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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON 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.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES/QUESTIONS PRESENTED

I. Did the Court of Appeals err in granting the Respondent's motion for judgment on the pleadings as to its claim for a declaratory judgment?

II. Did the Court of Appeals err in granting the Respondent's motion for judgment on the pleadings as to its claim for an injunction?

III. Did the Court of Appeals err in failing to reverse the denial of the Appellant's motion to dismiss the Respondent's claim for a declaratory judgment?

IV. Did the Court of Appeals err in failing to reverse the denial of the Appellant's motion to dismiss the Respondent's claim for an injunction?

V. Did the Court of Appeals err in failing to reverse and remand as to the Appellant's claim seeking relief under FOIA?

STATEMENT OF THE CASE

This Court issued a writ of certiorari to review the Court of Appeals' published opinion in South Carolina Lottery Commission v. Glassmeyer, 428 S.C. 423, 835 S.E.2d 524 (Ct. App. 2019).

This is a case in which the Respondent, the South Carolina Lottery Commission (hereinafter "the Lottery Commission"), a public body, sued the Petitioner (hereinafter "Glassmeyer"), a citizen of South Carolina, for making requests pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (hereinafter "FOIA"). (Appx. pp. 196-204.) The Lottery Commission sought a declaration that certain information Glassmeyer had sought through two FOIA requests is exempt from mandatory disclosure under FOIA and requested the issuance of a permanent injunction preventing Glassmeyer from seeking to obtain that information, along with an award of attorney's fees. (Appx. pp. 196-204.) The information concerned lottery winners who claimed prizes of or over a million dollars over a period of time, including their names, addresses, telephone numbers, and forms of identification that they presented to the Lottery Commission to claim their lottery prizes. (Appx. pp. 197, 210.)

Glassmeyer answered, denying that the Lottery Commission was entitled to any relief and asserting various defenses. (Appx. pp. 324-38.) Glassmeyer also pled counterclaims against the Lottery Commission, seeking a declaration that the Lottery Commission had violated FOIA, seeking an order directing the Lottery Commission to comply with FOIA with regard to his requests, and asserting a claim against the Lottery Commission for abuse of process. (Appx. pp. 332-34.) Glassmeyer's answer and counterclaim attached "a copy of a South Carolina Education Lottery Winner Claim Form" that was authored by the Lottery Commission and is used for lottery winners to submit claims to the Lottery Commission. (Appx. pp. 331, 336-37.) The form states

that the information the lottery winner provides on the form may be subject to disclosure under FOIA. (Appx. pp. 332-336.) The information the form requires to be disclosed on it includes the information sought by Glassmeyer in his FOIA requests. (Appx. p. 336.) The form also states that a claimant who submits it releases the Lottery Commission from liability for disclosure of information about the claimant. (Appx. p. 336.)

The case was set for a non-jury trial on December 5, 2014, before the Honorable L. Casey Manning. Before trial began, the Lottery Commission made an oral motion for judgment on the pleadings. (Appx. p. 394 ln. 5-7.) The Lottery Commission clarified that it sought relief under the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.*, rather than under FOIA. (Appx. p. 203, p. 389 ln. 2-4.) Glassmeyer made oral motions to dismiss the Lottery Commission's claims and to strike the Lottery Commission's prayer for attorney's fees. (Appx. p. 394 ln. 20-21, p. 402 ln. 16-18.) The Lottery Commission limited its motion for judgment on the pleadings to its own claims, not Glassmeyer's counterclaims. (Appx. p. 405 ln. 8 through p. 406 ln. 1.)

Those motions were all that were heard that day. (Appx. p. 411 ln. 12-18.) No trial was held that day or any day in this case. No party ever presented any evidence.

On November 17, 2015, Judge Manning filed an order granting the Lottery Commission the declaratory and injunctive relief it sought. (Appx. pp. 187-88.) The circuit court "ORDERED that [Glassmeyer] 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." (Appx. p. 188.) The order states that it "concludes the above-captioned lawsuit[.]" (Appx. p. 188.)

