THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2013-001880

City of Columbia,.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Respondent would restate the issues on appeal as follows:

I. **Whether the circuit court erred in finding that FOIA compelled disclosure of physical addresses, personal telephone numbers and email addresses of applicants for the position of City Manager?**

II. **Whether the Circuit Court erred in awarding attorneys' fees to Respondent as the prevailing party?**

STATEMENT OF THE CASE

This is an action for declaratory judgment arising out of Respondent's request for production of public documents pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (Supp. 2013) ("FOIA"). Respondent filed a summons and complaint for declaratory judgment on March 8, 2013. Respondent sought a declaration that he was entitled to unredacted documents from Appellant, an injunction prohibiting Appellant from withholding the redacted information, attorney's fees and costs.

Appellant filed an Answer on April 1, 2013, denying any FOIA violation. Appellant also requested an award of attorneys' fees and costs incurred in its defense. On April 25, 2013, Respondent filed a Motion to Strike Appellant's Prayer for Attorneys' Fees and a Motion for Summary Judgment. Appellant filed a cross Motion for Summary Judgment on or about May 14, 2013.

The Honorable G. Thomas Cooper, Jr. heard oral argument on both parties' Motions for Summary Judgment and on Respondent's Motion to Strike Appellant's Prayer for Attorneys' Fees on June 6, 2013. At that time, Appellant provided the trial judge with all unredacted materials for an *in camera* review. On June 19, 2013, Judge

Cooper granted Respondent's motions, leaving open the question of how much to award Respondent for attorney's fees and costs.

On July 1, 2013, Appellant filed a Motion for New Hearing and Reconsideration. The Court denied Appellant's motion on July 19, 2013.

Respondent provided the trial court with an Affidavit of Attorneys' Fees on August 5, 2013. On August 14, 2013, Appellant filed a memorandum in opposition to Respondent's request for attorneys' fees. Respondent submitted a Supplemental Affidavit in Support of Attorneys' Fees on August 15, 2013. On August 27, 2013, the trial court issued an order awarding Respondent attorneys' fees and costs in the amount of $11,185.01.

On September 4, 2013, Appellant filed a Notice of Appeal. Simultaneously, Appellant produced partially unredacted documents to Respondent, leaving physical addresses, personal telephone numbers and email addresses obscured from view. This action narrowed the focus of Appellant's appeal to the two issues now before this Court.

FACTS

On January 14, 2013, Respondent submitted a FOIA request for information to Appellant. [R. pp. 67-68; 69.] In his request, Respondent requested "[a]ll materials relating to not fewer than the final three applicants for the most recent vacancy announcement for the position of City Manager." [*Id.*] On or about January 24, Appellant produced thirty-four pages of documents relating to the five finalists for the position of City Manager, including the applications submitted by S. Allison Baker, Teresa Wilson, Leonard F. Regan, William P. Pate, and Jonathan F. Simmons, Jr. [R. p. 67 at ¶ 4; R. pp. 70-101.]

The response Respondent received from Appellant contained a list of the finalists' names, along with redacted copies of the finalists' applications and resumes. [*Id.*] The redactions obscured from view the following information: (1) some, but not all, home addresses; (2) some, but not all, telephone numbers of potential candidates and those persons listed as references for the applicants; (3) driver's license numbers and restrictions; (4) the reasons for leaving prior employment listed by all applicants; and (4) some, but not all, salary information. [R. p. 67 at ¶ 4; R. p. 70-101.] No explanation for the redactions was provided. [*Id.*]

In response to Appellant's production of redacted materials, Respondent demanded by letter dated January 24, 2013 that Appellant provide unredacted documents in response to his request. [R. p. 68 at ¶ 5; *see also* R. p. 102.] Kenneth E. Gaines, Esquire, City Attorney, responded on January 28, 2013 and declined to disclose the previously redacted information. [*Id.* at ¶ 6; R. p. 103.] Appellant cited the general rule regarding a public body's ability to redact records under FOIA, S.C. Code Ann. § 30-4-30, without citing any particular exemption that applied. [*Id.*]

Respondent filed a Summons and Complaint for Declaratory Judgment on March 8, 2013, seeking to compel production of the redacted information. [R. pp. 16-20.] By letter dated March 27, 2013, Appellant offered to provide unredacted materials to Respondent's counsel for an "in camera" review, stating "there is no 'smoking gun' in any of the redacted information." [R. p. 115.]

