

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Judge

Appellate Case No. 2020-000050

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

v.

George S. Glassmeyer,.....Petitioner.

REPLY TO RETURN TO  
PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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The Petitioner (hereinafter “Glassmeyer”) submits this reply to the Respondent (hereinafter “the Lottery Commission”)’s return to Glassmeyer’s petition for a writ of certiorari.

## REPLY ARGUMENT

### **I. The Lottery Commission’s return fails to address significant matters noted in the petition.**

The Lottery Commission’s return fails to address much of Glassmeyer’s petition, bypassing some issues entirely, without comment. The Lottery Commission makes only one substantive argument in its return: that the Court of Appeals was correct in holding that, as a matter of law, the information the Lottery Commission withheld from Glassmeyer fell within the unreasonable invasion of privacy exemption from mandatory disclosure under the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (hereinafter “FOIA”). As discussed in Glassmeyer’s petition, that argument is wrong, and there is no need for Glassmeyer to repeat his petition here.

The Lottery Commission does not articulate any contention that this Court’s precedent does *not* require that the “determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis.” Evening Post Publ’g Co. v. Berkeley Cnty. Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011); accord City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 323 S.C. 384, 475 S.E.2d 747 (1996) (rejecting categorical approach to unreasonable invasion of personal privacy exemption under S.C. Code Ann. § 30-4-40(a)(2)). The Lottery Commission’s return never states anything to the effect that it did not have the burden to prove the applicability of a FOIA exemption, nor does it state anything to the

effect that the Lottery Commission adduced a factual record that proved that S.C. Code Ann. § 30-4-40(a)(2) applied to the information requested by Glassmeyer. See Berkeley Cnty. Sch. Dist., 392 S.C. at 83; Evening Post Publ'g Co. v. City of N. Charleston, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005); Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). The Lottery Commission does not address the inconsistency of decisions of the Court of Appeals on whether to abide by this Court's precedent requiring the government to prove applicability of a FOIA exemption on a case-by-case basis. See South Carolina Lottery Commission v. Glassmeyer, Op. No. 5671 (S.C. Ct. App. filed July 31, 2019) (Shearouse Adv. Sh. No. 31 at 32); Pope v. Wilson, 427 S.C. 377, 831 S.E.2d 442 (Ct. App. 2019); Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015).

The Lottery Commission seems to concede that it had no standing to bring this action. The Lottery Commission does not argue against Glassmeyer on the point that 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 or injunctive relief about FOIA was that such relief could be sought by a "citizen of the State[.]" not by anyone else, including the government. S.C. Code Ann. § 30-4-100(a).

The Lottery Commission does not argue that it would suffer irreparable harm if Glassmeyer is not enjoined from seeking information that identifies who million-dollar lottery claimants are. The Lottery Commission does not argue against Glassmeyer on the point that, in light of the release signed by the lottery claimants, it appears impossible for the Lottery Commission to be exposed to any liability, under any theory, for giving out the information Glassmeyer sought 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); (Appx. p. 336). The Lottery Commission does not argue that the injunction the Court of Appeals upheld is narrowly tailored or that the enjoined activity would cause the ostensible harm that the circuit court and Court of Appeals perceived.

The Lottery Commission does not argue that the circuit court or the Court of Appeals took every allegation of Glassmeyer's and every reasonable inference from his allegations as true. The Lottery Commission does not argue against Glassmeyer on the point that the circuit court simply accepted the Lottery Commission's unadmitted allegations as true, in violation of bedrock procedural precedent about the standard on a motion for judgment on the pleadings. See Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47, 49 (2009); 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).

The Lottery Commission appears to have conceded that Glassmeyer is correct on these points. Cf. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (where respondent fails to respond to issue in respondent's brief, court may treat failure to respond as concession that appellant is correct). It has placed all the eggs of its return in one basket: the idea that the information Glassmeyer sought was properly determined, in the absence of proof, to be within the scope of the unreasonable invasion of personal privacy exemption to FOIA as a matter of law. As noted above, Glassmeyer's petition already discusses why that basket will not hold any eggs.

