THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
G. Edward Welmaker, Circuit Court Judge
Charles B. Simmons, Jr., Master-in-Equity

Case No. 2010-CP-23-6767

Arthur M. Field,..... Respondent-Appellant,

v.

Henry McMaster, Attorney General, ...Appellant-Respondent.

RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules of Court

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the Orders below reached the correct result in holding that certain documents did not need to be disclosed.

2. Whether Plaintiff Field's arguments pertaining to "investigative or deliberative documents" do not address the applicable statute, § 35-1-607(b)(1), and are otherwise without merit.

3. Whether Plaintiff Field's arguments pertaining to the attorney-client privilege are without merit.

4. Whether Plaintiff's claim that the Securities Division does not have the right to operate in "closed or executive session" is inapposite.

5. Whether the lower court was correct in holding that certain documents it exempted from disclosure were legal counsel correspondence and/or work product and therefore exempt under § 30-4-40(a)(7).

6. Whether Exhibit B to the July 18, 2011 Order, together with the Attorney General's privilege log as published in that Order, were more than sufficient to apprise Plaintiff Field or the nature of the documents reviewed and the privileges claimed.

STATEMENT OF THE CASE

Appellant-Respondent Attorney General adopts and incorporates by reference the Statement of the Case set forth in the Appellant's Brief of Appellant-Respondent. In addition, the Attorney General would simply note that this Respondent's Brief of Appellant-Respondent addresses issues raised in Plaintiff Field's cross-appeal filed on September 24, 2012, with respect to the Order of Judge Simmons dated August 18, 2011 and both of the Orders dated September 15, 2011. Previous Orders were not referenced in Field's Notice of Appeal in connection with his cross-appeal.

STATEMENT OF FACTS

Appellant-Respondent Attorney General adopts and incorporates by reference the Statement of Facts set forth in the Appellant's Brief of Appellant-Respondent with the following additions that pertain to the cross-appeal by Plaintiff Arthur Field.

To reiterate information in the prior Statement of Facts, the July 18, 2011 Order of Judge Simmons held that some documents were not subject to disclosure and that others were subject to disclosure. The documents held not subject to disclosure were detailed in the Court's Exhibit B to the July 18, 2011, Order, R. 28-41. That exhibit contained a brief explanation for each document or set of documents, similar to the claim of privilege asserted in the privilege log of the Attorney General. The cross-appeal of Plaintiff Field argues that Judge Simmons should not have held any documents to have been exempt or not subject to production. The Attorney

General's position is that the Orders below should be affirmed to the extent that they held that certain documents did not need to be disclosed.

ARGUMENT

1. The Orders below reached the correct result in holding that certain documents did not need to be disclosed.

The July 18, 2011 Order of Judge Simmons refers to the standard that requires a "showing how the release of the records would interfere with any pending criminal investigation. . . ." R. 9. It would thus appear that he applied the weighing test contained in § 30-4-40(a)(3) as applied in such cases as *Newberry Pub. Co., Inc. v. Newberry County Com'n on Alcohol and Drug Abuse*, 308 S.C. 352, 417 S.E.2d 870 (1992). That standard provides that certain records involved in the detection or investigation of crimes should not be released if "the disclosure of the information would harm the agency" by interfering with a criminal investigation.

The Attorney General has contended in its Appellant's Brief that this stringent standard did not need to be applied in this case, given the agency's reliance on other statutory provisions that do not require such a showing or a balancing test. Those provisions include § 35-1-607(b)(1)(documents received in the course of a securities investigation are not public documents) and § 30-4-40(a)(7)("[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships"). As a result, the Attorney General has contended in its Brief of Appellant that to the extent that Judge Simmons ordered the disclosure of some documents, the standard he applied was both inapplicable and unduly stringent, and should be reversed.

On the other hand, for those documents that he held were not required to be produced, no reversal is necessary. Judge Simmons' use of the standard above, even if erroneous, was harmless error. In fact, the Attorney General submits that for those documents deemed by Judge Simmons to be not subject to disclosure under the stringent standard applied by him, then nondisclosure is all the more appropriate, given that § 35-1-607(b)(1) and § 30-4-40(a)(7) provide for nondisclosure even in the absence of a showing of harm to an investigation.

