STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY

COURT OF COMMON PLEAS

G. Edward Welmaker, Circuit Court Judge

Charles B. Simmons, Jr., Master-in-Equity

APPEAL # 2011199466

CASE NO. 2010-CP-23-06767

ARTHUR M. FIELD, PRO SE.....Respondent-Appellant,

v.

HENRY MCMASTER.....Appellant-Respondent.

RESPONDENT'S FINAL BRIEF OF RESPONDENT-APPELLANT

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I. STATEMENT OF THE CASE AND FACTS

In July, 2009 (supplemented August 11, 2009), Arthur Field served a FOIA demand upon Attorney General Henry McMaster--Securities Division, pursuant to S.C.C.A. 30-4-30. Partial compliance was made by the Securities Division and no objections or claims of exemption were filed. On July 28, 2010, Field made a second FOIA demand on the same agency. Field sought documents related to the registration, oversight and ultimate failure to register the independent firm known as Capital Investment Funding, LLC (hereafter "CIF").[1] (See Record on Appeal, pp.78—84, 92—95, 281—287, hereafter "Record")

No objection was forthcoming within the time provided by statute. S.C.C.A.30-4-30(c). Limited compliance was eventually made.[2] Field timely initiated this action seeking declaratory and injunctive relief, and damages against the Attorney General in his role as Securities Commissioner, *ex officio*. (Record, pp.52—58) The validity of such

[1] CIF was approved for issuance of securities in April, 1999. Field became its principal member in November, 2003. The Securities Division renewed registration annually until March, 2007. Inexplicably, in 2007, the Division failed to renew or deny registration even though the Chief Securities Examiner approved the registration. A member of the Division privately issued a "Notice of Intent to Seek a Stop Order", despite the lack of statutory or regulatory authority to support such contrived document. The Chief Securities Examiner also testified there was no evidence of fraud or wrongdoing by CIF or Field. Despite statutory prohibition, the Attorney General issued a press release announcing a State Grand Jury was convened to investigate Field in 2008. Any exemption claim based on the need to preserve Grand Jury secrecy to protect Field was vitiated. No regulatory, civil or criminal action was ever filed against CIF or any member thereof by the State. Any objections to disclosure concerning discovery were irrelevant. Appellant herein *Henry McMaster* was the former Securities Commissioner. Presumably, the new Attorney General would replace him herein as Appellant. Reference herein is to Attorney General and Securities Commissioner interchangeably, in respect of his office.

[2] In response to the 2009 FOIA request, the Securities Division delivered the CIF prospectuses back to Field together with selected correspondence. Also released was the report received by the Division from Clifton Bodiford, C.P.A., hired by the Division to conduct an analysis of CIF's audited financial statement. Disclosure thereof abrogates all arguments made by the Division, since a privilege once waived is permanently waived. No objections, redactions or exemptions were sought or claimed. Some personnel records were eventually provided.

demands and statutory compliance by Field were not contested by McMaster. He merely claimed all documents not previously delivered to Field were exempt.[3] (See, e.g. Record, pp. 59—62, 85—91, 96—116)

Both parties moved for summary judgment. (Record, pp.68- 91). Hearing was held before Judge Welmaker on March 15, 2011. (Transcript, Record, pp.289—318), who ordered *in camera* examination of all documents by Judge Simmons (Orders 4/4/11 and 4/20/11, Welmaker,J., Record pp. 1--5) over McMaster's objection. In response thereto, Securities Division submitted the documents identified only in the style of "Box X, Redwall n, Folder A". As noted by Simmons, J. (Order, 8/18/11, Record pp. 42--46), the Attorney General also "submitted a Log consisting of 18 pages with rather generic, broad based reasons it felt disclosure was not required." The Division sweepingly claimed a privilege attaching to each and every one of the thousands of documents.[4]

Judge Simmons reviewed "literally 1000's of documents in the 15 boxes" and Ordered the release of 17 pages of collected documents and folders set forth in Exhibit A thereof, and precluded release of 14 pages worth of documents set forth in Exhibit B.

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[3] The Securities Division originally claimed privilege based upon the State Grand Jury investigation, but abandoned that claim before Judge Simmons. They maintained claims of attorney-client and work product privilege only. Field has at all times contested the constitutionality of the Act transferring the Securities Division to the Attorney General's control.