ARGUMENT

Standard of Review

In *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App.

2004), the South Carolina Court of Appeals held that "[t]he standard of review for a declaratory judgment action is . . . determined by the nature of the underlying issue." Where a plaintiff seeks a declaratory judgment under the FOIA to determine whether certain information should be disclosed, the action is one at law. *Id.*; *see also South Carolina Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994); *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165 (Ct. App. 2003).

"In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 270, 705 S.E.2d 73, 76 (Ct. App. 2010) (*quoting Electrolab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004)). "The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Id.*; *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

"An award of attorney's fees rests within the sound discretion of the trial judge and should not be disturbed on appeal unless there is an abuse of discretion." *Patel v. Patel*, 359 S.C. 515, 599 S.E.2d 114 (2004); *Burton v. York County Sheriff's Dept.*, *supra*. "Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence." *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989) (*citations omitted*).

I. FOIA COMPELS THE DISCLOSURE OF PHYSICAL ADDRESSES, TELEPHONE NUMBERS AND EMAIL ADDRESSES FOR APPLICANTS TO THE POSITION OF CITY MANAGER.

The South Carolina Freedom of Information Act codified the legislative intent that gave rise to its enactment:

> 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 formation of public policy. Toward this end, provisions of this chapter **must be construed so as to make it possible for citizens . . . 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.

S.C. Code Ann. § 30-4-15 (emphasis added). "The essential purpose of the FOIA is to protect the public from secret government activity." *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219, 221 (1991).

A public body cannot withhold information sought by a citizen under FOIA unless the information falls into one of the fifteen exemption categories contained within § 30-4-40, or is otherwise exempt from disclosure under various other FOIA provisions. S.C. Code Ann. § 30-4-40 (Supp. 2013). The presumption is for disclosure: "The burden of proving that an exemption to disclose exists under the [FOIA] lies with the government." *Evening Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011). "The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003) (*citing Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001)).

FOIA exemptions must be construed narrowly to conform to the public purposes of the Act. *Evening Post Pub. Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d

496 (2005). If a document does not fall within one of the enumerated exemptions, then the document and/or information cannot be withheld by a public body. *Id.* Whether an exemption applies is necessarily a case-by-case determination. *Id.*; *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996).

Appellant violated FOIA by failing to provide physical addresses, telephone numbers and email addresses for the applicants to the position of City Manager because neither the personal privacy exemption, S.C. Code Ann. § 30-4-40(a)(2), nor the exemption for matters otherwise exempt from disclosure by statute or law, S.C. Code Ann. § 30-4-40(a)(4), apply. The trial court's order granting summary judgment to Respondent should be affirmed.

A. S.C. Code Ann. § 30-4-40(a)(2) does not provide Appellant with grounds to withhold the requested information because its disclosure would not constitute an unreasonable invasion of privacy.

The FOIA provides that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40," which provides specific categories of "[m]atters exempt from disclosure. S.C. Code Ann. § 30-4-30(a); *see* S.C. Code Ann. § 30-4-40.

Appellant resorts to Section 30-4-40(a)(2) of the FOIA, which allows a public body to withhold "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of privacy." Although FOIA does not explicitly define what constitutes "information of a personal nature," the legislature's intention as to what information falls within the exemption can be determined by the Act as a whole. For example, the personal privacy exemption itself gives examples of specific categories of information which constitutes "information of a personal nature," including

- information as to gross receipts contained in applications for business licenses and

- information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap.

Id.

