

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

90719
RECEIVED

AUG 30 2019
SC Court of Appeals

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

v.

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

PETITION FOR REHEARING OR REHEARING *EN BANC*

Andrew S. Radeker
S.C. Bar No. 73743
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Appellant

The Appellant, George S. Glassmeyer (hereinafter “Glassmeyer”), hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same. Glassmeyer, in an effort to keep this petition succinct, incorporates herein by reference his previously submitted briefs, motion to argue against precedent, and September 6, 2018, letter submitting supplemental citations in this appeal, making by reference those same arguments here.

The identity of those who receive individual payouts of a million dollars or more of public funds from the State of South Carolina is not a private matter. It is a public matter. Respectfully, the opinion issued by this court erodes the public’s right to know how its money is spent and has great potential to shield any corruption there may be at the Lottery Commission, now or in the future, from discovery.

Further, the trampling of Glassmeyer’s procedural rights by the circuit court and, now, this court has been, with all due respect, flagrant. Of what use are procedural safeguards if courts ignore them? Why enshrine the sanctity of the right to a fair trial in the law if this court will allow lower courts to make evidentiary decisions where no evidentiary record is ever made?

In both its substance and its process, this court’s opinion cries out for a second look to correct these errors – if need be, by this court as a whole, *en banc*. See S.C. Code Ann. §§ 14-8-80 & -90.

- I. **This court has used the wrong standard of review and treated this case as though it had been tried. The lower court’s decision was to grant the Lottery Commission’s motion for judgment on the pleadings, but the decision was based on factual conclusions that**

were neither admitted nor pled in Glassmeyer's pleading. Accordingly, that alone would require the reversal of the lower court's decision.

When considering this petition for rehearing, *do not treat this appeal as though it were an appeal from the decision of a tried case. That is not what it is. Do not treat this appeal as though it were an appeal from an order granting summary judgment. That is not what it is.* This court's opinion states the following: "Glassmeyer contends the circuit court considered evidence outside of the pleadings and construed the pleadings in the light most favorable to SCLC. We disagree." Respectfully, this court must have misunderstood the nature of the proceedings that occurred below. Glassmeyer doesn't contend that the circuit court considered evidence outside the pleadings. The circuit court didn't consider any evidence at all. No evidentiary record was ever made.¹ There was no trial. There was no transformation of the Lottery Commission's motion for judgment on the pleadings into a summary judgment motion.² The circuit court just took the Lottery Commission's unadmitted allegations and transformed them into an order ruling for the Lottery Commission.

The Lottery Commission acknowledges in its brief that this case was not tried and that "only pre-trial motions were heard" on the day that had been set for trial. (Final Brief of Respondent p. x.) The Lottery Commission's motion was for judgment on the pleadings. The circuit court's decision was a decision to grant that motion. There are

¹ What may look like "exhibits" in the record are exhibits to the Lottery Commission's complaint. (R. pp. 29-147.)

² No notice of such conversion or opportunity for Glassmeyer to introduce evidence to oppose a summary judgment motion was ever provided, either, so any conversion into a summary judgment motion would have been improper, anyway. Charleston Cnty. Sch. Dist. v. Harrell, 393 S.C. 552, 559 n. 4, 713 S.E.2d 604, 608 n. 4 (2011); Baird v. Charleston Cnty., 333 S.C. 519, 527-28, 511 S.E.2d 69 (1999); Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987).

no two ways about it. Glassmeyer was entitled to a trial, but he never got one, so, please, do not treat him as though he lost one.

The standard of review applicable to this case is that for the review of a judgment on the pleadings, not, as stated by this court, that for the analysis of whether a declaratory judgment action is legal or equitable. As that analysis is usually used in determining what standard of review to use in assessing a court's factual findings made at trial, Glassmeyer cannot see how it is relevant here, where there was no trial.

The standard of whether a motion for judgment on the pleadings should be granted is the same as for a motion under Rule 12(b)(6), SCRCP, and the appellate court is required to apply the same standard to the review of an order granting such a motion. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). In deciding a motion for judgment on the pleadings, the trial court may not consider matters outside the content of the non-moving party's pleadings, and the appellate court is limited to the content of the pleadings in just same way. See Falk, 341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234. An appellate court must reverse the grant of a motion for judgment on the pleadings if, when viewed in the light most favorable to the non-moving party, "the facts alleged [in the non-moving party's pleadings] and inferences reasonably deducible therefrom would entitle the [non-moving party] to any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995).