[4] Field has never seen any of the documents submitted and Judge Simmons' Order also refers to the documents in the "Box X, Redwall n, Folder A" style. The contents of such documents was not disclosed. Field has maintained at all times this deprives him of the ability to contest the Attorney General's arguments about individual documents and has forced Field into making generalized legal arguments. Field appeals the circuit court's decisions permitting the Attorney General to provide only limited identification of those documents, and requests FOIA inspection of all documents in the State's possession. Arguments herein by Field must, of necessity, be generalized legal arguments. Appellant refuses to release the documents and Field is at a distinct disadvantage in this appeal and requests this Court bear such handicap in mind in its consideration hereof. The privilege log only asserted a general claim of privilege without explanation and is legally insufficient. *Rein v. U.S.Patent & Trademark Office,* 553 F.3d 353 (4th Cir. 2009).

(Order 7/18/11, Simmons, J., Record, pp.6--41 Exhibits; Record, pp.42--46). The Attorney General filed one or more Rule 59 Motions to Alter and to Stay (Record pp.117--120) to which Plaintiff objected (Record, pp.121-123, 263--278). Defendant's motions were all denied. (Order 8/18/11, Simmons, J. Record, pp.42—46, 47—49, 50--51). Field also filed a Rule 59 request to permit inspection of ALL documents, or in the alternative, certain documents clearly not generated by the Securities Division, insofar as Field could deduce from Exhibit B.[5] The Court denied Field's request with limited explanation (Order 8/18/11 Record, p.45). Thereafter, the Attorney General filed yet another Motion to Alter (Record, pp.128—257), which was also denied by both judges. (Order 9/15/11, Welmaker,J., Record, pp.50-51, and Order 9/15/11, Simmons, J. Record, pp.47--49).

The Securities Commissioner filed this appeal contesting the release of documents contained in Exhibit A (Record, pp. 332 *et seq.*). Field, as Respondent herein, requests the court uphold the aforementioned Orders as to Exhibit A of the 7/18/11 Order (Record, pp.6—41). Field won the FOIA action and is entitled to judgment and copies of all records as ordered by Judge Simmons. Documents eventually produced, if any, are done so only after Court Order. Field is the prevailing party and this Court should remand the matter for the determination of statutory compensation to which Field is now entitled.

II. STANDARD OF REVIEW

A declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law. *South Carolina Tax Comm'n v.*

[5] Field requested the files relating to correspondence received from Katz and Caserta, former members of CIF's original parent company in New Jersey. No argument concerning attorney-client privilege or work product can be made as to either of these files and preclusion of them was error.

Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994). The appellate court's standard of review herein extends only to the correction of errors of law. *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (1998) ; *Okatie River v. Southeastern Site Prep*, 353 S.C. 327, 577 S.E.2d 468 (App. 2003). Thus, the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings absent an error of law. *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 538 S.E.2d 672 (App. 2000); see also *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (App. 2003) (declaring that in actions at law, on appeal of case tried without jury, lower court must be affirmed where there is any evidence which reasonably supports judge's findings). *Burton v. York County Sheriff's Dept. and Bryan,* 358 S.C.339, 594 S.E.2d 888(App. 2004).

III. LEGAL ARGUMENT

A. FOIA IS TO BE INTERPRETED LIBERALLY TO GIVE THE PUBLIC FREE ACCESS TO GOVERNMENT ACTION.

Disclosure, not secrecy, is the dominant objective of the Freedom of Information Act. *Burton v. York County Sheriff's Dept., supra*, 358 S.C.339. The essential purpose of the FOIA is to protect the public from secret government activity. *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (App. 2003); see also *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 163, (2001); *Wiedemann v. Town of Hilton Head Island,* 330 S.C. 532, 535 n.4, (1998); *Fowler v. Beasley*, 322 S.C. 463, 468 (1996). FOIA creates an affirmative duty on the part of public bodies to disclose information. *Bellamy v. Brown*, 305 S.C.291, 295, 408 S.E.2d 219,221(1991); *Campbell, supra,* 354

S.C. at 281, 580 S.E.2d at 166. The purpose of the FOIA is to protect the public by providing for the disclosure of information. *Id.*