Additionally, Section 30-4-50 of the FOIA, regarding "matters declared public information," specifically provides that "home addresses and home telephone numbers of employees and officers of public bodies revealed in response to a request pursuant to [the FOIA] *may not be used for commercial solicitation purposes*." *Id.* (emphasis added). The inclusion of this provision bespeaks a legislative intent that this information be disclosed in response to a FOIA request for documents.

Appellant argues that the South Carolina Family and Personal Identifying Information Privacy Protection Act of 2002, S.C. Code Ann. § 30-2-10, *et seq.* ("Privacy Protection Act"), supplies a definition of "personal information" applicable to Appellant's personal privacy exemption argument under FOIA.[1] The FOIA does not incorporate by reference any definition of "personal information" from the Privacy Protection Act, nor does the FOIA indicate a legislative intention to exempt from disclosure such information. Even if the Privacy Protection Act's definition were applicable, that would not settle the question before the Court. The Privacy Protection Act merely states a definition of "personal information"; it does not answer the question

[1] The Privacy Protection Act defines "personal information" to include "information that identifies or describes an individual including, but not limited to, an individual's photograph or digitized image, social security number, date of birth, driver's identification number, name, home address, home telephone number, medical or disability information, education level, financial status, bank account numbers, account or identification number issued by or used, or both, by any federal or state governmental agency or private financial institution, employment history, height, weight, race, other physical details, signature, biometric identifiers, and any credit records or report." S.C. Code Ann. § 30-2-30(1).

of whether disclosure of such information would invade a person's privacy interests, which would exempt such information from disclosures under the FOIA. *See* S.C. Code Ann. § 30-4-40(a)(2).

The requested information is not capable of being considered "[i]nformation of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy," because such information is generally available to the public. Appellant admitted in its Motion for Summary Judgment before the trial court and its Brief before this Court that such information is in fact "obtainable from other sources (like the phone book or the internet)." This candid admission eviscerates the remainder of Appellant's argument and militates in favor of affirming the circuit court.

Appellant's resort to South Carolina Attorney General opinions is unavailing. The trial court performed a balancing of the alleged competing private and public interests with regard to the information requested as required by current South Carolina law. *See Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004). In *Burton*, this Court held that in determining whether requested information is "classified as personal or private information exempt from disclosure[,] [the Court] must . . . resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other." *Id.* at 352, 594 S.E.2d at 895. This Court recognized that "the determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis." *Id.* at 348, 594 S.E.2d at 893 (*citations omitted*).

The trial court found that this case was "a perfect example of a situation where a

person ordinarily entitled to privacy with regard to particular information places him or herself in the public eye." [R. pp. 1-11 (*see* p. 5).] Similar to the police officers in *Burton*, the trial court noted in this case that "[w]hen the applicants applied for such a high-level governmental position [as City Manager], they reasonably placed their personal privacy interests below that of the public or general interest." [*Id.* (*citing Burton* at 352, 594 S.E.2d at 895.)] Therefore, the trial court indicated that because of the public nature of the City Manager's position, the balancing of public and private interests tilted in Respondent's favor. In deciding the requested information was not exempt under the personal privacy exemption, the trial court appropriately balanced the public and private interests under applicable South Carolina law.

Moreover, even the South Carolina Attorney General has indicated that "[r]esidence addresses and telephone numbers have been deemed disclosable since the same are often ascertainable by reference to many publicly attainable books and records." SCAG Op. No. 87-60 (July 16, 1987) (*citing Michigan State Employees Association v. Department of Management and Budget*, 353 N.W.2d 496 (Mich. App. 1984) and *Hechler v. Casey*, 333 S.E.2d 799 (W. Va. 1985)). Appellant seizes on the Attorney General's mere caution to public agencies that they should exercise discretion before disclosing an unlisted or unpublished telephone number or where there are reasons such as the need for security which mandate personal privacy. *Id.* The Attorney General concluded that when considering whether to produce information such as telephone numbers and home addresses, the public body must make a "case-by-case" determination, "following the guidelines in cases such as *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) [holding that "no public

policy . . . overrides the goals of FOIA" with regard to a minor's death certificate] and *Child Protection Group v. Cline*, 350 S.E.2d 541 (W. Va. 1986)." *Id.*

