. The rules changed ---

5 THE COURT: But it changed.

6 MS. BALLARD: --- in 1991.

7 THE COURT: But I don't think that that -- now it
8 becomes discretionary again. I just don't think it is a
9 public matter. I don't think it is a matter that needs to
10 be disclosed; and it is protected for the reasons stated in
11 your brief, Mr. Smith.

12 So I don't want to focus on that she is not a public
13 body. I mean I think -- I think she is subject to that part
14 of it from the standpoint of a FOYA request. But I just
15 don't think the material they are entitled to it so ---

16 MS. BALLARD: Your Honor, for the record could I
17 respond to two points ---

18 THE COURT: Sure. Absolutely.

19 MS. BALLARD: --- in a 1981 Attorney General's
20 opinions?

21 THE COURT: Sure. Well, you can respond. But that is
22 really and truly we all know it is for guidance. It is not
23 binding on me. It is not binding on you. It won't be
24 binding on the reviewing court. They are going to make a
25 determination.

1 So I appreciate that. I am just -- one thing I have
2 learned is -- when I -- as I have stated before -- you all
3 remember him well too, and I can remember hearing him speak,
4 and Justice Ness would somewhere in his conversation would
5 always say I may be wrong but never in doubt. And I used
6 to ---

7 MS. BALLARD: His exact quote was I may be in error but
8 I am never in doubt.

9 THE COURT: Well, the one thing I have come to
10 realize ---

11 MS. BALLARD: Yes, sir.

12 THE COURT: --- now I understand. I used to think it
13 was pretty presumptuous as a lawyer. But when I took this
14 job I began to understand he is right.

15 You know I -- y'all may be -- you may be right, but
16 today I am not in doubt about what I am doing. I am
17 comfortable with my decision. And if the court says Judge
18 you have made a mistake, I will try to learn from that. But
19 I thank you for that.

20 MS. BALLARD: I appreciate your guidance on the issue,
21 Your Honor. Thank you very much.

22 THE COURT: Thank you so much, Ms. Ballard. Good to
23 see you as well.

24 And Mr. Smith I think probably for the protection of
25 everything if you will prepare an order.

RULE ON DISCIPLINARY PROCEDURE Par. 20

granted by the Court upon a showing by clear and convincing evidence that the attorney's disability has been removed and he is fit to resume the practice of law. Upon the application, the Court may take or direct action as it deems necessary or proper to a determination of whether the attorney's disability has been removed, including a direction for an examination of the attorney by qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of the examination be paid by the attorney.

G. If an attorney has been transferred to disability inactive status by an Order in accordance with paragraph C above, and thereafter in proceedings duly taken, he has been judicially declared to be competent, this Court may dispense with further evidence that his disability has been removed and may direct his reinstatement to active status upon terms as are deemed proper and advisable.

H. The filing of a petition for reinstatement to active status by an attorney transferred to disability inactive status or any other petition or motion based upon a mental or medical condition shall constitute consent to divulge his medical records. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since his transfer to disability inactive status and he shall furnish to this Court written consent to each to divulge such information and records as requested by Court appointed medical experts.

PARAGRAPH 20. CONFIDENTIALITY

A. All records and proceedings involving allegations of Misconduct by an attorney shall be confidential and shall not be disclosed unless:

- (1) The Respondent shall in writing request that they be public;
- (2) The investigation is predicated upon a conviction of the Respondent for a crime or upon public discipline imposed upon the Respondent in another jurisdiction, in which case the entire file pertaining to the crime or the public discipline, other than the work product and internal memoranda of the disciplinary agency, shall be public.

B. All proceedings involving allegations of disability on the part of an attorney shall be kept confidential until and unless the Supreme Court enters an Order transferring the Respondent to disability inactive status pursuant to paragraph 19 of the Rule in which case paragraphs 19D & E shall apply.

C. Proceedings involving allegations of misconduct by or the disability of an attorney frequently require the disclosure of otherwise confidential or privileged information concerning the complainant or the witness. In order to protect the interests of the complainant or the witness, the hearing panel to whom formal prosecution of an allegation of misconduct or disability of an attorney is assigned, or the Executive

Committee in matters considered by it, may, upon application and for good cause shown, issue a protective order prohibiting the disclosure of such information and direct that the proceedings be so conducted as to implement the order.