The South Carolina Legislature expressed the broad, remedial purpose of FOIA in the preamble S.C.C.A.30-4-15:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. *Campbell, supra*, 354 S.C. at 281, 580 S.E.2d at 166. The exemptions from disclosure under FOIA do not create a duty of nondisclosure. *Bellamy, supra*, 305 S.C. at 295, 408 S.E.2d at 221. Indeed, consistent with FOIA's goal of broad disclosure, the exemptions from its mandates are to be narrowly construed. See *Campbell, supra*, 354 S.C. at 281, 580 S.E.2d at 166; see also *Quality Towing*, 345 S.C. at 161, 547 S.E.2d at 864-65 (FOIA is remedial in nature). Access to government information is guaranteed to the public. *Fowler v. Beasley, supra,* 322 S.C. at 468.

B. THE COURT PROPERLY ORDERED THE ATTORNEY GENERAL TO DISCLOSE SECURITIES DIVISION DOCUMENTS TO FIELD. NO ERROR OF LAW EXISTS IN THE ORDER COMPELLING DISCLOSURE.

The Securities Division of the Attorney General's Office is not exempt from FOIA. It is a public body and must provide documents in response to FOIA. *Burton, supra, 358 S.C.339.* The Legislature chose not to exempt the Attorney General or the

Securities Division from FOIA. It did not provide such exemption when it expanded the State Grand Jury Act to include securities fraud violations or when it transferred the Securities Division in 1996. Even criminal investigations are subject to FOIA disclosure and documents must be released on a case-by-case basis after *in camera* review. See, *Newberry Publishing Co. v. Newberry County Comm'n on Alcohol & Drug Abuse,* 308 S.C.352, 417 S.E.2d 870(1982). The exemptions from FOIA are very narrow and to be construed against the public body seeking to claim such exemptions.

The Securities Division desire for privacy of its secret machinations is insufficient to shield it from public scrutiny. The manner in which its employees prosecute their duties is of large and vital public interest, especially if the authority vested in such Division is being abused by one or more of those employees. *Burton, supra,* 358 S.C.339. Field has a personal stake in the outcome, since he was the principal member of CIF and the actions of the Securities Division directly affected him. He is entitled to access to all of the Division's information relating to CIF. He would be entitled even if he were only a member of the public. FOIA does not require a personal stake in the outcome. *Sloan v. Friends of the Hunley, Inc.*, 369 S.C.20, 630 S.E.2d 474 (2006).[6] The public is certainly entitled to know how the Securities Division operates and how it

[6] Ironically, McMaster has argued since Field was the 'target' of the Securities investigation, he should not be entitled to know anything. Ostensibly, a stranger would be so entitled, but the person of interest would not be, which is ludicrous ala' Catch-22. It is also factually incorrect. The Securities Division oversees the issuance of securities under Title 35. CIF was the issuer. Field did not issue any securities. Even the improper "Notice of Intent to Seek a Stop Order" was only addressed to CIF. As the member with the largest capital account in CIF, the actions of the Securities Division are of great importance and interest to Field and the public. If those actions were improperly, arbitrarily, capriciously or illegally pursued, it is vital they be exposed to public scrutiny. Nobody else but Field would be interested enough to carry on this investigation. However, no civil action was ever initiated by the Securities Division against either CIF or Field. Further, the Division may have files or documents which would aid Field and the CIF Receiver in the process of winding up the company and collecting funds due to CIF or claims which it may have against third parties. Absent disclosure, Field and CIF may suffer irreparable harm.

makes its regulatory decisions and the applications thereof. Both securities issuers and purchasers need to fully understand the methods the Division used to refrain from granting CIF registration in 2007, when CIF submitted a virtually identical prospectus and application to that submitted and approved in 2006. Given the 2007 application was approved by Eric Pantsari, the Securities Division Chief Securities Examiner, one wonders by what procedure this decision was reversed and whether a vote was held in the Division to refrain from granting registration, who voted thereon and by what method. Disclosure would heighten "public awareness and understanding of the issue, and forces each member of the body to take responsibility for his vote." *Piedmont Publ. Serv. Dist. v. Cowart,* 319 S.C.124, 459 S.E.2d 876(App. 1995).

