

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Judge

Appellate (Court of Appeals) Case No. 2016-001112

Case No. 2020-000050


South Carolina Lottery Commission, Respondent,

v.

George S. Glassmeyer, Appellant.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

BOWERS LAW OFFICE LLC

Butch Bowers 

Karl S. Bowers, Jr.
SC Bar No. 16141
butch@butchbowers.com
P.O. Box 50549
Columbia, South Carolina 29250
(803) 753-1099

Attorney for Respondent

STATEMENT OF FACTS

Respondent 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.* Appellant George S. Glassmeyer (“Appellant”) is a citizen and resident of Richland County, South Carolina, who submitted “a long line of FOIA requests to the SCLC, seeking personal information relating to ‘all bona fide claims’” for an extensive amount of SCLC prizes. (Nov. 17, 2015 Cir. Ct. Order 1.) The leadership of SCLC cares deeply about its winners and endeavors to protect their personal privacy, safety, and security while balancing the agency’s obligations under the South Carolina Freedom of Information Act (“FOIA”), S.C. Code Ann. §§ 30-40-10 *et seq.* Appellant’s unreasonable and intrusive requests for lottery winners’ personal identifying information undermine and impede SCLC’s discretion to prevent the disclosure of “[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 2003, SCLC adopted a policy concerning the release of winners’ information in response to FOIA requests which allowed winners, upon notification, to seek judicial relief from the release of all or part of their personal information. Under that policy, SCLC would provide information appropriate for release under FOIA if no such judicial relief was sought by winners within fifteen (15) business days of receiving notice from SCLC. In most instances over the years, SCLC staff has been able to successfully work with FOIA requestors to provide them with the information they are seeking while still protecting to the greatest degree possible the personal privacy and

safety of its winners and their families. On or about March 31, 2014, Appellant 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. Specifically, for all such claims Appellant 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. On April 11, 2014, the Executive Committee of the SCLC Board of Commissioners met and reconsidered its eleven-year-old policy concerning the release of lottery winners’ information in response to FOIA requests.

Since the FOIA policy’s adoption in 2003, issues related to data security and the heightened need to protect individual privacy have rapidly evolved due to a number of factors, including technological advances and the relative ease of accessing personal information. In addition, large-scale data breaches in both the public and private sector, such as the 2012 breach of the South Carolina Department of Revenue computer system that compromised millions of taxpayers’ personal identifying information, have brought increased scrutiny and awareness of the importance of the government’s obligation to protect the security of the personal identifying information of its citizenry. Furthermore, numerous cases of threats against the personal safety and security of lottery winners have been well-documented across the country in both media reports and case law.¹ In

¹ See, e.g., *People v. Bennett*, 2013 WL 967583 (Mich. App. Mar. 7, 2013) (unpublished) (considering the case of a defendant who robbed a home, murdered one person, shot and severely injured another person, and physically assaulted a ten-year-old child in an attempt to steal a lottery ticket worth \$2,700.00); *State v. Bradford*, 2003 WL 21372743 (Iowa App. June 13, 2003) (unpublished) (considering the case of a person who purchased and cashed several winning lottery tickets who was choked until she passed out and suffered injuries requiring hospitalization when she was robbed for cash received from the winning tickets).

There are also numerous media reports regarding threats of and actual harm to lottery winners. Rebecca Nelson, *The Tragic Stories of the Lottery’s Unluckiest Winners*, TIME, Jan. 9, 2013 (<http://newsfeed.time.com/2012/11/28/500-million-powerball-jackpot-the-tragic-stories-of-the-lotterys-unluckiest-winners/>) (discussing a lottery winner’s death from cyanide the day after his lump sum check was issued being treated as homicide); JuJu Kim, *The Tragic Stories of the Lottery’s Unluckiest Winners*, TIME, Nov. 27, 2012 (<http://newsfeed.time.com/2012/11/28/500-million-powerball-jackpot-the-tragic-stories-of-the-lotterys-unluckiest-winners/>) (discussing a lottery winner’s murder in a robbery plot); Andy Campbell, *Killer of Lottery Winner Abraham Shakespeare Can’t Keep his Home, Judge Rules*, HUFFINGTON POST CRIME, Oct. 4, 2013