To illustrate the point further, Judge Simmons held as follows in each instance in which he concluded that a document need not be produced: "Record sufficient to establish legal counsel correspondence/work product or obtained in investigation and not subject to disclosure." R. 28-41. Reading the Order and Exhibit B together, it can be seen that for each document that he determined to have been appropriate not to disclose, he first concluded that the document constituted correspondence or work product of legal counsel, or was obtained in the course of investigation. These findings were sufficient in and of themselves to support Judge Simmons' holding that those documents need not be disclosed, because the findings amount to conclusions that the documents were covered by § 30-4-40(a)(7)(work product) or § 35-1-607(b)(1)(documents obtained in the course of a securities investigation). Nothing more needs to be shown. As a result, those findings, in conjunction with § 30-4-40(a)(7) and § 35-1-607(b)(1) constitute additional sustaining grounds that

warrant affirmance of those portions of his Orders pursuant to Rule 220(c), S.C.A.C.R. (affirmance on any ground(s) appearing in the record). To the extent that Judge Simmons additionally decided that disclosure of the documents might interfere with a pending investigation, while not necessary to the conclusion he reached, that holding simply provides an additional reason to hold that disclosure of the documents would not be in the public interest.

2. Plaintiff Field's arguments pertaining to "investigative or deliberative documents" do not address the applicable statute, § 35-1-607(b)(1), and are otherwise without merit.[1]

Plaintiff's first argument relates to documents that he characterizes as "investigative or deliberative documents." He contends that "[t]he Securities Division of the Attorney General's Office is not exempt from FOIA." Br. of Cross-Appellant at 10. The Attorney General has never so claimed, nor did the court below so rule. As already pointed out in its Brief of Appellant, p. __, the Attorney General's Office produced some 2,500 pages of Securities Division documents of the kind which are deemed public documents by § 35-1-607(a). Leaving aside work product documents for the moment, the "investigative" aspect of the Attorney General's claim is that § 35-1-607(b)(1) provides that documents "obtained by the Securities Commissioner in connection with an audit or inspection under Section 35-1-411(d) or an investigation under Section 35-1-602" are "not public records" (emphasis

[1] Appellant's Brief of Respondent-Appellant ("Br. of Cross-Appellant"), pp. 10-14.

added).

The Securities Division possesses both public and nonpublic documents. As provided in the unequivocal language of § 35-1-607(b), none of the documents deemed nonpublic by § 35-1-607(b)(1) are public. Of the remaining documents, some are public and not exempt, while others are "public but exempt" documents, i.e., ones that are subject to exemptions such as the work product exemption found in § 30-4-40(a)(7). The Attorney General agrees that public, nonexempt, documents in its files are subject to disclosure under FOIA. It has already produced almost 2,500 pages of such documents, making them available to Plaintiff in 2009 when he first made his FOIA request. R. 74. On the other hand, of course, the Attorney General submits that it should not be required to produce either nonpublic documents or "public but exempt" documents. Plaintiff's argument that the Securities Division claims a blanket exemption for all documents in its possession is simply not based on fact, and as a result is without merit.[2]

Plaintiff next argues that the deliberative process privilege should not apply to protect the documents in question from disclosure. Br. of Cross-Appellant at __. As

[2] Plaintiff notes in passing that the Attorney General allegedly did not object to the original FOIA request. Br. of Cross-Appellant at 10. This is not asserted as a ground for reversal, and in any event is incorrect as a matter of fact, *see* R. 80-81 In addition, this claim was not raised to and ruled upon by the trial judge and therefore may not be raised for the first time on appeal. *See, e.g., Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

with Plaintiff's blanket exemption argument, this argument raises claims that have never been made. The Attorney General has never even mentioned, much less sought to assert, the deliberative process privilege in this case. Nor did any of the Orders of the court below allude to that privilege in any way. As a result, this argument of Plaintiff is another one that bears no relationship to the facts of the case.