In deciding a motion for judgment on the pleadings made by Glassmeyer's opponent, the circuit court was not permitted to look outside what Glassmeyer pled.

See Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman's Ins., 302 S.C. 234. The circuit court's order, however, is shot through with factual findings that are statements of things that Glassmeyer did not admit in response to the Lottery Commission's complaint and did not allege himself. (R. pp. 1-12.)

Of the allegations made in the Lottery Commission's complaint, here are the ones that Glassmeyer admitted (with explanations where Glassmeyer responded with something other than an unqualified admission):

- "Plaintiff South Carolina Lottery Commission (SCLC) is an "instrumentality of the State and public body, corporate and politic, . . . [with] powers as generally exercised by commissions engaged in entrepreneurial pursuits" and was created pursuant to Act 59 of 2001 (South Carolina Education Lottery Act), S.C. Code Ann. §§ 59-150-10 *et seq.*" Glassmeyer admitted this allegation to the extent it was consistent with law.
- "Defendant is a citizen and resident of Richland County, South Carolina."
- "Jurisdiction and venue are properly in this Court." Glassmeyer admitted this allegation to the extent it was consistent with law.
- "On or about March 31, 2014, Defendant submitted his first in a series of FOIA requests to SCLC, seeking certain information relating to 'all bona fide claims' for any SCLC prize equal to or exceeding One Million Dollars (\$1,000,000) in gross proceeds from March 1, 2013 to March

20, 2014.” Glassmeyer admitted this allegation to the extent it accurately stated the content of his FOIA request.

- “Specifically, for all such claims Defendant requested the claimant’s full name, address, and telephone number; the date and gross amount of the claim; and a copy of any and all forms of identification obtained from the claimants.” Glassmeyer admitted this allegation to the extent it accurately stated the content of his FOIA request.
- “. . . on or about April 16, 2014, SCLC provided a written response to Defendant’s request (Exhibit B), wherein Plaintiff provided the following information: (1) gross dollar amounts of all such claims; (2) the dates of all such claims; (3) the home town and state of residence for all such claimants; and (4) the game associated with the prize won.” Glassmeyer admitted that the Lottery Commission sent the response.
- “In addition, in its April 16, 2014 response SCLC notified Defendant that the (1) full names; (2) addresses; (3) telephone numbers; and (4) forms of identification of all such claimants are specifically exempted from disclosure by S.C. Code Ann. : 30-2-310(A)(1)(e), which in turn made this information exempt from disclosure under S.C. Code Ann. § 30-4-40(a)(4). Moreover, SCLC notified Defendant that it had determined that all such information is also exempt from disclosure pursuant to S.C. Code Ann. § 30-4-40(a)(2) because it is of a personal nature and its public disclosure would constitute an unreasonable invasion of personal privacy.” Glassmeyer admitted that the Lottery

Commission's referenced response stated what is stated, but Glassmeyer denied that the content of that response has or had the legal effect or effects claimed by the Lottery Commission and denied that the information requested is exempt from disclosure under FOIA.

- "On or about April 17, 2014, Defendant notified SCLC that he believed the response of April 16, 2014 did not satisfy his March 31, 2014 FOIA request." Glassmeyer admitted that the correspondence he sent stated what it stated.
- "Defendant also submitted an additional request seeking only claimant's full name for all claims for any SCLC prize equal to or exceeding One Million Dollars (\$1,000,000) in gross proceeds from March 1, 2013 to March 20, 2104." Glassmeyer admitted that the correspondence he sent stated what it stated.
- "On April 16, 2014, the Defendant sent a FOIA request seeking a copy of the letter SCLC sent to winners after his initial request, copies of any and all 'legal documents' received from any source, and copies of any and all documents from 'any lawyer, law firm, or winners of any SCEL prize' relating to his initial FOIA request. Mr. Glassmeyer's requests of April 16, 2014, April 17, 2014, and SCLC's response are presented in Exhibit C." Glassmeyer admitted that the correspondence he sent stated what it stated.
- "On April 25, 2014, in the Court of Common Pleas for the Fifth Judicial Circuit of South Carolina, The Honorable L. Casey Manning entered an

order granting declaratory judgment to a recent lottery winner confirming that the release of the winner's personal identifying information would constitute an unreasonable invasion of personal privacy within the meaning of S.C. Code Ann. § 30-4-40(a)(2) (Exhibit D). The Court further entered a permanent injunction restraining the SCLC from releasing any and all information regarding that lottery winner in response to any FOIA request." Glassmeyer's qualifications as to this allegation are several and substantial. Glassmeyer admitted that the referenced order states what it states, but he denied that the order has any effect on his rights to receive the information he has requested from the Lottery Commission. Further, Glassmeyer pled that the order in the Doe suit was the product of the Lottery Commission and Doe colluding to gin up the order.