light of growing privacy and security concerns expressed to SCLC by recent lottery winners and in recognition of the changing environment regarding the protection of personal information, on April 11, 2014, the Executive Committee of SCLC unanimously voted to suspend the 2003 policy regarding the release of lottery winners' information in response to FOIA requests and, in turn, unanimously adopted a new policy authorizing the Executive Director to determine the appropriate response(s) to pending or future requests for information made pursuant to FOIA. The Executive Committee also designated the Chairman of the Board of Commissioners (or the Executive Director in his absence) to act with full authority and on behalf of the Board regarding the defense or initiation of lawsuits related to FOIA.

Consistent with the newly-adopted policy concerning the release of lottery winners' information in response to FOIA requests and consistent with its past practice of attempting to work with requestors, on or about April 16, 2014, SCLC provided a written response to Appellant's request, wherein SCLC 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. In addition, in its April 16, 2014 response, SCLC notified Appellant that the (1) full names; (2) addresses; (3) telephone numbers; and (4) forms of identification of all such claimants (collectively and hereinafter, "personal identifying information") 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 Appellant that it had determined that all such

(http://www.huffingtonpost.com/2013/10/04/abraham-shakespear-murdered-lottery-winner_n_4042811.html) (discussing a woman who befriended a lottery winner to take control of his wealth being convicted of first-degree murder in his death); Ron Dicker, *Virginia Lottery Winner Who Uses Wheelchair Robbed After Cashing Ticket*, HUFFINGTON POST CRIME, Feb. 7, 2013 (http://www.huffingtonpost.com/2013/02/07/virginia-lottery-winner-wheelchair-robbed-ticket_n_2638978.html) (discussing a wheelchair-bound lottery winner who was robbed while leaving a store after cashing ticket).

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 privacy. On or about April 17, 2014, Appellant notified SCLC that he believed the response of April 16, 2014 did not satisfy his March 31, 2014 FOIA request, thus making this matter ripe for adjudication. Appellant further demonstrated his relentless manner in seeking to obtain the personal identifying information of lottery winners by also submitting an additional request seeking only the 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, 2014.² Whether the public disclosure of lottery winners' personal identifying information is exempted by FOIA is the subject of this petition.

² On April 16, 2014, Appellant sent a FOIA request seeking a copy of the letter SCLC sent to lottery 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. (Compl. Ex. C (Appellant's FOIA Requests to SCLC)).

ARGUMENT

The South Carolina Court of Appeals properly held, as a matter of law, that the public disclosure of lottery winners' personal identifying information – i.e. the (1) full names, (2) addresses, (3) telephone numbers, and (4) forms of identification of claimants – is exempted from FOIA. Moreover, the Court of Appeals properly denied the Petitioner's Petition for rehearing. Petitioner now comes to the Supreme Court seeking yet another bite at the same apple.

SCLC recognizes the balance between its affirmative duty to disclose public information and its discretion to withhold exempted materials to protect the privacy and safety of lottery winners and their families. *Compare Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991), with S.C. Code Ann. § 30-4-40(a)(2). In recognition of this balance and pursuant to case law, SCLC parsed through the information requested by Appellant and separated information that could be publicly disclosed from information that was exempt from disclosure under FOIA. *City of Columbia v. American Civil Liberties Union of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996); *Newberry Publ'g Co. v. Newberry Cnty. Comm'n on Alcohol & Drug Abuse*, 308 S.C. 352, 417 S.E.2d 870 (1992). SCLC responded to Appellant's request and disclosed a portion of non-personal identifying information concerning past lottery winners that he requested, including (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. (Compl. Ex. B (SCLC Ltr. to Appellant)). However, the public disclosure of lottery winners' personal identifying information constitutes an unreasonable invasion of privacy and is therefore exempt under FOIA. S.C. Code Ann. § 30-4-40(a)(2).