By way of background, the deliberative process privilege, found in federal law, protects "documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated." *F.T.C. v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Such a document "must be predecisional—it must have been generated before the adoption of an agency's policy or decision." *Id.* In other words, when a governmental agency adopts a "policy or decision," some jurisdictions will protect predecisional documents from disclosure.

The Supreme Court of South Carolina has declined to adopt the deliberative process privilege. *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010). However, that decision simply has no application to this case, in which the deliberative process privilege has never been claimed by the Attorney General or even discussed by the lower court, much less adopted by the court.

Plaintiff next purports to address the issue of statutory exceptions for investigative material. The paucity of merit in Plaintiff's argument on this point is

shown, however, by his total omission of reference to § 35-1-607(b)(1), the statute on which the Attorney General has relied as providing that documents received in the course of a securities investigation are not public documents. Instead, and without regard to the contents of that controlling statute, he asserts that "[c]ertain investigations are potentially exempt from production as a matter of statutory law. No such specific statutory exemption exists to shield any investigation conducted by the Securities Division. . . ." Br. of Cross-Appellant 13. This may arguably be correct in the very limited technical sense that § 35-1-607(b)(1) does not create an "exemption" as such. However, Plaintiff's argument is fundamentally incorrect in substance because § 35-1-607(b)(1) does more than simply create an exemption. Instead, it deems documents received in securities investigations "not public documents" at all.

Section 30-4-30 of FOIA provides that "[a]ny person has a right to inspect or copy any public record of a public body. . . ." (Emphasis added.) By its terms, this provision requires disclosure only of "public records," as that term is defined in § 30-4-20(c). Section 30-4-40(a) provides that some information that is otherwise part of a public record, may, in the agency's discretion, be exempted from disclosure. However, the effect of a statute such as § 35-1-607(b)(1), deeming certain records not public records at all, is to remove them from FOIA altogether. As a result, any document received in the course of a securities investigation is

defined as not being a public record, and as a result, there is no need to examine the exemptions found in § 35-1-607(b)(1).[3] (Of course, even if it were necessary to examine the exemptions, the result, nondisclosure, would be the same. Section 30-4-40(a)(4) exempts, using different language, "Matters specifically exempted from disclosure by statute or law.")

3. Plaintiff Field's arguments pertaining to the attorney-client privilege are without merit.[4]

Section (B)(2) of the Brief of Cross-Appellant argues that there is an absence of an attorney-client relationship with respect to attorneys in the Securities Division. The short answer to this is that Judge Simmons never held that any document was covered by the attorney-client privilege. Instead, in each instance in which he held that a document need not be produced, the July 18, 2011, Order states in its Exhibit B as follows: "Record sufficient to establish legal counsel correspondence/work product or obtained in investigation and not subject to disclosure." R. 28-41 (emphasis added).

Plaintiff asserts, based on *Matter of Grand Jury Subpoenas Duces Tecum*, 241 N.J.Super. 18, 574 A.2d 449 (N.J.Super.A.D. 1989), that only outside counsel for a government body, as opposed to in-house counsel, can claim attorney-client

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[3] The documents for which work product is claimed are not necessarily all covered by § 35-1-607(b)(1). The work product exemption is claimed for those documents that would not otherwise be deemed nonpublic under § 35-1-607(b)(1).

[4] Br. of Cross-Appellant 14-18.

privilege. However, that case only held that the privilege can extend to outside counsel, not that it did not extend to in-house counsel. Section 30-4-40(a)(7), which refers to "legal counsel for a public body," does not suggest in any way that such legal counsel needs to be outside counsel, as opposed to attorneys who are employees of the public body.[5] While there is no South Carolina case that addresses this issue, the U.S. Supreme Court has held that the federal FOIA exemption was intended to "include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties. . . ." *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975)(emphasis added). Plaintiff's claim that § 30-4-40(a)(7) can only apply to outside counsel for a government entity is therefore unsupported by authority and is without merit.