Appellant's desire to have this Court adopt the South Carolina Attorney General's opinion is disingenuous. In arguing that opinions of the Attorney General and case law cited therein supports its appeal, Appellant has failed to provide any facts to support a reversal in this case based on those authorities. Appellant has failed to submit any evidence in support of its position with regard to the five factor balancing test established in *Child Protection Group v. Cline*. *See* SCAG Op. No. 87-60 (July 16, 1987). These five factors include (1) whether disclosure would result in substantial invasion of privacy and, if so, how serious; (2) the extent or value of the public interest, and the purpose or object of the individuals seeking disclosure; (3) whether the information is available from other sources; (4) whether the information was given with an expectation of confidentiality; and (5) whether it is possible to [provide] relief so as to limit the invasion of individual privacy. *Id.* at 543. In this case, the five factors weigh in Respondent's favor.

The first and third *Cline* factors, whether disclosure would result in a substantial invasion of privacy and whether the information is available from other sources, overlap with regard to the requested information in this case. There would be little to no risk of invasion of privacy in this case as Appellant has admitted, and it is a generally known fact that telephone numbers and addresses are publically available information. Email addresses also are generally available through online research. Because the information is available from other sources, it is unreasonable to believe that there would be an invasion of privacy if the public body produced such information to Respondent. This

factor therefore weighs in Respondent's favor.

Appellant has failed to provide any contrary evidence to overcome the third *Cline* factor. The South Carolina Attorney General indicates in its Opinion that where the person has an unlisted or unpublished telephone number or where there are reasons such as the need for security which mandate personal privacy, the public body may decide not to produce the information in response to a FOIA request. Here, Appellant has failed to adduce any evidence to show any of the five applicants to the position of City Manager have unlisted or unpublished telephone numbers, addresses, or hidden email addresses. Only with regard to current City Manager Teresa Wilson does Appellant suggest that there may be some other reason for security.

There is no evidence in the record to support Appellant's bald, conclusory statement that Teresa Wilson "is a single parent with a young child at home" and therefore, that Appellant's publication of her telephone number, address, and email will "potentially expose her family to the criminals and schemers the government attempts to thwart." Statements of attorneys are not considered facts in a case without actual evidentiary support. *See Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) ("factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court") (*citing Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180,184 (Ct. App. 1986) (holding depositions relied upon by counsel, but not filed, were not in the record and could not be considered)). Here, there is an absence of any competent evidence showing Ms. Wilson is a single parent with an unlisted address and telephone number in any public index. Appellant's footnote attempting to provide this Court with a basis for

reversing the trial court is not evidence and should be disregarded.

The second factor in the *Cline* analysis regards the public interest and requires a consideration of the "purpose or object of the individuals seeking disclosure." *Cline*, 350 S.E.2d at 543. This factor also weighs in Respondent's favor, as the issue of whether applicants for a position of City Manager are truthful on their application, including the person ultimately chosen for the position, and whether such persons reside within the jurisdictional limits of the public body to which they are applying for a leadership position is a matter of great public importance. Additionally, Appellant admits in its Brief that there was "widespread media interest in the selection," indicating that the information sought by Respondent was of public importance, or at the very least, public interest. *Compare Soc'y of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) (considering the disclosure of a "requested death certificate [of] a murder victim" which was "of great public interest.").

The fourth *Cline* factor also weighs in Respondent's favor. The five applicants for the position of City Manager voluntarily gave their addresses, telephone numbers, and email addresses to the Appellant when applying for the position and made the conscious decision to apply for a prominent position with a public body. It is unreasonable for the applicants to have an expectation of confidentiality with regard to the information provided.