- "SCLC now seeks a Declaratory Judgment pursuant to Rule 57, SCRPC, and the South Carolina Declaratory Judgment Act, S.C. Code Ann. § 15-53-10 *et seq.*, confirming that the release of a lottery winner's name, complete address, telephone numbers(s), and/or forms of identification submitted to SCLC would constitute an unreasonable invasion of their privacy in accordance with S.C. Code Ann. § 30-4-40(a)(2) and therefore may be withheld from disclosure in response to any FOIA request." Glassmeyer admitted the Lottery Commission sought what it sought but denied that the Lottery Commission was entitled to what it sought.

- “SCLC therefore requests that the Court declare that the release of a lottery winner’s name, complete address, telephone numbers(s), and/or forms of identification submitted to SCLC would constitute an unreasonable invasion of their privacy in accordance with S.C. Code Ann. § 30-4-40(a)(2) and therefore may be withheld from disclosure in response to any FOIA request.” Glassmeyer admitted the Lottery Commission requested what it requested but denied that the Lottery Commission was entitled to what it requested.
- “The purpose of FOIA is not to expose individuals to unwarranted and unnecessary invasions of privacy, but instead it is designed to ‘prevent the government from acting in secret.’” Glassmeyer admitted that a purpose of FOIA is to prevent the government from acting in secret and that exposing individuals to unwarranted invasions of privacy is not a purpose of FOIA.

(R. pp. 20-27, 148-52.)

To the extent admitted and only to that extent, the above allegations Glassmeyer admitted, along with the allegations in his answer and counterclaim in support of his affirmative defenses and counterclaims, constituted the entire factual universe available to the circuit court to use in deciding the Lottery Commission’s motion for judgment on the pleadings. See Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman’s Ins., 302 S.C. 234.

The circuit court, however, decided to grant judgment on the pleadings by accepting the unadmitted allegations of the Lottery Commission’s complaint, treating

the things the Lottery Commission alleged as though they had been proven. As this court has just recently reminded us, though, “[a]llegations in a [c]omplaint denied in [an] answer are evidence of nothing.” Curry v. Carolina Ins. Group of SC, Inc., Op. No. 5679 (S.C. Ct. App. filed Aug. 21, 2019) (Shearouse Adv. Sh. No. 33 at 42, 47) (quoting Griffin v. Van Norman, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990) (brackets added by court in Curry opinion); accord Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) “[m]ere allegations, denied by the other party, are not evidence”).

This court was not permitted to look outside what Glassmeyer pled in reviewing the decision below. See Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman’s Ins., 302 S.C. 234. But this court did look outside what Glassmeyer pled (e.g., finding that what was stated in the Lottery Commission’s committee meeting minutes was true and that disclosing lottery claimants’ identities exposes them to significant safety risks).

With the proper standard of review applied, in order for this court to affirm the lower court’s findings and conclusions that were outside the scope of what Glassmeyer pled, this court would have had to determine that those things were true as a matter of law – since they could not have been determined as matter of fact. See Russell, 305 S.C. 86; Curry, (Shearouse Adv. Sh. No. 33 at 42, 47) (quoting Griffin, 302 S.C. at 522); Falk, 341 S.C. 281; Fireman’s Ins., 302 S.C. 234. As discussed below and in Glassmeyer’s briefs, the court could not have made such a determination consistently with existing law.

Respectfully, this court must have misapprehended or overlooked that it was finding support for its conclusions in “[a]llegations in a [c]omplaint denied in [an]

answer [that were] evidence of nothing.” Curry, (Shearouse Adv. Sh. No. 33 at 42, 47) (quoting Griffin, 302 S.C. at 522). It is deeply important that the substantive conclusions that a court reaches be right; however, it is just as important that the process used to reach those conclusions be right. See LaSalle Bank Natl. Assn. v. Davidson, 386 S.C. 276, 279, 688 S.E.2d 121, 122-23 (2009). There are many substantive problems with the circuit court’s order and this with this court’s opinion affirming it, but, on this point of procedural error, even without regard to any other issues, reversal is required. See Russell, 305 S.C. 86; Curry, (Shearouse Adv. Sh. No. 33 at 42, 47) (quoting Griffin, 302 S.C. at 522); Falk, 341 S.C. 281; Fireman’s Ins., 302 S.C. 234.