Plaintiff next argues that the attorney-client privilege should not apply to "information transmitted to [Securities Division] investigators or regulators by external third parties." Br. of Cross-Appellant 17. Once again, Plaintiff fundamentally ignores or misunderstands the basis for nondisclosure of such documents. Information transmitted to the Securities Division by external third parties in connection with an investigation does not need to be attorney-client material in order to be withheld from disclosure because it consists of documents received in the course of a securities investigation that are deemed not public

[5] The term "public body" includes any department of the State. § 30-4-20(a).

documents by § 35-1-607(b)(1).

4. Plaintiff's claim that the Securities Division does not have the right to operate in "closed or executive session" is inapposite.

In Section (B)(3) of the Brief of Cross Appellant, Plaintiff raises a claim pertaining to closed or executive sessions of public bodies. This is yet another point that has not been the subject of either the Attorney General's claims or the Orders of the lower court. Aside from that, the Securities Division is not comparable to such entities as state boards or county councils that hold regular public meetings. As a result, it need not be addressed by this Court.

5. The lower court was correct in holding that certain documents it exempted from disclosure were legal counsel correspondence and/or work product and therefore exempt under § 30-4-40(a)(7).

As already noted, Judge Simmons comprehensively reviewed every one of the thousands of documents submitted to him for review. He determined that many of them did not need to be disclosed. Those documents are the subject of this cross-appeal by Plaintiff Field. Judge Simmons first determined that certain of the documents that did not need to be disclosed were "legal counsel correspondence/work product." R. 28-41. As set forth in Question 1 above, this conclusion alone provides a sufficient basis for affirming his holding that those documents did not need to be disclosed.

In response, Plaintiff Field makes only the conclusory argument that the documents in the investigative files of the Securities Division were "prepared in the

course of the regulatory process" or were work product of Securities Division "employees engaged in the ordinary regulatory process of the 2007 CIF registration by qualification." Br. of Cross-Appellant 19. However, as noted earlier and in the Appellant's Brief of the Attorney General, documents pertaining to the registration of securities are public documents, pursuant to § 35-1-607(a), which provides that "a record contained in or filed with a registration statement, application, notice filing, or report, are public records and are available for public examination." This is the category of documents that was produced in 2009. Plaintiff cannot reasonably contend that there are registration-related documents that have not been disclosed to him.

In addition, Plaintiff contends that attorney correspondence or work product in the investigative files of the Securities Division should not be exempted because it was not prepared in anticipation of litigation, rather than in the ordinary course of business. Br. of Cross-Appellant 19-20.

The first response to this is that Judge Simmons, who reviewed all of the documents, effectively held that at a minimum, the ones he held to have been exempt were "documents compiled during a criminal investigation by an agency." R. 9. In other words, they were compiled with a view toward court proceedings. While the Securities Division investigation was in fact a civil investigation rather than a criminal investigation, it was still an investigation, and one that obviously was

directed toward future litigation if warranted by the facts and law that were developed in the course of that investigation.[6] The only reason for an investigation by the Securities Division was "to determine whether a person has violated, is violating, or is about to violate this chapter or a rule adopted or order issued under this chapter, or to aid in the enforcement of this chapter or in the adoption of rules and forms under this chapter. . . ." § 35-1-602(a)(1). In turn, such investigations were directed toward the kinds of remedies found in §§ 35-1-603 (civil enforcement) or 35-1-604 (administrative enforcement). As a reading of both of those statutes indicates, they both point toward litigation.