**II. The Lottery Commission has mischaracterized the record and arguments made by Glassmeyer.**

The ostensible “facts” in the Lottery Commission’s deceptively titled “Statement of Facts” section of its return are mostly just the unadmitted allegations of its complaint, much as was the circuit court’s order that the Court of Appeals affirmed. (Appx. pp. 177-88, 196-204, 324-338.) The Lottery Commission engages throughout its return in the logical fallacy of *petitio principii*, assuming the initial thing, often stated as *begging the question* or *circular reasoning*. As support for its factual contentions, the Lottery Commission simply cites the making of those very contentions in its complaint – but it does not and cannot cite to factual material in the record that actually supports its factual contentions, because *no evidentiary record was ever made*. (Appx. p. 411 ln. 12-18.) The Lottery Commission’s argument about factual support can be summed up as being that there is of course factual support for the findings of the circuit court and the Court of Appeals, because the Lottery Commission alleged that those things are true. But “[a] complaint is part of the pleadings of a case and is not evidence.” Doe v. Doe, 324 S.C. 492, 478 S.E.2d 854, 857 (Ct. App. 1996) (internal quotation marks omitted). “It is a truism that allegation without proof is as unavailing as proof without allegation. Not only is it essential that every fact necessary to constitute a cause of action or defense be pleaded, but every such fact, if in issue, must be proved.” Williams v. Metro. Life Ins. Co., 202 S.C. 384, 25 S.E.2d 243, 246 (1943). A record of proof to support the circuit court’s and Court of Appeals’ conclusions does not exist.

The Lottery Commission's return mischaracterizes the discussion in Glassmeyer's briefs to the Court of Appeals concerning this Court's opinion in State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015). What Glassmeyer's briefs actually had to say about Counts is below:

The information sought by Glassmeyer was not “[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) (emphasis added).

The only right a person has regarding privacy under the South Carolina Constitution is the right to be free from *unreasonable invasions* of privacy, not even all invasions of privacy. S.C. Const. art. I, § 10 (“Searches and seizures; invasions of privacy”). “The 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, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.” Id.

Past case law has not shed much light on this provision of the South Carolina constitution. In 2015, however, our state Supreme Court decided State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), in which the Court stated that physical intrusions into “the privacy interests in one’s home are precisely what our state constitutional provision was intended to protect.” Id. at 71 n. 7. Not only does providing the information in dispute here not cause any physical intrusion into a lottery claimant’s home or even tend to do so, the information sought by Glassmeyer was not about what is going on in a lottery claimant’s house but simply an address for the person, where that house is (or was at the time the claim form was filled out). (R. pp. 21, 34, 160.) Providing the information subject of this case is nowhere near as intrusive as what Counts determined to be an unreasonable invasion of privacy. Id. It is the kind of information typically found in a phone book.

(Appx. p. 108-09.)

The Lottery Commission derides Glassmeyer's discussion of State v. Counts, 413 S.C. 153, 776 S.E.2d 59, 71 n. 7 (2015), in which our Supreme Court, discussing the state constitutional prohibition on unreasonable invasions of privacy, noted that physical intrusions into "the privacy interests in one's home are precisely what our state constitutional provision was intended to protect." The Lottery Commission misses the point of the discussion, which is that something on the order of the severity of a physical intrusion into the home is the kind of thing that would constitute an unreasonable invasion of personal privacy under S.C. Code Ann. § 30-4-40(a)(2).

(Appx. pp. 169-70.)

The language of the state constitutional provision concerning unreasonable invasions of privacy mirrors the language of S.C. Code Ann. § 30-4-40(a)(2); thus, this Court's treatment of the constitutional language bears noting in analyzing the meaning of S.C. Code Ann. § 30-4-40(a)(2). S.C. Const. art. I, § 10.

