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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Judge

Appellate Case No. 2016-001112

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

v.

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

MOTION TO ARGUE AGAINST PRECEDENT

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Appellant hereby moves pursuant to Rule 217, SCACR, to argue against precedent with regard to Glassmeyer[1] v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015). This motion is made out of an abundance of caution. There are several independent reasons Appellant is entitled to reversal in this case, some of which have nothing to do with anything discussed in the Glassmeyer v. City of Columbia opinion. Also, no reported opinion following Glassmeyer v. City of Columbia has yet provided insight into the proposition or propositions for which that opinion stands; thus, it is quite possible that this court views or will view that opinion's precedential effect as presenting no inconsistency with any of Appellant's arguments for reversal in this case. Since it is also possible, however, that this court may interpret Glassmeyer v. City of Columbia as inconsistent with at least some of what Appellant argues in this appeal, Appellant makes this motion so that his counsel, consistently with Rule 217, SCACR, may discuss Glassmeyer v. City of Columbia freely at oral argument and argue that, if that case is precedent for a proposition that is inconsistent with an argument by Appellant in this case, Glassmeyer v. City of Columbia ought to be overruled to that extent.

The grounds for this motion are as follows:

1. Glassmeyer v. City of Columbia involved a request to the City of Columbia under the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, et seq., (hereinafter "FOIA") that sought "all materials relating to not fewer than the final three applicants for the most recent vacancy announcement for the position of city manager."

[1] In a remarkable coincidence, Appellant in this case is the same person who was the plaintiff and, later, the respondent, in that case.

Glassmeyer v. City of Columbia, 414 S.C. at 216-17. The request sought, among other items of information, the applicants' home addresses, telephone numbers, and email addresses. Id. at 217. While the City originally withheld more of the requested information, the case came before this court on the City's argument that "the trial court erred in finding the FOIA compelled disclosure of home addresses, personal telephone numbers, and personal email addresses for applicants to the position of city manager." Id. at 218. The court held "the applicants' home addresses, personal telephone numbers, and personal email addresses are '[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy' and are exempt from disclosure under section 30-4-40(a)(2)." Glassmeyer v. City of Columbia, 414 S.C. at 223. Accordingly, that case involved the same unreasonable-invasion-of-personal-privacy exemption from mandatory FOIA disclosure that is at issue in the instant case. S.C. Code Ann. § 30-4-40(a)(2).

2. The court stated as follows:

> Glassmeyer contends the City's disclosure of the information would not result in a substantial invasion of privacy because the telephone numbers and addresses are publicly available information and email addresses are generally available through online research.
>
> . . .

> We find the home addresses, personal telephone numbers, and email addresses of the applicants are information in which the applicants have a privacy interest. However, we must balance the privacy interest of the applicants against the interest of the public's need to know this information.
>
> . . .
>
> Glassmeyer asserts the disclosure of the information would serve the public's interest by demonstrating whether the applicants were truthful in their applications. Other than the home addresses, telephone numbers, and email addresses, the City has disclosed the applicants' entire applications, including their educational backgrounds and employment histories. We fail to see how disclosure of the limited information the City seeks to protect would serve to establish the veracity of the applicants more than the information already provided.
>
> In balancing the interests of protecting personal information against the public's need to know the information, we find no evidence in the record demonstrates disclosure would further the FOIA's purpose of protecting the public from secret government activity. Accordingly, we hold the applicants' home addresses, personal telephone numbers, and personal email addresses are "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy" and are exempt from disclosure under section 30-4-40(a)(2).

Glassmeyer v. City of Columbia, 414 S.C. at 221, 223.

3. A citizen requesting information under FOIA is entitled to all public records he requests unless an exemption to mandatory disclosure applies, and "[t]he burden of proving that an exemption exists lies with the government." Evening Post Publishing Co. v. Berkeley

Cnty. Sch. Dist., 392 S.C. 76, 83, 708 S.E.2d 745 (2011). Respectfully, Appellant notes that language from the quoted passages from Glassmeyer v. City of Columbia above could be read as indicating that a FOIA requester must put forth some specific reason why the information is sought, which is not the law, and that the reason the information is sought has something to do with whether the unreasonable-invasion-of-personal-privacy exemption applies, which it does not.

4. The test for whether the unreasonable-invasion-of-personal-privacy exemption applies is whether the information sought is of such a character that "the public disclosure thereof would constitute unreasonable invasion of personal privacy." S.C. Code Ann. § 30-4-40(a)(2). The burden is on the government to show that an exemption applies, not on the requesting citizen to show why he needs or wants the information. Evening Post, 392 S.C. at 83.

5. A citizen who has made a FOIA request does not carry a burden to "demonstrate[] disclosure would further the FOIA's purpose of protecting the public from secret government activity." Glassmeyer v. City of Columbia, 414 S.C. at 223. To the extent that Glassmeyer v. City of Columbia stands for the proposition that a FOIA requester has a burden of any kind to meet with regard to whether an exemption applies, it is wrong, is contrary to Supreme Court precedent, and should be overruled. See Evening Post, 392 S.C. at 83.

6. But perhaps more troubling is what is *not* discussed in the analysis in Glassmeyer v. City of Columbia, 414 S.C. at 218-23. The analysis discusses whether a person's address and telephone number are items of information in which the person has a privacy interest, id., but what the analysis does not do is take the next step, a step required by the language of exemption. Having found a privacy interest was implicated, the analysis used in Glassmeyer v. City of Columbia did not then ask the necessary question to determining whether the unreasonable-invasion-of-personal-privacy exemption applies: Would public disclosure of the information not just implicate a privacy interest but actually "constitute *unreasonable* invasion of personal privacy[?]" S.C. Code Ann. § 30-4-40(a)(2) (emphasis added). Is the information sought of such a deeply private character that disclosing it pursuant to a FOIA request would unreasonably invade a person's privacy? See id.