The Court of Appeal properly held that FOIA exempts the disclosure of a lottery winner's name or other personal identifying information, including, but not limited to, mailing address,

phone number, social security number, and date of birth, because the disclosure of such information would constitute an unreasonable invasion of the lottery winner's personal privacy. Petitioner argues that this information does not fall within a FOIA exemption. However, S.C. Code Ann. § 30-4-40(a)(2) exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." This language tracks the South Carolina Constitution, which states that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated" S.C. Const. art. I § 10. Notably, a lower South Carolina court has held that the disclosure of lottery winners' personal identifying information constitutes an unreasonable invasion of personal privacy. *John Doe v. S.C. Lottery Comm'n*, 2014-CP-40-2446.

In the courts below, Petitioner relied on *State v. Counts*, Op. No. 27546, n.7 (S.C. Ct. App. July 8, 2015), for the proposition that physical intrusions into "the privacy interests in one's home are precisely what our state constitutional provision was intended to protect." Petitioner suggests that these physical intrusions must be the only kind of action that constitutes an unreasonable invasion of privacy. However, neither the state constitution nor the FOIA exemption is so narrowly defined. In fact, the South Carolina Constitution differentiates between physical intrusions and other types of invasions of privacy. The state constitution distinguishes between "unreasonable searches and seizures," which represents intrusions of a physical nature, and "unreasonable invasions of privacy," which is a broader, catch-all provision that protects against other types of non-physical intrusions, such as the public disclosure of lottery winners' personal identifying information. Further, the FOIA exemption reasserts this broader protection against non-physical intrusions of privacy by protecting against "unreasonable invasions of personal

privacy,” which is mirrored language from the state constitution. Thus, it was proper for the circuit court to find that a non-physical intrusion, such as the disclosure of lottery winners’ personal identifying information, would constitute an unreasonable invasion of personal privacy.

Petitioner also relies on *Society of Professional Journalists v. Sexton*, 324 S.E.2d 313 (S.C. 1984), for the proposition that because death certificates, “which contain much more information of a personal nature than that sought by [Petitioner] in this case,” do not fall within this FOIA exemption, then neither should lottery winners’ personal identifying information. However, the South Carolina Supreme Court held that such personal information disclosed on a death certificate is considered a private, “personal right[] which do[es] not survive” the death of the individual, and therefore FOIA did not exempt this disclosure. *Soc. of Prof. Journalists*, 324 S.E.2d 313. The implication of this Supreme Court decision is that such personal information would constitute a private, personal right during the life of an individual, subject to the protections from the state constitution and FOIA against unreasonable invasions of privacy. In the case at bar, SCLC seeks to protect the personal identifying information of persons still alive. Thus, contrary to Appellant’s interpretation, the *Society of Professional Journalists* decision supports SCLC’s position instead. Therefore, the Court of Appeals did not err in holding that the disclosure of still-living lottery winners’ personal identifying information would constitute an unreasonable invasion of personal privacy.

Additionally, Petitioner attempted to interpret legislative intent from looking at FOIA in its entirety. Appellant cited below S.C. Code Ann. § 30-4-50, a completely separate code provision upon which SCLC is not relying and which states that “home addresses and home telephone numbers of *employees and officers of public bodies* revealed in response to requests pursuant to [FOIA] may not be used for commercial solicitation purposes.” *Id.* (emphasis added). Clearly,

the legislative intent of this provision has no interpretive impact on the disclosure of information regarding lottery winners, who are not employees or officers of public bodies.