Appellant herein continues to exhibit the bad faith it has demonstrated at every step against Field and CIF. Judge Simmons correctly observed with some amazement, McMaster "citing very broad conclusions for nondisclosure, has taken the position that none of the 1000's of pages of documents contained in the 12 boxes of materials should be disclosed. Respondent [McMaster] even objects to disclosure of documents in its possession that came either directly from Petitioner [Field] or his attorney since Respondent contends they are, at least in part, 'documents from the investigative side of the Securities Division that constitute either attorney work product or correspondence, or material obtained in investigation.'"[7] (Order 7/18/11 Simmons,J., Record p.8) McMaster also wished to prevent disclosure of the identifying Log!

[7] McMaster's claim of exemption of 'material obtained in an investigation' is mistaken. No such exemption exists at law. The 'deliberative process' exemption was not adopted by the South Carolina Legislature (see Brief of Field on Appeal for additional detail, adopted herein as if fully set forth.)

Judge Simmons held "It is simply unreasonable, once a FOIA request is made, for a public body to issue a blanket response that basically says, 'I don't have to tell you anything about what we may have since you are not entitled to it anyway.' Such is contrary to the intent of FOIA." (*Ibid.*) Relying on *Newberry, supra,* Judge Simmons held "Documents contained in the files which are otherwise available to the public as public records are not automatically exempt from disclosure merely because they were incorporated into an agency's reports and/or files." (Order 7/18/11 Simmons, J., Record, p.9). The court further held:

> Upon a thorough review of the complete record, other than making very broad, general objections to literally each and every one of the 1000's of pages of documents in its files, with the vast majority of objections being styled 'Work product; Obtained in investigation' or 'Correspondence/Work product', the Respondent has made no showing how the release of the records would interfere with any pending criminal investigation, no showing of how certain documents are 'Correspondence/Work product' exempt from disclosure, and no showing of how certain documents are 'Work product.' (Record, p.9)

Such blanket claims of exemption offend public policy and demonstrate the overwhelming 'arrogance' of prosecutors and "win-at-all-cost" mentality recently lamented by Chief Justice Toal. It also offends the vast array of state and federal holdings in the matter. See, e.g., *Jenks v. U.S. Secret Service*, 517 F.Supp.307(S.D.Ohio 1981); *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir 1973), cert.den. 415 U.S.977(1974); *Evening News Ass'n v. City of Troy*, 417 Mich.481, 339 N.W.2d 421(1983). (Specific exemption claims are discussed in Field's Brief on Cross-Appeal and such arguments are adopted and repeated as if fully set forth herein.)

The circuit court did not err in ordering Securities Commissioner McMaster to disclose the documents contained in Exhibit A of Judge Simmons' Order of 7/18/11 and

to the extent the court below permitted the disclosure of documents set forth in Exhibit A, it was correct in doing so and should be upheld.

C. WAS IT ERROR FOR THE COURT TO PRECLUDE DISCLOSURE OF ANY DOCUMENTS? NO EXEMPTION APPLIES TO THE DOCUMENTS HELD BY THE STATE OR SUPPORTS ANY EXCLUSION. THE LEGISLATURE CHOSE NOT TO ENACT A 'DELIBERATIVE PROCESS' EXEMPTION. ALL DOCUMENTS SHOULD HAVE BEEN DISCLOSED.

S.C.C.A. 30-4-40 enumerates specific exemptions to the requirements of full disclosure provided for in S.C.C.A.30-4-30.[8] The State failed its burden to meet any of these exemptions. It failed to object to any of the disclosure requests in the manner or time required by statute. S.C.C.A.30-4-30(c). Only after litigation was instituted seeking injunctive and punitive relief did the Attorney General claim documents should be exempt under the "attorney-client" or "attorney work product" privilege, or as part of the investigatory process. These arguments must fail as a matter of law.

1. No exemption exists for investigative or deliberative documents in South Carolina.

Internal investigations of the Securities Division are not exempt from disclosure; the FOIA must be interpreted according to its plain and unambiguous meaning. *City of Columbia v. ACLU,* 323 S.C.384, 475 S.E.2d 747(1996). The Attorney General claims these documents were part of an investigation. That is irrelevant; **no exemption exists for investigative documents**. All of the arguments made by the Attorney General and all of the rationale of the Orders of Judge Simmons and/or Judge Welmaker in favor of

[8] Subsections (1), (2), (4), (5), (6), (8)—(14), and (16)—(19) of S.C.C.A. 30-4-40 provide exemptions which bear no relevance at all to this matter and will not be considered.

nondisclosure are based upon the 'deliberative process' exemption codified in the federal FOIA. 5 U.S.C.522(b)(5)(2006). Judge Simmons deems them "material obtained in an investigation" in Exhibit B.