D. No persons whomsoever in any way connected with a matter before the Board, or otherwise, including witnesses, counsel, counsel's secretaries, Respondent, Board members, judicial officers, Board employees, reporters or investigators, shall mention the existence of any such proceeding, nor disclose any information pertaining thereto or discuss any testimony or evidence therein except to persons directly involved, and then only to such extent as necessary for a proper disposition of the matter. Any proceeding before the Board may be made public upon written request of the Respondent.

E. Violation of this provision shall be deemed contempt of this Court and punishable as such. All persons attending any proceedings or taking part in any matter hereunder shall be advised of this provision upon the commencement thereof. All records and correspondence held by members of the Board at the conclusion of their respective terms of office shall be carefully screened by them. They shall deliver all essential records and correspondence, so held, to the Board for filing with the permanent records of the Board, and destroy all nonessential records having no permanent or continuing effect.

F. The Board through the Chairman may disclose relevant information that is otherwise confidential to agencies authorized to investigate the qualifications of judicial candidates, to agencies investigating qualifications for admission to practice, to law enforcement agencies investigating qualifications for government employment, and to such other agencies as designated by the Court. If the Board through the Chairman decides to answer a request for relevant information, and if the attorney who is the subject of the request has not signed a waiver permitting the requesting agency to obtain confidential information, the Board through the Chairman shall send to the attorney at his last known address a notice that information has been requested and by whom, together with a copy of the information that the Board proposes to release to the requesting agency. The Board through the Chairman shall inform the subject attorney that the information shall be released at the end of eight days unless the attorney obtains a court order restraining such disclosure.

G. The Board through the Chairman or his designee shall transmit notice of all public discipline imposed on an attorney or the transfer to inactive status due to disability of an attorney to the National Discipline Data Bank maintained by the American Bar Association.

H. All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by this Rule.

RULE ON DISCIPLINARY PROCEDURE Par. 22

I. When it is necessary to obtain the permission of a tribunal to withdraw from representation, an attorney may reveal the fact that the client has filed a grievance to help establish good cause for withdrawal. If the motion to be relieved includes a reference to the grievance, the attorney shall serve a copy of the motion on the client, but shall give opposing counsel only notice of the motion, without revealing the existence of the grievance. The motion to be relieved shall be accompanied by a request that the records relating to the motion be sealed. The tribunal shall take steps to prevent the disclosure of the existence of the grievance to any other person. After deciding the motion to be relieved, the tribunal shall insure that either the record on the motion is sealed or that all references to the grievance are deleted from any record available to the public. All members of the tribunal and staff who learn of the existence of the grievance shall not reveal that fact to any other person.

[Amended effective May 16, 1989]

PARAGRAPH 21. SERVICE OF NOTICES, ETC.

Wherever in this Rule provision is made for the service of any notice, order, report or other paper or copy thereof upon any complainant, or Respondent or petitioner in connection with any proceeding involving a grievance or a petition for reinstatement, service may be made upon counsel of record for complainant, Respondent, or petitioner, either personally, by registered mail or by certified mail, return receipt requested.

PARAGRAPH 22. CLERK IS AGENT FOR SERVICE OF NOTICES ON NON-RESIDENT ATTORNEYS

Service of any notice provided for in this Rule upon any non-resident Respondent who has been admitted to the practice of law pursuant to the Rules of this Court, or upon any resident Respondent who, having been so admitted, subsequently becomes a non-resident or after due diligence cannot be found at his usual abode or place of business in this state, may be made by leaving with the Clerk of the Court a true and attested copy of such notice and any accompanying documents and by sending to the Respondent, by registered mail, a like, true, and attested copy, with an endorsement thereon of the service upon the said Clerk, addressed to such Respondent at his last known address.

The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Board. The Chairman of the Board or the Court before which there was pending any proceeding in which notice has been given as provided in this section may order such continuance as may be necessary to afford the Respondent reasonable opportunity to appear

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
R. MARKLEY JENNIS JR., CIRCUIT COURT JUDGE
Trial Court Case No.: 2015-CP-10-5757
Appellate Case No. 2016-000555

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

Appellant,

vs.

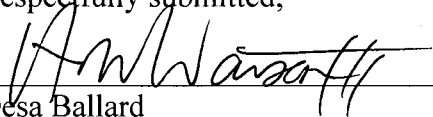
Scarlett Wilson, Solicitor Of the Ninth Judicial Circuit,
An elected public official,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,


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July 26, 2016

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AUG 10 2016
SC Court of Appeals