The fifth factor in *Cline*, "[w]hether it is possible to mould relief so as to limit the invasion of individual privacy," does not appear to be applicable in this case. *Cline*, 350 S.E.2d at 543 (maintaining that "courts have consistently taken steps such as the deletion of certain personal data from documents to be released so as to protect the privacy

interests of individuals involved."). In *Cline* the court took the "somewhat unprecedented step" by ordering public disclosure of the requested documents, but limiting the public's right to know specific information about a person's "medical condition." *Id.* at 546. If there is a possible alternative remedy so as to limit the invasion of individual privacy, Appellant bears the burden of coming forward with such evidence. Here, it has failed to do so.

Appellant also relies on *Maracich v. Spears*, 133 S.Ct. 2191, 186 L.Ed.2d 275 (2013), for its argument that a governmental body should not be compelled to disclose information such as telephone numbers, physical addresses, and email addresses due to the fear of "stalkers and criminals who could acquire personal information . . . and to prohibit sale of personal information." *Id.* at 2198 (referring to the policies of the federal Driver's Privacy Protection Act of 1994). *Maracich v. Spears*, together with other federal case law citing federal statutes or the United States Freedom of Information Act, 5 U.S.C. § 552, 80 Stat. § 250 ("US FOIA"), are not binding on South Carolina courts. In *Newberry Pub. Co., Inc. v. Newberry County Com'n on Alcohol & Drug Abuse*, 308 S.C. 352, 417 S.E.2d 870 (1992), the South Carolina Supreme Court held that federal case law interpreting the US FOIA is not binding in this state because the exemptions contained in the [US FOIA] are more expansive than those contained in South Carolina's FOIA." *Id.* at 354 n. 4, 417 S.E.2d at 872 n. 4.

The United States Supreme Court's interpretation of the facts and applicable federal statute in *Maracich v. Spears* is not analogous to the facts of this case. In *Maracich*, the Supreme Court of the United States interpreted the United States Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§ 2721-2725 ("DPPA"). "The

DPPA regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs). Disclosure of personal information is prohibited unless for a purpose permitted by an exception listed in 1 of 14 statutory subsections." *Id.* at 2196 (*citing* 18 U.S.C. at § 2721(b)(1)-(14)).

The narrow issue presented to the Supreme Court was "whether an attorney's solicitation of clients for a lawsuit falls within the scope" of one of the exemptions under the DPPA. *Id.* The Supreme Court ultimately concluded "an attorney's solicitation of clients is not a permissible purpose" covered by the DPPA exemption. *Id.* Not only does *Maracich* fail to address the public policy or purpose underlying either the US FOIA or the South Carolina FOIA, it interprets and applies a federal statute regarding disclosure of state DMV information for solicitation purposes and addresses concerns which are irrelevant to the issues raised in this case.

The South Carolina General Assembly has already considered and addressed Appellant's asserted concern that Respondent may convert the telephone numbers, physical addresses, and email addresses into "potential billboards or social media fodder." Section 30-4-50 of the FOIA provides that "home addresses and home telephone numbers of employees and officers of public bodies revealed in response to a request pursuant to [the FOIA] *may not be used for commercial solicitation purposes.*" *Id.* (emphasis added). Therefore, Respondent could be held liable for his use of the requested information for commercial solicitation purposes. Although limiting a recipient's usage of home addresses and telephone numbers, Section 30-4-50(b) specifically states: "this provision must not be interpreted to restrict access by the public and press to information contained in public records." *Id.*

Additionally, the Privacy Protection Act, if applicable as Appellant asserts, contains its own restriction on "obtain[ing] or us[ing] any personal information obtained from the state agency for commercial solicitation." S.C. Code Ann. § 30-2-50(1). No provision of the Privacy Protection Act prohibits a public body from disclosing the "private information," as defined; instead, the Act implies that disclosure may be required under the FOIA. The Privacy Protection Act implies that the public body "shall provide a notice to all requestors of records . . . that obtaining or using public records for commercial solicitation . . . is prohibited." S.C. Code Ann. § 30-2-50(2). This section indicates that the public body will disclose such information, but in doing so, must warn the recipient that commercial solicitation is expressly prohibited by law.