The South Carolina Legislature chose not to adopt the deliberative process exemption codified in the federal FOIA, which specifically exempts certain internal departmental communications.[9] It is not for any court to imply what the South Carolina Legislature purposely chose to omit when it enacted S.C.C.A.30-4-10, et seq. The Legislative intent is paramount in statutory construction. *Hodges v. Rainey,* 341 S.C.79, 533 S.E.2d 578(2000). The court may not substitute its judgment for that of the Legislature. *CP&L Co. v. City of Bennetsville,* 314 S.C.137, 442 S.E.2d 177,179(1994). The Legislature is presumed to know the existence of other conflicting sections when later statutes are enacted concerning related subjects. *Berkebile v. Outen,* 311 S.C.50, 426 S.E.2d 760(1993). Similarly, see, *General Electric Co. v. Department of Environmental Protection,* 429 Mass. 798, 711 N.E.2d 589 (Mass. 1999), where its Supreme Court held:

> That the Massachusetts statute does not contain an express exemption for work product similar to that included in the FOIA is significant. If the language of a statute differs in material respects from a previously enacted analogous Federal

[9] Even in federal law, documents which relate to factual, investigative matters must be disclosed. *Environmental Protection Agency v. Mink,* 410 U.S.73, 93 S.Ct.827(1973). Only opinions are exempt. See, Exemption 5 in the federal act. 5 U.S.C. 552(b)(5)(2006), amended to favor more disclosure by Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat.2524. Reports of consultants or outside witnesses are also not exempt under the federal act. *Dept. of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S.1 (2001). The files designated Redwall 15 (Porter statement, Record, p.34); Redwall 22 and 24 (Southern First Bank Record, p.34), Redwall 25 (James Caserta, Bob Kurtz Record, p.34), Redwall 9 (Johnny Hagens, Record, p.31); etc., cannot possibly be exempt. They are not even experts for the Division and were advocating their own interests. See, *Merit Energy Co. v. U.S.Dept. of Interior,* 180 F.Supp.2d 1184 (D.Colo. 2001).

> statute which the Legislature appears to have considered, a decision to reject the legal standards embodied or implicit in the language of the Federal statute may be inferred... There is no ambiguity in the statute's explicit mandate that the public have access to all government documents and records except those that fall within the scope of an express statutory exemption. As we said in construing an analogous statute, the open meetings law as it applies to municipal governments, G. L. c. 39, Sect. 23B, "exceptions are not to be implied. Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied."[10]

The federal deliberative process exemption would not support the lower court's orders herein. "The ultimate objective ...is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process." *Nat'l Wildlife Fed'n v. U.S. Forest Service,* 861 F.2d 1114(9th Cir. 1988). It is meant to prevent harm flowing from the exposure of the deliberative process of the agency. No harm at all could result from the citizens of South Carolina having a better understanding of how securities are regulated. Unlike most other jurisdictions and the federal government, South Carolina is a 'disclosure' state, not a 'merit' state in matters of securities regulation. It is vital for all security issuers and purchasers to understand what satisfies the requirements of S.C.35-1-304 and what CIF may have done to run afoul of such requirements despite the recommendation of the Chief Securities Examiner to approve CIF's registration in 2007.