The order did not address Glassmeyer's motions, and it did not address Glassmeyer's counterclaims. (Appx. pp. 177-88.) The order found as facts things that Glassmeyer neither stated in his answer and counterclaim nor admitted in response to the Lottery Commission's complaint. (Appx. pp. 177-88, 196-337.)

Glassmeyer moved to reconsider. (Appx. pp. 347-383.) The court denied that motion by order filed May 17, 2016. (Appx. p. 189, 191.)

Glassmeyer appealed. During the pendency of the appeal, the General Assembly enacted a change to FOIA, amending S.C. Code Ann. § 30-4-110, and Glassmeyer brought that to the court's attention. (Appx. pp. 63-65.)

The Court of Appeals held that the Lottery Commission did have standing to sue Glassmeyer, affirmed the grant of judgment on the pleadings on the Lottery Commission's claims, and reversed and remanded only as to Glassmeyer's abuse of process counterclaim. (Appx. p. 13.) The Court of Appeals stated the standard of review as that for determining whether a declaratory judgment action is legal or equitable. (Appx. p. 4.) The Court of Appeals held that the Lottery Commission had standing to bring its claims. (Appx. p. 13). It held that whether the FOIA exemption in S.C. Code Ann. § 30-4-40(a)(2) applies to the information withheld by the Lottery Commission is a question of law that "does not require looking at any facts other than Glassmeyer's request." (Appx. p. 12.) The Court of Appeals did not address Glassmeyer's claim seeking relief under FOIA. (Appx. pp. 1-13.) The Court of Appeals declined to address the denial of Glassmeyer's motion to dismiss, stating that issue was not appealable. (Appx. p. 13.)

The Court of Appeals denied Glassmeyer's petition for rehearing. (Appx. pp. 49-50.)

Glassmeyer petitioned this court for a writ of certiorari, which this court granted on July 8, 2020, as to the five questions presented by Glassmeyer's petition:

1) Did the Court of Appeals err in granting the Lottery Commission's motion for judgment on the pleadings as to its claim for a declaratory judgment?

2) Did the Court of Appeals err in granting the Lottery Commission's motion for judgment on the pleadings as to its claim for an injunction?

3) Did the Court of Appeals err in failing to reverse the denial of Glassmeyer's motion to dismiss the Lottery Commission's claim for a declaratory judgment?

4) Did the Court of Appeals err in failing to reverse the denial of Glassmeyer's motion to dismiss the Lottery Commission's claim for an injunction?

5) Did the Court of Appeals err in failing to reverse and remand as to Glassmeyer's claim seeking relief under FOIA?

STANDARD OF REVIEW

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 court may not consider matters outside the content of the non-moving party's pleadings, and an appellate court is limited to the content of the pleadings in just the same way. See Falk, 341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234. A judgment on the pleadings is proper only where there is no issue of fact raised by the non-moving

party's pleadings that would entitle the non-moving party to judgment if those issues were resolved in his favor. Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47, 49 (2009). 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); accord Sapp, 687 S.E.2d at 49.

ARGUMENT

The Court of Appeals' opinion contravenes this Court's precedent concerning the government's obligation to prove the applicability of an exemption from disclosure under FOIA before a court allows it to withhold requested information. The opinion also undermines bedrock principles about how motions directed at pleadings are to be decided, principles designed to ensure that cases proper for trial get to proceed to trial.

The implications of allowing the Court of Appeals' opinion to stand are disturbing for FOIA and the public's use of FOIA. The Court of Appeals' jurisprudence about determining the applicability of FOIA exemptions is, at present, internally inconsistent and variously in line with and not in line with precedent already set by this Court. If this Court does not correct the missteps of the Court of Appeals in this case, the potential for the Court of Appeals and trial courts to misapply the law in this context in future FOIA cases is significant.