Moreover, Section 30-4-40(a)(13) of the FOIA requires public bodies to "ma[k]e available for public inspection and copying . . . materials relating to not fewer than the final three applicants under consideration for a position." *Id.* In defining "materials related to the final three applicants," the FOIA requires public bodies to disclose "**[a]ll materials**," excepting only a few very specific categories of data ("tax returns, medical records, social security number[s], or information otherwise exempt from disclosure by [Section 30-4-40]."). The legislature did not include within those enumerated exceptions the information at issue in this case—home addresses, telephone numbers, and personal email address—and if it intended that such information be exempt from disclosure, it would have so provided.

"The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature." *Mikell v. County of Charleston*, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009) (citations omitted). The court must enforce the legislative intent

of the statute if it can be reasonably discovered in the language used. *Id.*; *See also Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "The canon of construction '*expressio unius est exclusion alterius*' or '*inclusio unius est exclusion alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81, 84 (2013). In this case, it means that the specific enumeration of exemptions under S.C. Code Ann. § 30-4-40(13) (listing income tax returns, medical records, and social security numbers as exempt information), would mean that the legislature intended not to exempt home addresses, telephone numbers, and email addresses.

This Court should conclude that the telephone numbers, addresses, and email addresses of the five applicants for the position of City Manager do not qualify as "information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy," and affirm the trial court.

B. No other statute or law provides a separate ground for Appellant to withhold the requested information pursuant to S.C. Code Ann. § 30-4-40(a)(4).

Section 30-4-40(a)(4) of the FOIA provides an exemption from disclosure for "matters **specifically exempted from disclosure** by statute or law." (emphasis added.) Although Appellant cites this section in its Brief and argued before the lower court that the Privacy Protection Act supplies a basis for withholding physical addresses, telephone numbers and email addresses, Appellant appears to have abandoned this argument on appeal by failing to provide what "other statute or law" allows it to withhold the information. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993). "An issue raised on appeal but not argued in the brief is deemed abandoned and

will not be considered by the appellate court." *Id.* at 106, 439 S.E.2d at 285 (*citing Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992)).

In *Fields*, this Court held that where an Appellant only "ma[d]e . . . one . . . conclusory argument without supporting authority," the issue was not appropriately argued and presented for the Court's consideration. *Id.* at note 3 (*citing Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); *Matthews v. City of Greenwood*, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991)). Similarly, in this case, Appellant merely states in its Brief that "[t]he information requested . . . is exempt from disclosure by S.C. Code Ann. § 30-4-40[a](2) *and [a](4).*" (emphasis added). Appellant never cites any "other law or statute" which would provide the City with a basis for redacting the information under Section 30-4-40(a)(4). "[A]n issue is deemed abandoned on appeal and, therefore, not presented for [the Court's] review, if it is argued in a short, conclusory statement without supporting authority." *Fields*, at 106 note 3, 439 S.E.2d at 285 note 3.

Respondent's gratuitous reference to Section 30-4-40(a)(4), allowing a public body to withhold "matter specifically exempted from disclosure by statute or law," has not been adequately preserved for appeal. Moreover, even if it were sufficiently presented to this Court for its review, Respondent is unaware of the other "statute or law" on which Appellant relies such that it may adequately respond.

II. THE ATTORNEYS' FEES AWARD WAS PROPER.

Appellant argues that because Respondent conceded that state law required withholding of driver's license numbers and restrictions, he likewise conceded his ability to obtain attorneys' fees for his successful prosecution of his quest for the remaining information. Appellant's argument is without merit under existing law. The FOIA

provides for attorneys' fees to the prevailing party seeking relief under the Act, whether the prevailing party succeeds in whole *or in part*. S.C. Code Ann. § 30-4-100(b) (Supp. 2013); *see also New York Times Co. v. Spartanburg County School Dist. No. 7*, 374 S.C. 307, 649 S.E.2d 23 (2007). Even though Respondent agreed that drivers' license information and restrictions thereto was properly withheld from disclosure, he is still the "prevailing party" with regard to the other improperly withheld information, such as phone numbers and addresses, reasons for leaving prior employment, the duties of one applicant's prior employment position and compensation information. *See* S.C. Code Ann. § 30-4-100(b).