II. This court’s opinion is inconsistent with the government’s burden to prove the applicability of a FOIA exemption and the case-by-case approach required under FOIA by our Supreme Court and as held by this court in Pope v. Wilson this June.

Our Supreme Court has held that the “determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis.” Evening Post Publishing Co. v. Berkeley Cnty. Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). Interpreting this directive, this court reversed the grant of a motion for judgment on the pleadings in a FOIA case this June, concluding “that when a citizen in litigation with a governmental agency directs a FOIA request to that agency, the agency must *show* the applicability of a specific FOIA exemption to *each* requested public record.” Pope v. Wilson, Op. No. 5657 (S.C. Ct. App. filed June 19, 2019) (Shearouse Adv. Sh. No. 25 at 35, 43) (emphasis added). This court in Pope noted that “[t]he seriousness with which our appellate courts have viewed FOIA rights in the past is an additional reason for our appellate courts to continue requiring the government to *show* an exemption.” Id. at 43 n. 9 (emphasis added). This court observed that

affirming the circuit court's judgment on the pleadings, which addressed the information sought categorically, rather than specifically, "could possibly encourage circuit courts to gloss over what should be a case-specific analysis" and that the circuit court's "vague" and categorical determination that the records sought were exempt from FOIA "comes close to the 'blanket prohibition' that our supreme court has cautioned against." *Id.* at 44 (quoting Evening Post, 392 S.C. at 83 ("the exemptions should be narrowly construed to not provide a blanket prohibition of disclosure in order to 'guarantee the public reasonable access to certain activities of the government'")).

In Pope, this court rejected the circuit court's determination that the applicability of a FOIA exemption could be determined on the pleadings as a matter of law. *Id.* Rejection of that notion is entirely consistent with the Supreme Court's statement that "[t]he burden of proving that an exemption exists lies with the government." Evening Post, 392 S.C. at 83 (emphasis added). 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 invoked the unreasonable invasion of personal privacy exemption under S.C. Code Ann. § 30-4-40(a)(2), 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.

This court stated in its opinion in the instant case that "[t]he question of whether the information Glassmeyer requested was exempt under FOIA is a question of law and

does not require looking at any facts other than Glassmeyer's request." That is wrong. Evening Post, 392 S.C. at 83; City of Columbia, 323 S.C. at 387; Pope, (Shearouse Adv. Sh. No. 25 at 43). The burden is on the government to prove, with evidence, on a case-by-case basis, that a FOIA exemption applies with regard to each record for which an exemption is claimed. See Evening Post, 392 S.C. at 83; Pope, (Shearouse Adv. Sh. No. 25 at 43). This especially true with regard to the FOIA exemption at issue in this case, since "Section 30-4-40(a)(2) does not specifically list or define the types of records, reports, or other information that should be classified as personal or private information exempt from disclosure." Burton v. York County Sheriff's Dept., 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004). The Supreme Court has already rejected the matter-of-law approach to this FOIA exemption in City of Columbia v. ACLU. 323 S.C. at 387. Accordingly, the government entity claiming this exemption is tasked with proving a factual record that shows both that 1) the information sought is of a personal nature and 2) that disclosure of the information would necessarily constitute an unreasonable invasion of personal privacy. Id.; Burton, 358 S.C. at 352.

The court's opinion in this case, however, has contravened precedent authored by this court and by the Supreme Court. Similarly to the lower court in Pope, the lower court in this case issued a judgment on the pleadings that, regardless of its many other problems, took a categorical, rather than a case-by-case, record-by-record approach to the question of whether the information sought by Glassmeyer fell within the rather narrow and factually specific confines of a FOIA exemption that allows a public body not to disclose "[i]nformation of a personal nature where the public disclosure thereof

would constitute unreasonable invasion of personal privacy.” S.C. Code Ann. § 30-4-40(a)(2). In affirming the lower court, this court ran afoul of precedent.