7. Essentially, the proper inquiry under S.C. Code Ann. § 30-4-40(a)(2) is whether the information if of such a kind or is sought under such circumstances that disclosing it would amount to a violation of the South Carolina Constitution under S.C. Const. art. I, § 10, which provides the people of this state a right to be free from "unreasonable invasions of privacy[.]"

8. Practically every piece of information that concerns a person implicates at least a scintilla of a privacy interest. Merely because

information sought in a FOIA request implicates an interest in personal privacy does not trigger the exemption of S.C. Code Ann. § 30-4-40(a)(2). Merely because providing information sought in a FOIA request would amount to *an* invasion of personal privacy does not trigger the exemption. To the extent that Glassmeyer v. City of Columbia condones an analysis that does not reckon whether the information sought is of such a deeply private nature that its disclosure would necessarily be an *unreasonable* invasion of personal privacy, it should be overruled.

9. In City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 323 S.C. 384, 475 S.E.2d 747 (1996), the City of Columbia claimed the unreasonable invasion of personal privacy exemption under S.C. Code Ann. § 30-4-40(a)(2) applied, but the Supreme Court disagreed with the "contention that the internal investigation reports of law enforcement agencies are per se exempt because they contain personal information as a matter of course. The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis. Thus, it remains to be seen whether the report qualifies for an exception under FOIA." City of Columbia, 323 S.C. at 387.

10. As discussed in Appellant's briefs, names and addresses are not of such an intensely private character that they would, without something more, be that kind of information. They are too public,

not private enough. The government disclosing information to a FOIA requester that could be found in a telephone book is not an unreasonable invasion of personal privacy. A request for such information would have to be made under some unusual circumstances in order for such a request to come within the ambit of the exemption.

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

Glassmeyer v. City of Columbia decision is precedent for it being proper to rely on such authority, it contradicts Supreme Court precedent and should be overruled.

12. To the extent that Glassmeyer v. City of Columbia stands for the proposition that disclosing names and home addresses always or even usually would fall within the unreasonable-invasion-of-personal-privacy exemption, it should be overruled. As discussed in Appellant's brief, legislative intention as to what information does fall within this exemption can be seen by looking at FOIA as a whole. FOIA provides in a section regarding "matters declared public information" that "home addresses and home telephone numbers of employees and officers of public bodies revealed in response to a request pursuant to [FOIA] may not be used *for commercial solicitation purposes*." S.C. Code Ann. § 30-4-50 (emphasis added). FOIA also deems as exempt from disclosure "information relating to public records which include the name, address, and telephone number . . . of an individual or individuals who are handicapped or disabled *when the information is requested for person-to-person commercial solicitation of handicapped persons* solely by virtue of their handicap." S.C. Code Ann. § 30-4-40(a)(2). The natural interpretation to take from this is that the General Assembly intended that home addresses and telephone numbers are the sort of

information that, under ordinary circumstances, is required to be disclosed in response to a FOIA request.

13. Taking a categorical approach to what falls within S.C. Code Ann. § 30-4-40(a)(2) would be deeply problematic and inconsistent with existing precedent. To the extent that Glassmeyer v. City of Columbia stands for the proposition that names and addresses are a category of information that fall within the exemption of S.C. Code Ann. § 30-4-40(a)(2), it should be overruled.

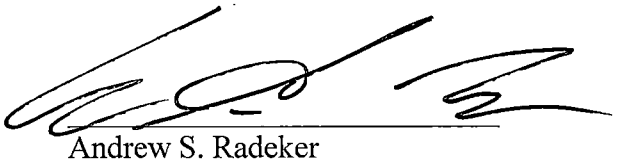
14. Appellant is not contending that names and address could never, under any circumstances, fall within the exemption of S.C. Code Ann. § 30-4-40(a)(2). If a FOIA requester were to ask for the names and addresses of child sex abuse victims, for example, that request would likely come within the ambit of S.C. Code Ann. § 30-4-40(a)(2), regardless of whether any other exemption would also apply. But that would be because the response to the request would identify people as having experienced an event that implicates their deepest privacy concerns. Receiving large amounts of state funds (as here) and applying for a job (as in Glassmeyer v. City of Columbia), by contrast, barely rate as implicating privacy concerns at all.

15. It may be that the court does not interpret Glassmeyer v. City of Columbia in a way that is at all inconsistent with Appellant's arguments. It may be that the court views Glassmeyer v. City of Columbia as distinguishable from this case. (After all, the claimants

who claim their lottery winnings from the Lottery Commission do so by completing a form that explicitly informs them that the information they submit may be subject to release under FOIA. (R. pp. 155-56, 160.) Nothing in the Glassmeyer v. City of Columbia opinion indicates that the job applicants filled out a similar form.) What Appellant asks in this motion is the freedom to discuss with the court at oral argument the ways that Glassmeyer v. City of Columbia could be interpreted as bad precedent, such that it ought to be addressed by this court.

WHEREFORE Appellant prays for an order permitting oral argument against precedent with regard to Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015), to the extent that the court views that opinion as inconsistent with any of Appellant's arguments for reversal in this case.

Respectfully submitted,



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August 28, 2018

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PROOF OF SERVICE

I, the undersigned, certify that I served the motion to argue against precedent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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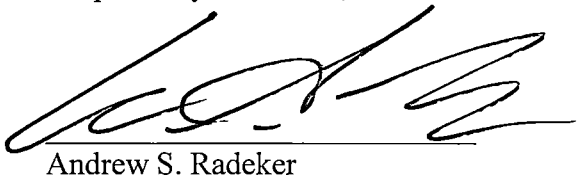
August 28, 2018

Respectfully submitted,



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