The South Carolina Supreme Court has defined "prevailing party" broadly, to include "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, **even though not to the extent of the original contention** [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006) (*quoting Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (alteration in original) (emphasis added). "The definition of prevailing party 'clearly envisions a victory **to some degree** on the merits.'" *Id.* (*quoting Jasper County Bd. of Educ. v. Jasper County Grand Jury*, 303 S.C. 49, 52, 398 S.E.2d 498, 500 (1990)) (emphasis added).

Additionally, Appellant cannot avoid the imposition of attorney's fees and costs against it by arguing any "good faith" or "reasonable interpretation" defense. In *New York Times Co. v. Spartanburg County School District No. 7*, the South Carolina Supreme Court expressly rejected a public body's argument that "attorney's fees [were]

not proper because [the public body] acted in good faith and based on its reasonable understanding" of the FOIA. *Id.* at 312, 649 S.E.2d at 31. The Court maintained that there is "[n]o good faith exception . . . for an award of attorney's fees under FOIA." *Id.* at 313, 649 S.E.2d at 31.

The trial court's order awarding Respondent his attorneys' fees was reasonable and supported by adequate findings. South Carolina case law is clear that so long as a trial court makes specific findings of fact on the record for each factor set forth by *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), the order should be affirmed. *See Burton v. York County Sheriff's Dep't* (Ct. App. 2004); *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993).

Here, Respondent submitted an Affidavit of Attorneys' Fees on August 5, 2013. (R. pp. 133-135.) In the Affidavit, Respondent's counsel set forth the procedural history of the lawsuit, identified the documents prepared in its pursuit, explained the amount of time worked on the case, and provided reasonable evidence to support each of the factors required in *Jackson v. Speed* for issuance of an award of attorneys' fees and costs. Respondent requested a total of Twelve Thousand Six Hundred Fifty-Five Dollars and 01/100 Cent ($12,655.01) in attorneys' fees and costs. [*Id.* at ¶ 10.]

On August 14, 2013, Appellant filed a Memorandum in Opposition to Respondent's Petition for Attorney Fees. [R. pp. 150-153.] Appellant argued that Respondent was not entitled to the full amount of requested attorneys' fees because Respondent initially sought "all" information concerning the finalists for City Manager, but during Respondent's oral argument on his Motion for Summary Judgment, Respondent conceded that "state law required [Appellant] to withhold the applicants'

driver's license numbers and restrictions." [R. p. 150-153 (*see* p. 3 at ¶ 1).] Appellant also argued that certain attorneys' fees and costs for time worked on a potential appeal should not be charged to Appellant. [*Id.* (*see* p. 3 at ¶¶ 2-3).] Appellant requested that any fee award be reduced by 31.2 hours. [*Id.* (*see* p. 3 at ¶ 4).] Appellant raised other arguments regarding specific entries submitted by Respondent. [*Id.* (*see* pp. 3-4 at ¶¶ 1-3).]

In response to Appellant's Memorandum in Opposition, Respondent's counsel filed a Supplemental Affidavit of Attorneys' Fees on August 15, 2013, addressing the issues raised by Appellant. [R. pp. 155-156.] The trial court issued an Order awarding attorneys' fees to Respondent on August 27, 2013. [R. pp. 14-15.] The court indicated that it had "reflected upon . . . the factors" in *Jackson v. Speed*, and after doing so concluded that "it [was] appropriate to award fees and costs in the amount of Eleven Thousand One Hundred Eighty-Five Dollars and 01/100 Cents ($11,185.01)." [*Id.*] The amount awarded by the trial court was One Thousand Four Hundred Seventy Dollars ($1,470.00) less than the amount requested by Respondent. [*See* R. pp. 133-135 at ¶ 10.]