The Court of Appeals is wrong about whether the identities of million-dollar lottery claimants are, as categorical matter, exempt from disclosure under a FOIA exemption that applies only if and when a public body proves that what is sought under FOIA is "[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).[1] The Lottery Commission did no more than show that disclosure of the information at issue in this case would identify the people to whom the state paid a million dollars or more in claimed lottery winnings. The Lottery Commission never showed that disclosure of the information Glassmeyer sought would result in *any* private matter being revealed. Receiving a million dollars or more of public funds is not a private matter. It is a 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).

I. In granting and affirming a judgment on the pleadings, the circuit court and the Court of Appeals made factual findings that were neither admitted nor pled in Glassmeyer's pleading, failing to apply the correct standard.

This case was not tried, and only motions directed at the pleadings were heard on the day that had been set for trial. (Appx. p. 133, 387-411.) The Lottery Commission's motion was for judgment on the pleadings. The circuit court's order, though, reads much as though the case had been tried and contains numerous factual findings. (Appx. pp. 177-88.) The Court of Appeals' 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." (Appx. p. 9.) Glassmeyer did not contend that the circuit court considered evidence outside the pleadings. The circuit court did not consider any evidence at all. No evidentiary record was ever made.[2] There was no trial. The circuit court just took the Lottery Commission's unadmitted

[1] Section 30-4-40(a)(2) was amended in 2017, but not to alter the language at issue here.

[2] What may look like "exhibits" in the record are exhibits to the Lottery Commission's complaint. (Appx. pp. 205-323.)

allegations and unproven position on the facts and transformed them into an order ruling for the Lottery Commission.

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 Sapp, 687 S.E.2d at 49; Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman's Ins., 302 S.C. 234. The circuit court's order, however, is replete with factual findings of things that Glassmeyer did not admit in response to the Lottery Commission's complaint and did not allege himself. (Appx. pp. 177-88, 196-204, 324-338.) Glassmeyer's admissions in response to the complaint did not extend much further than admitting that he made the subject FOIA requests and that the Lottery Commission sent him the correspondence it sent him. (Appx. pp. 196-204, 324-338.)

Only the Lottery Commission's allegations that Glassmeyer admitted, along with Glassmeyer's own allegations in his answer and counterclaim, made up the factual universe available to the circuit court to use in deciding the Lottery Commission's motion for judgment on the pleadings. See Sapp, 687 S.E.2d at 49; 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 treating the *unadmitted* allegations of the Lottery Commission's complaint as though they had been proven. (Appx. pp. 177-88.) The Court of Appeals did the same thing, looking outside what Glassmeyer pled in reviewing the circuit court's decision. For example, the Court of Appeals found that what was stated in the Lottery Commission's committee meeting minutes was true and that disclosing lottery claimants' identities exposes them to significant risks. (Appx. pp. 7, 8.)

The Court of Appeals' opinion makes plain that it did not apply the correct standard of review. Indeed, the Court of Appeals stated the standard of review as the test for determining whether a declaratory judgment action is legal or equitable, which is not a standard of review at all. (Appx. p. 4.)

Had the Court of Appeals applied the correct standard of review, that for appellate review of an order granting judgment on the pleadings, it would have seen that the allegations and admissions in Glassmeyer's answer and counterclaim do not prove the Lottery Commission's case against Glassmeyer. In choosing to affirm, the Court of Appeals looked impermissibly to unadmitted allegations of the *moving* party's pleading to find a basis for its decision. There are many substantive problems with the circuit court's order and the Court of Appeals' opinion affirming it, but, on this point of procedural error, even without regard to any other issues, black-letter law required the Court of Appeals to reverse. See Sapp, 687 S.E.2d at 49; Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman's Ins., 302 S.C. 234.

II. The Court of Appeals' 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.

Precedent authored by this Court holds 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). "The burden of proving that an exemption exists lies with the government." Berkeley Cnty. Sch. Dist., 392 S.C. at 83; accord Evening Post Publ'g Co. v. City of N. Charleston, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005) (to advance purpose of FOIA, "government has the burden of proving that an exemption applies"); Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996) (same).