Respectfully, this court misapprehended or overlooked that it violated precedent by affirming the grant of a motion for judgment on the pleadings that decided this FOIA exemption was applicable on a categorical basis.

III. This court’s decision that the Lottery Commission could seek a declaratory judgment about a question arising under FOIA runs counter to established legal principles.

As this court noted in the opinion subject of this petition, “it is important to note that the legislature amended section 30-4-110 of the FOIA statute in 2017” to provide grounds for a public body to bring proceedings to have a question under FOIA determined, in the limited circumstances given in that section – but it is not important for the reason that the opinion gives.

That statutory change went into effect on May 19, 2017, after the briefing in this appeal was complete and, thus, long after the events and lower court proceedings subject of this case. The reporter’s notes on the change state that it “rewrote the section, . . . providing rights and remedies of public bodies from whom requests are made[.]” Rptr’s notes, S.C. Code Ann. § 30-4-110.

“It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law.” Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964). The 2017 change to this statute was the first time that the language of FOIA has stated that a public body has a right to seek relief under FOIA. This action was brought before the statutory change.

Before the legislature changed S.C. Code Ann. § 30-4-110, the law about who could seek a declaratory judgment for a question arising under FOIA was that such relief could be sought by a “citizen of the State[,]” not by anyone else. S.C. Code Ann. § 30-4-100(a). Before FOIA was enacted, no one could seek declarations about whether certain information in public records was exempt from a requester’s right as a citizen to disclosure of that information, because that right did not exist. When FOIA was enacted, it gave such a right, but only to a “citizen of the State[,]” S.C. Code Ann. § 30-4-100(a). That was the law in effect during all material times in this case.

Between the Uniform Declaratory Judgments Act (a general statute) and FOIA, FOIA is the more specific statute. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, 814 S.E.2d 513, 518 (S.C. 2018) (quoting Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted)). At all times material to this case, FOIA provided that the only entity that could seek a declaratory judgment *as to a question arising under FOIA* was a “citizen of the State[,]” which the Lottery Commission acknowledges it is not. (R. p. 20.)

This court’s opinion now provides a precedential springboard for government bodies to bring suits like this one – suits against someone merely for having made a FOIA request or requests, even if the grounds for the suit fall outside the scope of the suits government bodies are now authorized to bring under the new provisions of S.C.

Code Ann. § 30-4-110. Respectfully, this court must have misapprehended or overlooked that the opinion issued in this case has the effect of enlarging the terms of a statute the Legislature enacted to allow for government entities to seek relief under FOIA, but only in specified circumstances. Id.

IV. The court was incorrect to conclude that disclosure of million-dollar lottery claimants' names and addresses would constitute an unreasonable invasion of their personal privacy.

Respectfully, this court misapprehended the proper analysis of the substantive FOIA question about the applicability of the unreasonable-invasion-of-personal-privacy exemption of S.C. Code Ann. § 30-4-40(a)(2). The circuit court and, now, this court have determined that the information sought in Glassmeyer's FOIA requests falls within a FOIA exemption that applies only where what is sought under FOIA is "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." Id.

The identity of those who receive individual payouts of a million dollars or more of public funds from the State of South Carolina is not a private matter, but is, rather, a very public matter. "South Carolina FOIA mandates that the public be provided with information regarding the expenditure of public funds." Weston v. Carolina Research and Development Foundation, 303 S.C. 398, 402, 401 S.E.2d 161, 164 (1990). The public interest in knowing who was paid many millions of dollars by a South Carolina state entity is self-evident. Id. This court's statement that is "unable to fathom how disclosure of the rest of the information" – information that identifies the people who have been given these millions of public dollars – "would benefit the public more than what was already provided" does not make sense. Finding out who

received large sums of money from the public fisc is a quintessential matter of public interest. See id.

This court's analysis and the circuit court's simply assumes that providing a FOIA requester with the names of successful lottery claimants necessarily amounts to an infringement upon the private lives of the claimants – but that has never been shown to be true. “Our Supreme Court has defined the ‘right to privacy’ as the right of an individual to be let alone and to live a life free from *unwarranted* publicity. However, one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest.” Burton, 358 S.C. at 352 (emphasis added, internal quotation marks omitted) (quoting Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984)). First of all, receiving large amounts of state funds barely rates as implicating privacy concerns at all. It does not concern matters of the bedroom, the family, one's fears, one's childhood, or one's personality traits. It does not concern whether one has suffered any trauma. It is not embarrassing. There is not, and should not be, anything especially private about receiving a million dollars or more in public funds from the state. Indeed, the State of South Carolina publishes the names and respective annual salaries of state employees, as well as the names of and amounts paid to vendors who conduct business with the state. Second, to the extent that disclosure of information that identifies who got these millions of dollars from the state translates into publicity at all, it is certainly *warranted* publicity. See Weston, 303 S.C. at 402. The public has a rather significant legitimate interest in knowing who got the public's money. See id.