Law enforcement agencies are not exempt from FOIA even when in the process of detecting and investigating crime unless the agency can show the real likelihood of imminent harm to the agency. A presumption of such harm has been rejected by the

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[10] Also see, *People ex rel. Birkett v. City of Chicago,* 292 Ill.App.3d 745, 686 N.E.2d 66(App.Div. 1997), wherein the Court refused to extend the common law to create a deliberative process exemption similar to the federal statute when none had been enacted by the Illinois Legislature. Similarly, *News & Observer Publ.Co. v. Poole,* 330 N.C.465, 412 S.E.2d 7, 18(1992)(whether "deliberative process privilege exemption should be made is a question for the legislature, not the Court), and *Penn. Dept. of Envir. Resources v. Texas Eastern Transmission Corp., 130 Pa.655, 569 A.2d 382(1990).*

Supreme Court, and the Securities Division demonstrated no such harm herein. *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C.452, 611 S.E.2d 496 (2005).[11] It is not incumbent upon Field to demonstrate need for the documents, even if the investigation was directed at him. It is the State's burden to prove the overwhelming need to exempt the documents from FOIA. This they have failed to do as to all documents. See, *Loigman v. Atty. Gen. Kimmelman*, 102 N.J. 98, 505 A.2d 958(1986).

2. The attorney-client privilege does not apply. No outside counsel was consulted. The employees of the Securities Division cannot act as their own attorneys. No expectation of confidentiality existed at the time.

The only arguably relevant exemptions considered by Judge Simmons and Judge Welmaker are set forth in S.C.C.A.30-4-40(7) and (15). Subsection (7) exempts, "Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." To satisfy such exemption, the Appellant must prove the documents were: a) *correspondence*, or b) *work product*. It must also prove these emanated from a *legal counsel for a public body in an attorney-client relationship*. Judge Simmons does not specify which section(s) of the exemptions he bases the Exclusions on. He merely states "the Court finds that the following

[11] Initially the State attempted to claim the documents should be exempt under S.C.C.A.30-4-40(3). However, that exemption specifically concerns the "Records of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency..." The Securities Division is not a law enforcement agency, *per se*. Its remedies are civil or administrative only. S.C.C.A.35-1-603 and 604. It was not involved in the process of detecting and investigating crime and is specifically barred by statute from doing so. S.C.C.A.35-1-508. Nor did it allege any potential harm to it in the circumstances specifically enumerated in paragraphs (A) through (E) of S.C.C.A.30-4-40(3). The State subsequently abandoned this claimed exemption. Further, such exemption is very narrowly construed by other states, even in criminal investigations. See, e.g., *Parker v. Lee*, 259 Ga. 195, 378 S.E.2d 677(1989); *City of Atlanta v. Corey Entertainment*, 278 Ga.474,476, 604 S.E.2d 140(2004); *Napper v. GA Televesion Co.*, 257 Ga.156, 356 S.E.2d 640(1987).

generally identified documents, attached as a list denoted Exhibit B, are exempt from the FOIA request based upon the exemption standards set out at Sec. 30-4-30 and Sec.30-4-40." (Order, Simmons, J. 7/18/11, Record, p.9, et seq.).

None of the material contained in either Exhibit A or B qualifies for exemption under Subsection (7). None of the employees of the Securities Division act as its legal counsel. No such employee is entitled to assert either a privilege attaching to a legal counsel or the attorney-client privilege. To invoke the attorney-client privilege an outside attorney must be engaged. Communications between members of the Securities Division, some of whom may happen to be attorneys, is insufficient to invoke the privilege on any level.

The Securities Division is charged with overseeing and registering securities annually. The Securities Division is a regulatory agency staffed by employees, some of whom happen to be admitted attorneys, but are not employed as such. [12] In the course of registration by qualification, its staff members conduct whatever general investigation is needed to effectuate registration. S.C.C.A. 35-1-304, et seq. The staff members of the Division do not act as attorneys. They are not legal advisors or legal counsel to the Securities Division providing independent legal advice to the Securities Division

[12] Prior to 1999, the Securities Division was part of the Secretary of State's office. When it required civil or criminal enforcement, it referred the matter to the Attorney General. Field has contended at all times the placement of the Securities Division under the aegis of the Attorney General is unconstitutional and permits precisely the abuses which took place herein against CIF and Field, and which wrongfully continue with the State Grand Jury. The only government official charged with the oversight of the Attorney General is the Attorney General. The Securities Division is a civil, regulatory agency, not a criminal agency and any exemption it claims concerning 'criminal investigations' is specious.

employees —they are the Division.[13] As noted above, the Division employees contacted Field directly on numerous occasions. Field worked closely with Eric Pantsari, Roland Corning and Teresa Meyers over the years. All were aware CIF was represented by counsel. All advised Field they were not acting as lawyers, but as regulators and were not in breach of any ethical restrictions.