Sometimes, the Court of Appeals has gotten this right. The Court of Appeals reversed the grant of a motion for judgment on the pleadings in a FOIA case in 2019, 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, 427 S.C. 377, 388, 831 S.E.2d 442, 448 (Ct. App. 2019) (emphasis added). "The 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 388 n. 9 (emphasis added). The Court of Appeals in Pope observed that affirming the circuit court's judgment on the pleadings "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 390 (quoting Berkeley Cnty. Sch. Dist., 392 S.C. at 83).

This Court has previously rejected a categorical approach to the specific FOIA exemption at issue in the instant case. 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 this 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.

The Court of Appeals stated 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." (Appx. p. 12.) That is wrong. Berkeley Cnty. Sch. Dist., 392 S.C. at 83; City of Columbia, 323 S.C. at 387; City of N. Charleston, 363 S.C. at 457; Fowler, 322 S.C. at 468; Pope, 427 S.C. at 388, 390. 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. Berkeley Cnty. Sch. Dist., 392 S.C. at 83; City of Columbia, 323 S.C. at 387; City of N. Charleston, 363 S.C. at 457; Fowler, 322 S.C. at 468; Pope, 427 S.C. at 388, 390. 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). This 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 of Appeals' opinion also engages in impermissible burden shifting. The Court of Appeals decided there was no showing made of why the public needs to know the specific information requested by Glassmeyer, looked to whether Glassmeyer showed a reason why *he* wanted the information, and decided that he "has not provided any reason that the public needs to know the information he requested or any reason as to why the information [the Lottery

Commission] provided was not adequate[,]" presumably, not adequate to serve a specific purpose for which Glassmeyer wanted it. (Appx. p. 11.) That is 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, unless the information is sought for commercial solicitation purposes. See id.; S.C. Code Ann. §§ 30-4-40, -50. It is incongruous with this 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 regarding an exemption. Berkeley Cnty. Sch. Dist., 392 S.C. at 83.

The flawed balancing analysis the Court of Appeals used appears to derive from one of its own decisions, Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015), which Glassmeyer cautioned the court about and sought for the Court of Appeals to overrule. (Appx. pp. 51-61, 109-12.) 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[,]" requesting, among other items of information, the applicants' home addresses, telephone numbers, and email addresses. Glassmeyer v. City of Columbia, 414 S.C. at 216-17. The Court of Appeals 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 of Appeals' 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. Instead, the law is that disclosure of public records under FOIA is mandatory, unless and until the public body at issue proves that a FOIA exemption applies. Berkeley Cnty. Sch. Dist., 392 S.C. at 83; City of Columbia, 323 S.C. at 387; City of N. Charleston, 363 S.C. at 457; Fowler, 322 S.C. at 468. The Court of Appeals' opinion in the instant case is not an isolated incident of that court bucking this Court's precedent and shifting the burden under FOIA. The Court of Appeals has done the same thing before. Glassmeyer v. City of Columbia, 414 S.C. at 221, 223.

In the instant case, by shifting the burden of proof and taking a categorical, matter-of-law approach instead of using a case-by-case analysis, the Court of Appeals issued an opinion, which is now precedent for all trial level courts in this state, that contravenes this Court's binding precedent. That is something our law does not permit. S.C. Const. Art. V, § 9. The Court of Appeals has put trial-level courts in an untenable position, unable to apply the Court of Appeals' precedent consistently with precedent authored by this Court. Reversal by this court in an opinion that rights the ship of this state's FOIA jurisprudence would rescue trial courts from this predicament.

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

The Court of Appeals never undertook the proper analysis of the substantive FOIA question of whether the unreasonable-invasion-of-personal-privacy exemption of S.C. Code Ann. § 30-4-40(a)(2) applies to the information requested here. That FOIA exemption 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.