Plaintiff also asserts that as a matter of fact, the "Securities Division herein was not preparing for any litigation. None ever took place." Br. of Cross-Appellant 19. First, it is illogical to say that if no litigation has taken place so far, none will ever take place. Plaintiff suggests that the Securities Division investigation concerning

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[6] Because the documents are located in the Securities Division's investigative files, the Attorney General does not now claim that they should be exempt as State Grand Jury records. The Securities Division does not institute criminal actions. *See* § 35-1-508(b)(" Securities Commissioner may refer that evidence as is available concerning violations of this chapter or of any rule or order under this chapter to the appropriate Division of the Attorney General's Office or other appropriate prosecution, law enforcement, or licensing authorities who may institute the appropriate proceedings under this chapter"). However, this section indicates that the civil investigation material may eventually become criminal investigation material if turned over to entities with authority to prosecute crimes. Again, however, the work product exemption claimed by the Attorney General is different from the criminal investigation exemption set forth in § 30-4-40(a)(3), because that exemption makes no reference to work product.

him is now ended, but this claim is based on a February 2008 agreement between himself and the Attorney General's Office that does not support his claim. Plaintiff asserts that that February 2008 agreement was a stipulation to "a closure of any possible investigation involving CIF [Field's corporation]. . . ." Br. of Cross-Appellant at 20 n. 20 (emphasis added). That document, which Plaintiff has obviously seen because he consented to it, is online at http://www.scag.gov/securities/securitiesorders/resoutionletter_capitalinvestment.pdf. It is also in the records supplied to Judge Simmons. R. 18. A review of that document will show that it was only an agreement by the Division not to stop issuance of future securities by CIF, simply because the company had closed down. In effect, this was an instance of mootness. Contrary to Plaintiff's assertion, there was no indication that the Division was dropping any future civil enforcement actions and remedies available in the Richland County Court of Common Pleas under §§ 35-1-603 and 35-1-604.

In summary, Judge Simmons, after reviewing the documents in detail, held that all of the ones which are the subject of Plaintiff's cross-appeal were exempt. Plaintiff claimed before Judge Simmons in Plaintiff's August 3, 2012 motion, R. 259, that there was no civil enforcement action pending, and in effect, that the documents could not be regarded as prepared in anticipation of litigation. However, Judge Simmons, who was familiar with the contents of the documents, declined to change

his mind about the documents he held to be exempt. Plaintiff has shown no reason for that conclusion to be reversed.

6. Exhibit B to the July 18, 2011 Order, together with the Attorney General's privilege log as published in that Order, were more than sufficient to apprise Plaintiff Field of the nature of the documents reviewed and the privileges claimed.

Plaintiff's final argument is that the July 18, 2011, Order, along with the Attorney General's privilege log released to Field over the objection of the Attorney General was still not specific enough to apprise Field of the nature of the documents and the privileges claimed for them. The response of the Attorney General is that the privilege log was not only specific enough, its release to Field by the court below was in error, because too much information was released by the court below. The reasons for this are set forth at pp. [39-44] of the Appellant's Brief of the Attorney General. Those points are incorporated herein by reference.

Plaintiff cites a federal case, *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353 (4th Cir. 2009), in which the privilege log submitted by the agency was held to be too general. However, that case concerned a privilege log of the kind known in federal FOIA law as a "*Vaughn* index," based on *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973). Unlike the situation in the present case, where all of the voluminous documents were reviewed by the court below *in camera*, a *Vaughn* index is one that is produced as a "substitute for *in camera* review. . . ." *Rein, supra,* 553 F.3d at 366 (emphasis added). Cases such as *Rein* illustrate the fact that when a court in a FOIA

case is supplied with both the documents themselves and a detailed privilege log, as happened here, the court has more than adequate information on which to conduct its review. Likewise, for the reasons already shown, it remains the position of the Attorney General that Plaintiff Field not only was supplied with a privilege list that was adequate, he was in fact supplied with one by the court below that told him more than he was entitled to know. For these reasons, Plaintiff's final argument is without merit.

CONCLUSION

For the foregoing reasons, the Appellant-Respondent Attorney General respectfully submits that the portions of the Orders below that decline to order the disclosure of information should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Henry McMaster, Attorney General, certifies that the Respondent's Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Henry McMaster, Attorney General, certifies that Respondent's Brief of Appellant-Respondent complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant-Respondent, does hereby certify that service of **Respondent's Brief of Appellant-Respondent** was made upon the *pro se* Respondent-Appellant Field by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 2nd day of April 2013:

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