And such staff members are not retained counsel, which is a requirement for the attorney-client privilege to apply. See, *In re Grand Jury Subpoenas Duces Tecum*, 241 N.J.S.18,28 (App.Div. 1989). The attorney-client privilege is of course "limited to communications made to the attorney in his professional capacity." *United Jersey Bank v. Wolosoff*, 196 N.J.S. 553, 562 (App. Div. 1984). "The privilege accords the shield of secrecy to administrative agencies whenever "confidential communications" are rendered within the context of the strict relation of attorney and client." *Ibid.* The Securities Division would be the client if it had retained the Law Division of the Attorney General's office or outside counsel for representation in litigation; but it did not. Even then, only certain documents would be privileged when transmitted to the outside counsel under confidential circumstances.

It is illogical to shield the Division's communications under the guise of attorney-client privilege and abrogates the theory underlying such protection. This is especially so when the communications are from third parties made to the Division employees (such as

[13] The attorney-employees repeatedly assert they do NOT act as attorneys. They contacted Field directly despite being aware both Field and CIF were represented by counsel from 2003 through 2008. Field received several phone calls from and negotiated with D.A.G. Roland Corning, S.A.A.G. Teresa Meyers, A.A.G. William Condon. Such persons informed Field they acted as regulators, not attorneys, and were not inhibited by ethical restrictions in doing so. Any privilege founded on such person's coincidental admission to the bar is specious. They were not acting in a capacity as a legal advisor to a third party, which is the only time such privilege attaches.

Johnny Hagens, Robert Kurtz, James Caserta, etc. Exhibits A and B). Arguably, no attorney-client privilege would attach at all under those circumstances. If the Attorney General's argument herein were to prevail, the ludicrous result would be to employ nothing but attorneys in every public body in every position from janitor through director. The Attorney General would then claim every document, communication, or memo of any kind, generated under any circumstance, would be exempt under Subsection (7).

The attorney-client privilege is specifically and narrowly construed at law. This matter has been considered by South Carolina and courts of other jurisdictions. Recently, in *Evening Post Publishing v. Berkeley County School District,* No. 29649(S.C. 3/21/11 Hearn, J.), our Supreme Court held, "The General Assembly, by the clear language of the statute, believes FOIA should be broadly construed to allow the public to gain access to public records. The interest in confidentiality expressed through the attorney-client privilege should not trump the public's right to know..."

The privilege does not apply to the investigative or regulatory process itself. In *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524, 550-51 (1997), the Court held that a unit of State government, such as the Turnpike Authority, is a "client" for purposes of the attorney-client privilege, and consequently any legal advice rendered by retained counsel in connection with the plaintiff's sexual harassment complaint against the Turnpike Authority fell within the attorney-client privilege and was shielded from disclosure. In contrast, where the attorney is not providing legal advice, but is merely

performing "non-legal duties" such as conducting an investigation, the attorney-client privilege otherwise available to a state agency will be deemed inapplicable. *Ibid.*[14]

The Securities Division herein was merely engaged in its regulatory capacity. It was not preparing for any litigation; none ever took place. Neutral, objective analyses of agency regulations and their application to individual matters are not protected communications, even when made to an outside attorney. *Coastal States Gas Corp. v. Dept. of Energy,* 617 F.2d 854 (D.C.Cir. 1980). Members of the Securities Division staff are not engaged as outside attorneys and are not subject to the same ethical and liability restraints as employees of the Securities Division, who enjoy either limited or absolute immunity. *Tax Analysts v. Internal Revenue Service,* 117 F.3d 607(D.C.Cir. 1997)(disclosure ordered). The D.C. Court of Appeals reasoned that no private attorney has the power to formulate the law to be applied to others, whereas the I.R.S. and the Securities Division, as regulatory agencies, do.