Like the names of those who receive substantial state salaries or payments under contract from the state, the identity of those who receive individual payouts of a million dollars or more of public funds from the State of South Carolina is a public matter. "South Carolina FOIA mandates that the public be provided with information regarding the expenditure of public funds." Weston, 303 S.C. at 402. The public interest in knowing who was paid many millions of dollars by a South Carolina state entity is self-evident. Id. The Court of Appeals' statement that it was "unable to fathom how disclosure of the rest of the information" – information that identifies the people who

have been given millions of public dollars – "would benefit the public more than what was already provided" (Appx. p. 11) is inconsistent with precedent this Court set in Weston. 303 S.C. at 402. Finding out who received large sums of money from the public fisc is a quintessential matter of public interest. See id.

The Court of Appeals' analysis and the circuit court's simply assumed 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. This 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; Society of Prof'l Journalists, 283 S.C.

at 566; Burton, 358 S.C. at 352. The public has a rather significant legitimate interest in knowing who got the public's money. Weston, 303 S.C. at 402

What Glassmeyer wanted to know about these lottery claimants is the same sort of information that goes in a phone book: names and addresses. In its rightly decided Burton decision, 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, in the instant case the Court of Appeals failed to undertake any analysis of whether the information at issue is of such a deeply private character that it falls within this narrow exception.

The Court of Appeals, 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." (Appx. p. 11.) Practically any information about a person could lead to the discovery of other personal information. Information about a person that could lead to the discovery of other personal information is not what is exempted from disclosure under S.C. Code Ann. § 30-4-40(a)(2).

The Court of Appeals' opinion in this case and its opinion in Glassmeyer v. City of Columbia, 414 S.C. at 221, 223, reveal a trend in the Court of Appeals' opinions of holding 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* of the 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). Similarly to the Court of Appeals'

opinion in this case, Glassmeyer v. City of Columbia states that a person's address and telephone number are items of information in which the person has a privacy interest, 414 S.C. at 218-23, but what neither opinion does is take the next analytical step, a step required by the language of exemption. Having found a privacy interest was implicated, the analysis used by the Court of Appeals in both cases did not then ask the question necessary 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. The Court of Appeals' opinion in these cases has effectively lopped off half of the statutory inquiry, without any permission from the legislature to change what its statute says. With these opinions binding trial-level courts as precedent, we should expect to see trial-level decisions that do the same thing, unless this Court puts the Court of Appeals back on the right track.

The Court of Appeals gave rather short shrift to something that the circuit court ignored altogether: the fact that the lottery claimants gave the requested information, under no compulsion, 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. (Appx. pp. 331-32, 336.) Being informed of that, they chose to submit the information anyway. (Appx. pp. 331-32, 336.) 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. Nothing in this record shows how it is an unreasonable

invasion of someone's privacy for a government agency to give out a person's identifying information when that person did not 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.

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).

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.

The Court of Appeals has lately been misapprehending what is exempt under S.C. Code Ann. § 30-4-40(a)(2) and how to analyze properly whether this exemption applies, and not just in this case. See Glassmeyer v. City of Columbia, 414 S.C. at 218-23. With a reversal in this case, this Court can clear up that misunderstanding and get the Court of Appeals back to issuing opinions that are consistent with what S.C. Code Ann. § 30-4-40(a)(2) actually exempts from mandatory disclosure. See Burton, 358 S.C. at 352.

IV. The Court of Appeals' decision that the Lottery Commission could seek a declaratory judgment about a question arising under FOIA runs counter to established legal principles.

The Court of Appeals observed that "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. (Appx. p. 8.) It is indeed important.

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). 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 to disclosure of that information, because such a right to get information 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, S.C. Code Ann. § 15-53-10, *et seq.* (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, 423 S.C. 295, 814 S.E.2d 513, 518 (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. (Appx. p. 196.)