What Glassmeyer wanted to know about these lottery claimants is the same sort of information that goes in a phone book: their names and addresses. In Burton, the Court of Appeals held that allegations concerning the sexual practices of off-duty deputy sheriffs constituted the sort of information that could fall within the unreasonable-invasion-of-personal-privacy exemption. 358 S.C. at 352. Names and addresses and whether someone received a large sum of money from the state are not that sort of information. Respectfully, this court failed to engage in any analysis of whether the information at issue is of such a deeply private character that it falls within this exception to the rule of mandatory disclosure.

This court, rather, concluded that S.C. Code Ann. § 30-4-40(a)(2) applied merely because “[t]he lottery claimants’ names are not public knowledge and the release of such information could lead to the discovery of other personal information.” But wouldn’t practically any information about a person have the potential to “lead to the discovery of other personal information[?]” This opinion, particularly in combination with its apparent interpretation of Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015), comes dangerously close to announcing a rule that information that is about a person – i.e., literally, personal information – falls as a matter of law within the ambit of a FOIA exemption that, on its face, requires information to be *both* personal *and* the of sort that its disclosure to a FOIA requester necessarily would constitute an unreasonable invasion of personal privacy. S.C. Code Ann. § 30-4-40(a)(2). This opinion has effectively lopped off half of the inquiry, without any permission from the Legislature to change what its statute says.

Furthermore, this court gave rather short shrift to something that the circuit court ignored altogether: the fact that the lottery claimants gave this information, uncompelled, to the Lottery Commission on a document that informed them that the Lottery Commission may well end up giving some FOIA requester the information they put on it, including their names and addresses. (R. pp. 155-56, 160.) Being informed of that, they chose to submit the information anyway. (R. pp. 155-56, 160.) That goes to the level of privacy a reasonable person ought to expect to have in that information, and that level is not a high one, if one should reasonably expect to have any at all. Burton, 358 S.C. at 352. How is it an unreasonable invasion of someone's privacy for a government agency to give out a person's identifying information when that person didn't have to give the agency the information, was told that the agency might have to give it out to anyone who asked for it, and, being so informed, gave the agency the information anyway? The answer is simple: it isn't. Id.

When the burden is placed, as the law requires it to be, on the public body to prove the applicability of an exemption to mandatory disclosure, one sees immediately that the Lottery Commission has a difficult time contending that release of this information infringes on the claimants' privacy, period, much less that it rises to the heightened level of an "unreasonable invasion" of it. S.C. Code Ann. § 30-4-40(a)(2).

In addition, this court's opinion engaged in a balancing analysis that is off base. This court looked at what *Glassmeyer* wanted the information for – but that's not the way the analysis works. The analysis of a case involving the potential application of FOIA's unreasonable-invasion-of-personal-privacy exemption involves balancing an individual's privacy interest against the need or desire *of the public generally* to have

access to *the type of information* in question. Burton, 358 S.C. at 352. The interest in the information that is subject of the inquiry is not that of the individual requester, it is the public's "general interest" in being able to access information of the type at issue. Id. The reason that the particular citizen who made the request wants the information is usually irrelevant. See id.; S.C. Code Ann. §§ 30-4-40, -50. It is incongruous with our Supreme Court's holding that "[t]he burden of proving that an exemption exists lies with the government" for a FOIA requester to have to make any showing at all of why he wants the information in question. Evening Post, 392 S.C. at 83.

The public interest in the information sought is palpable and inherent: the public has a right to know who receives its money. Weston, 303 S.C. at 402. Given the public nature of a person's receipt of a million dollars or more in state money, whatever invasion, if any, of that person's privacy is implicated by disclosing his name and address is minimal at best and is certainly reasonable. See id.