Further, Petitioner cites S.C. Code Ann. § 30-4-40(a)(2), which provides some examples of what information is exempt, such as “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.” From this example, Appellant argues that the “natural interpretation” is that the legislature intended that home addresses and telephone numbers, under “ordinary circumstances,” are the type of information required to be disclosed in response to FOIA requests. However, S.C. Code Ann. § 30-4-40(a)(2) prefaces all of the examples by expressly stating “[i]nformation of a personal nature shall include, *but not be limited to . . .*” *Id.* (emphasis added). By using the phrase “shall include, but not be limited to,” the legislature evidently did not intend for any of the examples, including the one Appellant cites, to narrow or limit the overarching protection against a “public disclosure [that] would constitute unreasonable invasion of personal privacy.” *Id.*; *see also S.C. Dep’t of Consumer Affairs v. Rent-a-Center, Inc.*, 547 S.E.2d 881, 883-84 (S.C. Ct. App. 2001) (“The canon of construction ‘expressio unius est exclusio alterius’ or ‘inclusio unius est exclusio alterius’ holds that ‘to express or include one thing implies the exclusion of another, or of the alternative.’

This maxim should be used to accomplish legislative intent, not defeat it. The maxim ‘is a rule of statutory construction; it is not a rule of substantive law. Accordingly, [it] ‘should be used with care.’”) (internal quotation marks and citations omitted); *Hobart Corp. v. Waste Mgmt. of Ohio*, 758 F.3d 757 (6th Cir. 2014) (explaining “that the [expression unius] canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant

to signal any exclusion” and declining to apply *expressio unius* where it would “defeat” the “principal purpose” of the statute); *Cintech Indus. Coatings v. Bennett Indus.*, 85 F.3d 1198 (6th Cir. 1996) (explaining that the *eiusdem generis* canon does not apply when “the provision . . . express[es] a contrary intent,” by including language such as “including, but not limited to”).

Further, Petitioner’s narrow interpretation would frustrate the legislative intent of the FOIA exemption, which seeks to prohibit broad categories of unreasonable invasions of personal privacy, rather than only the specific examples listed in the provision. Therefore, the Court of Appeals did not err in holding that lottery winners’ personal identifying information fell under the FOIA exemption outlined in S.C. Code Ann. § 30-4-40(a)(2), which broadly protects against unreasonable invasions of privacy.

Finally, Petitioner completely ignores the Supreme Court precedent regarding the essential purpose of FOIA, which “is to protect the public from secret government activity.” *Perry v. Bullock*, 409 S.C. 137, 141, 761 S.E.2d 251, 253 (2014). This case has nothing at all to do with the public’s right to be protected from secret government activity, but everything to do with protecting the right of private citizens who are not government officials from the disclosure of personal information that would constitute unreasonable invasion of personal privacy. As a result, the Court of Appeals reached a proper conclusion in this case.

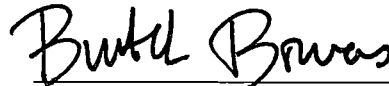

CONCLUSION

For the foregoing reasons, certiorari is simply not warranted in this case. The South Carolina Court of Appeals properly and correctly affirmed the lower court’s order because the public disclosure of lottery winners’ personal identifying information, such as the (1) full names, (2) addresses, (3) telephone numbers, and (4) forms of identification of claimants, constitute an

unreasonable invasion of personal privacy and therefore is exempt from FOIA pursuant to S.C. Code Ann. § 30-4-40(a)(2).

Respectfully submitted,

BOWERS LAW OFFICE LLC

Karl S. Bowers, Jr.

SC Bar No. 16141

butch@butchbowers.com

P.O. Box 50549

Columbia, South Carolina 29250

(803) 753-1099

Columbia, South Carolina
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Attorney for Respondent

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PROOF OF SERVICE

I, the undersigned, certify that I served the foregoing response to the writ of certiorari by depositing a copy on February 13, 2020 in the United States Mail, postage prepaid and addressed as follows:

Andrew S. Radeker, Esquire
Harrison, Radeker & Smith, P.A.
PO Box 50143
Columbia, SC 29250
Attorney for Appellant

Butch Bowers 

BOWERS LAW OFFICE LLC
Karl S. Bowers, Jr.
SC Bar No. 16141
butch@butchbowers.com
P.O. Box 50549
Columbia, South Carolina 29250
(803) 753-1099

Attorney for Respondent