By expressly considering the *Jackson v. Speed* factors and by reducing the amount awarded to Respondent from the original amount requested, the trial court appropriately evidenced its exercise of discretion in awarding Respondent his attorneys' fees and costs. Appellant's argument that "the order awarding attorney fees does not provide a basis for determining 'how' the trial judge exercised discretion" is inaccurate.

Additionally, even if this Court reversed the trial court on the first issue presented by Appellant—deciding that FOIA does not compel disclosure of home addresses, personal telephone numbers, and personal email addresses—this Court should affirm the

trial court's order as to Respondent's attorneys' fees. Rule 220(c), SCACR ("appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"); *see also I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (holding prevailing party may raise additional sustaining grounds and the appellate court could affirm a ruling from the lower court regardless of whether additional sustaining grounds were presented to or ruled on by the trial court). In its Order granting Summary Judgment in Respondent's favor, the trial court held Respondent was entitled to summary judgment on his request for declaratory relief and attorney's fees on the basis that Appellant failed to timely provide its bases for redactions as required by S.C. Code Ann. § 30-4-40(c), irrespective of the merits of its arguments as to those redactions. *See also Litchfield Plantation Co., Inc. v. Georgetown County Water and Sewer District*, 314 S.C. 30, 443 S.E.2d 574 (1994).

In *Litchfield*, the Supreme Court held that a public body's failure to respond to a FOIA request within fifteen (15) days did not result in a waiver of exemptions under the FOIA. However, in a footnote to the opinion, the Court held that while the exemptions were not deemed waived merely because the public body failed to respond as required under the FOIA, the public body would nevertheless be subject to "appropriate equitable relief" and "assessed attorneys' fees and costs" for having failed to abide by the deadline. *Id.* at note 1. Here, Appellant raised the personal privacy exemption as a basis for its withholding of the requested information only after Respondent filed the summons and complaint. In neither Appellant's thirty-four pages of responsive documents nor the City Attorney's letter were any exemptions raised, and accordingly, Respondent is entitled to an award of attorney's fees and costs as the "prevailing party."

For these reasons, the appellate court should affirm the trial court's Order Awarding Respondent's attorneys' fees and costs.

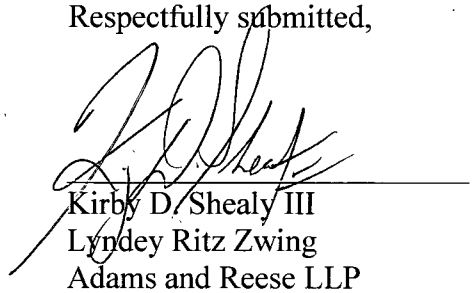
CONCLUSION

The FOIA protects citizens from secret government activity. Respondent should be granted unrestricted access to the information contained in the five applicants' applications for City Manager, including physical addresses, telephone numbers, and email addresses, because its disclosure does not constitute an unreasonable invasion of privacy and there is no other statute or law that prohibits such information from being disclosed. Furthermore, the circuit court's findings of fact were supported by evidence in the record.

Likewise, the trial court appropriately exercised discretion in calculating and awarding attorneys' fees and costs to Respondent as the prevailing party based on the evidence in the record.

The trial court should therefore be affirmed.

Respectfully submitted,



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January 9, 2014.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2013-001880

City of Columbia,.....Appellant,

v.

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

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief and Certification of Compliance with Rule 211(b), SCACR, by depositing a copy in the United States Mail, postage prepaid, on January 14, 2014, addressed to his attorney of record, W. Allen Nickles, III, Esquire, 1519 Richland Street, Columbia, South Carolina 29201.

January 14, 2014.

Victoria Moody - Paralegal