V. Glassmeyer v. City of Columbia needs to be overruled or distinguished.

Glassmeyer set out in his brief and in a motion to argue against precedent that Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015), ought to be either overruled or distinguished, at least to the extent inconsistent with Glassmeyer's arguments on appeal. It should. As discussed above, between that opinion and this one, this court has come dangerously close to announcing a rule that information that tends to identify a person falls as a matter of law within the ambit of S.C. Code Ann. § 30-4-40(a)(2). If the government can withhold information in response to a FOIA request merely because it would tell a reader who someone is, this exception to the rule of mandatory disclosure will swallow FOIA nearly whole.

Glassmeyer v. City of Columbia involved a FOIA request to the City of Columbia 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.” 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. 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.

The court’s analysis in that case was that it found “the home addresses, personal telephone numbers, and email addresses of the applicants are information in which the applicants have a privacy interest” and that “[i]n 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.” Id. at at 221, 223. The court then stated that, “[a]ccordingly, 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 223.

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 – or the opinion in this case – 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.

Just as troubling, or perhaps more, is what is *not* discussed in the analysis in Glassmeyer v. City of Columbia, 414 S.C. at 218-23. The opinion states that a person’s address and telephone number are items of information in which the person has a privacy interest, id., but what the opinion does not do is take the next analytical 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. To the extent that Glassmeyer v. City of Columbia condones an analysis that does not reckon whether the information

sought is of such a nature that its disclosure would necessarily be an *unreasonable* invasion of personal privacy, it should be overruled.

To the extent that Glassmeyer v. City of Columbia stands for the proposition that disclosing names and home addresses always does or even usually would fall within the unreasonable-invasion-of-personal-privacy exemption, it should be overruled. Taking a categorical approach to what falls within S.C. Code Ann. § 30-4-40(a)(2) is deeply problematic and inconsistent with existing precedent.

VI. The Lottery Commission plainly was not a proper party to seek the injunction it got, the lower court plainly erred in ordering the injunction it did, and this court erred in affirming it.

This court found that the Lottery Commission “had standing under the Declaratory Judgments Act to bring this declaratory judgment *and injunction* action. Thus, we affirm the circuit court’s grant of injunctive relief.” (Emphasis added.) Respectfully, Glassmeyer must note that this finding does not make any sense.

This court must have misapprehended or overlooked that the standing requirements for an action seeking a declaratory judgment and an action seeking injunctive relief are different. Declaratory relief, not injunctive relief, is what is available under the Declaratory Judgments Act. S.C. Code Ann. § 15-53-30. This court has conflated the very different requirements for standing to seek a declaratory judgment under the Declaratory Judgments Act with those for seeking an injunction. This court correctly quoted the Supreme Court regarding the elements a plaintiff must prove in order to receive an injunction: “(1) he will suffer immediate, irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3) he has no adequate remedy at law.” Compton v. S.C. Dept. of Corr., 392 S.C. 361, 366, 709

S.E.2d 639, 642 (2011). Those elements are very different from those for standing to seek a declaratory judgment. Id.; S.C. Code Ann. § 15-53-30. An actual application of the analysis of those elements to this case demonstrates quite readily that the Lottery Commission did not have standing to seek the injunction rendered here, much less that the record shows they were entitled to get it.

The Lottery Commission alleged that the Lottery Commission's *claimants* would suffer immediate and irreparable harm to their personal privacy without the entry of a permanent injunction. (R. p. 26.) No one involved in this case to date has articulated any legal authority to the effect that the Lottery Commission has standing to seek an injunction to prevent harm to someone else.

The scope of the injunction against Glassmeyer is frighteningly broad. The court did not enjoin him from obtaining certain information from the Lottery Commission. The court did not enjoin him from making FOIA requests of the Lottery Commission for certain information. No, the court "ORDERED that Defendant is PERMANENTLY restrained and enjoined from seeking to obtain the (1) full names; (2) addresses; (3) telephone numbers; and (4) forms of identification of all lottery winners and claimants." (R. p. 12.) Period. Of all lottery winners and claimants, whether their status as such is known to Glassmeyer or not. Whether that information is sought from *any source*. Forever. This is certainly not a proper case for an injunction against Glassmeyer, but, even if it were, *this* injunction would be impermissibly broad. An injunction should never be issued that is broader in scope than what is necessary to stop the harm it is designed to prevent. Goldberg v. Trakas, 206 F.Supp. 867 (E.D.S.C. 1962); see Gibbs v. Kimbrell, 311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993) (injunction

precluding violation of covenants should not extend beyond date that covenants would expire by their terms).