The newly created grounds for a public body to sue a FOIA requester are quite limited. S.C. Code Ann. § 30-4-110(A) ("public body may . . . seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure"). The Court of Appeals' 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(A). The Court of Appeals has, in effect, done away with the legislature's limits on when government entities may seek relief under FOIA and allowed such suits any time there is a disagreement about whether a FOIA exemption applies to a given request.

The law does not and should not permit the government to sue a citizen simply for making FOIA requests. See S.C. Code Ann. § 30-4-110(A). That, however, is what the Court of Appeals

has allowed. If this court does not step in and reverse the Court of Appeals on this point, we should expect to see trial-level courts follow the Court of Appeals' lead.

V. 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 Court of Appeals erred in affirming it.

The Court of Appeals held 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." (Appx. p. 13, emphasis added.)

Declaratory relief, not injunctive relief, is what is available under the Declaratory Judgments Act. S.C. Code Ann. § 15-53-30. The elements a plaintiff must prove in order to receive an injunction are that "(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. It was certainly not 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. (Appx. p. 202.) A plaintiff does not have standing to seek an injunction to prevent alleged harm to someone else. Compton, 392 S.C. at 366.

Additionally, the scope of the injunction against Glassmeyer is frighteningly broad. The Court of Appeals affirmed the circuit court's decision that "ORDERED that [Glassmeyer] 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." (Appx. p. 188.) 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).

Neither the circuit court nor the Court of Appeals connected the harm envisioned in the absence of an injunction to how the issuance of this or any injunction is needed to prevent that harm. The circuit court appears to have equated a perceived harm flowing from *disclosure* of the information at issue with the very different activity of *asking for* the information – yet the latter is what was enjoined. (Appx. p. 188.) Asking for the information, which is the enjoined activity, is not what causes or even could cause the ostensible "harm." (Appx. pp. 177-88.)

The Court of Appeals perceived a "risk of unlimited legal exposure for [the Lottery Commission]," 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. (Appx. p. 8.) 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.**

(Appx. p. 336.)

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). For the sake of the law of injunctions and declaratory judgments, this Court should reverse the Court of Appeals.

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

The Court of Appeals 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. (Appx. p. 13.) 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). The Court of Appeals 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. This court should reverse on this point and dismiss the Lottery Commission's claims against Glassmeyer, which, as a matter of law, the Lottery Commission could not bring against him.

VII. The opinion the Court of Appeals issued in this case treats one of Glassmeyer's counterclaims as though it did not exist.

Glassmeyer pled a counterclaim against the Lottery Commission for relief under FOIA. (Appx. pp. 332-33.) This claim must be remanded to be adjudicated. The Lottery Commission expressly limited its motion for judgment on the pleadings to its own claims, not Glassmeyer's counterclaims. (Appx. p. 405 ln. 8 through p. 406 ln. 1.) Neither of Glassmeyer's counterclaims, including his FOIA violation claim, could possibly have been ruled upon as a result of the Lottery Commission's motion. While Glassmeyer believes he will prevail on his FOIA claim, the only procedurally proper outcome here concerning that claim is for this Court to remand it.

CONCLUSION

This Court's reversal of the Court of Appeals is needed so that this Court may issue a decision that addresses inconsistency in the Court of Appeals' FOIA opinions and brings the whole of this state's FOIA jurisprudence in line with the precedent authored by this Court. This Court's reversal is needed to bring the Court of Appeals' opinions about motions directed at pleadings back into conformity with bedrock principles that exist to make sure that cases that require factfinding are not disposed of in a summary way. Sapp, 687 S.E.2d at 49; Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman's Ins., 302 S.C. 234.

This court should reverse the Court of Appeals and remand both of Glassmeyer's counterclaims for trial.

Respectfully submitted,

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July 24, 2020

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON 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.

PROOF OF SERVICE

I, the undersigned, certify that I served the foregoing brief of petitioner by sending the same by email to counsel for the respondent, named below, at the email addresses shown below:

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