In citing to an order in Doe v. S.C. Lottery Commission, 2014-CP-40-2446, the Lottery Commission has violated the South Carolina Appellate Court Rules, which expressly state that unpublished opinions "should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR; accord Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 554-56, 813 S.E.2d 292, 297-99 (Ct. App. 2018); Higgins v. Med. Univ. of S.C., 326 S.C. 592, 601, 486 S.E.2d 269, 273 (Ct. App. 1997). Perhaps moreover, though, this order the Lottery Commission cites as authority is one of the subjects of Glassmeyer's abuse of process claim. Glassmeyer's answer and counterclaim, the allegations of which must be taken

as true in reviewing a judgment on the pleadings against him, has this to say about that order:

The order is apparently the product of collusive conduct or what is tantamount to collusion. As shown by attachments to the [Lottery Commission]'s own Complaint, the [Lottery Commission] invited the lawsuit that resulted in the order, as well other lawsuits, including those reflected by pleadings attached to the complaint, by asking the plaintiffs in those suits to sue the [Lottery Commission] and seek the relief sought in those cases. The [Lottery Commission] wanted and wants the plaintiffs in those lawsuits to win those suits. The [Lottery Commission] did not and does not plan to substantively oppose the relief sought by the plaintiffs in those lawsuits. Those lawsuits do not and did not represent actual live controversies; rather, the [Lottery Commission] (the defendant in those suits) desired and desires the same outcome sought in those suits by the plaintiffs therein. To the extent the order purports to adjudicate [Glassmeyer]'s right to receive the information he has requested from the [Lottery Commission] under FOIA, the order is void and of no effect; [Glassmeyer] was not a party to the suit that produced the order, and no one in that suit advocated for [Glassmeyer]'s rights or position as to the matters involved in that suit. The same is true for all the other suits invited by the [Lottery Commission] in this regard. Further, the order reaches an incorrect conclusion and makes incorrect findings, likely as a result of the [Lottery Commission]'s failure to actually defend the suit that created the order.

(Appx. pp. 326-27.)

The Lottery Commission has the temerity to cite as authority an order produced by its own improper collusive conduct. Perhaps it does so because there is no precedent to support its position. Perhaps it does so as another instance of the circular logic it has employed throughout this case.

**III. The Lottery Commission has failed to articulate a reason why disclosure of the information Glassmeyer sought would constitute an unreasonable invasion of privacy.**

The Lottery Commission's continuation of its *petitio principii* strategy is evident throughout its return. It states repeatedly that providing a FOIA requester with the names of successful lottery claimants necessarily and as a matter of law amounts to an unreasonable infringement upon the privacy of the claimants, but what is missing – and what was missing from the circuit court's and Court of Appeals' decisions – is reasoning to back up that statement. *How* is disclosing information that identifies people who have received millions of dollars in public funds an unreasonable invasion of privacy? *Why* is disclosing this information, contained in the contents of government records that those same people created, necessarily an unreasonable invasion of their privacy? *What* about identifying people who have expressly acknowledged that the Lottery Commission may have to give out their identifying information constitutes an invasion of privacy at all?

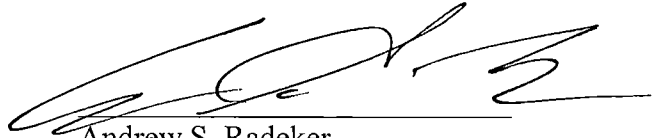
The Lottery Commission's return is silent in response to these questions, as it must be. There is no record in this case that contains anything that would answer these questions in the Lottery Commission's favor.

**CONCLUSION**

The Lottery Commission's return simply begs the question. It provides this Court with nothing to contradict the reasons why this Court should grant certiorari and bring clarity back to this state's FOIA jurisprudence.

WHEREFORE, Glassmeyer prays for this Court to issue a writ of certiorari to review the Court of Appeals' opinion and decision in this case.

Respectfully submitted,

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

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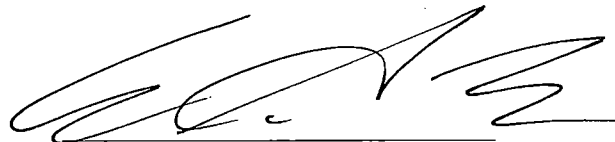
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PROOF OF SERVICE

I, the undersigned, certify that I served the foregoing reply to return to petition for writ of certiorari, along with a copy of the appendix, by depositing a copy of them on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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