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

This court perceived a “risk of unlimited legal exposure for SCLC,” presumably stemming from the Lottery Commission’s release of information that would identify the people to whom it paid a million dollars or more in state money. Not only has this court and the lower court failed to come up with any theory on which the Lottery Commission could be liable to someone for disclosing this information under FOIA, the form on which the lottery claimants submit this information to the Lottery Commission contains the following, in bold type, displayed prominently above the line for the claimant’s signature:

**INFORMATION FROM THIS FORM MAY BE
SUBJECT TO DISCLOSURE UNDER THE S.C.
FREEDOM OF INFORMATION ACT (FOIA). I
release SCEL from all liability or claims relating to
information provided to or used by a party obtaining
information pursuant to FOIA.**

(R. p. 160.)

It would appear to be impossible for the Lottery Commission to be exposed to any liability, under any theory, for giving out this information in response to a FOIA request. See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007) (discussing nature and effect of release). This court appears to have overlooked or misapprehended this point and, further, has overlooked or misapprehended that the injunction granted by the circuit court is manifestly improper.

VII. The denial of Glassmeyer's motion to dismiss was properly before the court, and it should have been reversed.

This court declined to address the lower court's failure to grant Glassmeyer's motion to dismiss the Lottery Commission's claims, stating that the denial of a motion to dismiss is not appealable. In a case in this posture, though, the denial of a motion to dismiss is appealable. Where an appealable issue is before an appellate court, a decision that is not appealable in itself may be appealed and addressed by the appellate court. Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 623 S.E.2d 387 (2005); Briggs v. Richardson, 273 S.C. 376, 379 n. 1, 256 S.E.2d 544, 546 n. 1 (1979); Southeastern Housing Found. v. Smith, 380 S.C. 621, 670 S.E.2d 680, 688 n. 14 (Ct. App. 2008); Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 338, 574 S.E.2d 502, 511-12 (Ct. App. 2002); Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001). For the reasons discussed above and in Glassmeyer's briefs, the court should have reversed and granted Glassmeyer's motion to dismiss. The Lottery Commission failed to plead facts that, if true, would have constituted a cause of action, even if taken in the light most favorable to the Lottery Commission. See Rule 12(b)(6), SCRCP.

VIII. The opinion issued in this case treats one of Glassmeyer's counterclaims as though it didn't exist.

Glassmeyer pled a counterclaim against the Lottery Commission for relief under FOIA. (R. pp. 156-57.) This court's opinion reads as though that counterclaim was never pled. Respectfully, this court must have overlooked that Glassmeyer had pled this counterclaim, which was not the subject of the Lottery Commission's motion for judgment on the pleadings and, accordingly, must be remanded to be adjudicated.

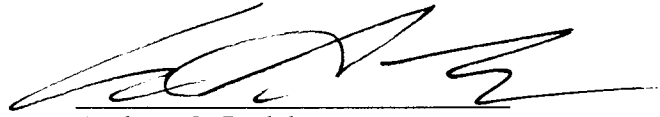
IX. Rehearing *en banc* would be proper.

"A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Consideration by the full court appears necessary to secure or maintain the uniformity of this court's decisions, as well as to ensure adherence to Supreme Court precedent. Further, the members of this court should be alarmed that a panel of this court affirmed a judgment on the pleadings that was based, not on the non-movant's pleading, but on the unadmitted allegations of the *movant's* pleading. That needs to be nipped in the bud before it grows out of control.

WHEREFORE, Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. S. Radeker', written over a horizontal line.

Andrew S. Radeker
S.C. Bar No. 73743
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Appellant

August 30, 2019

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

RECEIVED

AUG 30 2019

SC Court of Appeals

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

v.

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

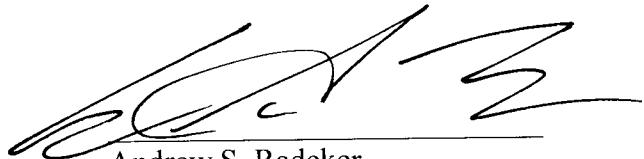
PROOF OF SERVICE

I, the undersigned, certify that I served the foregoing petition for rehearing or rehearing *en banc* by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Karl S. Bowers, Jr., Esq.
Bowers Law Office
P.O. Box 50549
Columbia, SC 29250

August 30, 2019

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Appellant