The privilege does not magically appear just because an attorney is involved. As noted in *United States v. Robinson,* 121 F.3d 971, 975 (5th Cir. 1997), cert. den., 522 U.S. 1065(1998), "documents do not become cloaked with the lawyer-client privilege merely by the fact of their being passed from client to lawyer."[15] There must be a prior agreement as to the confidentiality of the communication between the client and an

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[14] The N.J. Appellate Division also recognized when the Attorney General's Law Division was retained by another state division as its counsel, then the 'hiring' division was entitled to invoke the attorney-client privilege relating to the advice or legal services sought from the Law Division. *Fisher v. Division of Law*, 400 N.J. Super 61, 65-66 (App. Div. 2008). In the case at bar, the Attorney General incorrectly seeks to extend that philosophy to eliminate the outside law division providing legal advice and simply apply it to any licensed attorney no matter how employed.

[15] The Securities Division does not have statutory authorization to differentiate between open meetings and executive sessions, as some municipal bodies do. Cf. the incorrect and probably overruled holding in *Cooper v. Bales,* 268 S.C.270, 233 S.E.2d 306(1977)(attorney Jean Toal for appellants therein). All meetings of the Securities Division are public information.

outside attorney. *Maine v. U.S.Dept. of the Interior*, 298 F.3d 60,71(1st Cir. 2002). The Illinois Supreme Court held a "public body may not simply treat the words 'attorney-client privilege' or 'legal advice' as some talisman, the mere utterance of which magically creates a spell of secrecy over the documents at issue." *Ill. Educ. Ass'n v. Ill. State B'd of Educ.,* 204 Ill.2d 456,470, 791 N.E.2d 522(2003). It is insufficient for the documents merely to be exchanges between the agency and the attorney and the burden is on the agency to demonstrate confidentiality to invoke the privilege. *Nat'l Res. Def. Council v. D.O.D.,* 388 F.Supp.2d 1086, 1099(C.D.Cal. 2005).

The Securities Division failed to satisfy the U.S. Supreme Court mandated requirements of a Vaughn index when it provided the court below with the Log. It did not describe the documents with particularity and it only provided vague generalities concerning the documents as a whole and fails to identify which ones were prepared for litigation or were communications to an attorney. This is insufficient and prejudiced Field in his FOIA action and this appeal. See *Maine, supra.* Although the court could see the documents, Field could not and was forced to base his arguments below and herein on the very general index.

Nor does the placement of the Securities Division under the aegis of the Attorney General provide instant privilege. The Attorney General sits as Securities Commissioner by statute. S.C.C.A.1-7-115(b) and S.C.C.A.35-1-102(28). In such role, he is designated as the Administrator. S.C.C.A.35-1-102(1). This is a separate and distinct function from that of Attorney General. As Securities Commissioner, he is not acting as its Legal Advisor, as specifically codified in S.C.C.A.1-7-90 (advice to Governor or General Assembly); S.C.C.A.1-7-100 (advice for solicitors), or S.C.C.A.1-7-110 (advice for state

officers or the public service commission). Had the Legislature thought it wise to do so, it could have provided a work product exemption for the Attorney General and his minions in all departments for pending or contemplated legal action, as Tennessee chose to do, T.C.A.10-7-504(C); or even an attorney-client relationship for any attorney working under his supervision on such pending or contemplated case. T.C.A.10-7-504(D).[16] But no such broad exemptions exist in South Carolina and none may be created by this Court.

3. The Securities Division does not have the statutory right to operate in closed session. All of its deliberations are public.

The Securities Division does not have the right to operate in closed or executive session. No statute provides for denial of access by the public to the operations of the Securities Division. Even were such a statute to exist, states construe such restrictions very narrowly. See, e.g., *White Dog Publ., Inc. v. Culpeper County B'd of Supervisors*, 272 Va. 377, 634 S.E.2d 334 (2006).

4. No work product privilege can apply. The material was not generated by legal counsel to the Division in preparation of litigation. All documents were generated by Division employees in the ordinary course of the Division's regulatory function.

[16] Despite such statutory restrictions, Tennessee courts still order disclosure of all records in most circumstances. See, e.g., *Memphis Publ. Co. v. Holt, Dir. Memphis Police Dept.*, 1985 TN. 1203 (App. Div. 8/15/85). The South Carolina Legislature recognized the concept of confidentiality for the Attorney General, but restricted it to those circumstances where it acts as the attorney defending a state employee or subdivision in a civil suit. S.C.C.A.1-7-70. It specifically did not extend such confidentiality to situations outside that narrow circumstance. Had members of the Law Division acted as counsel to members of the Securities Division, an argument might exist. But such is not the case herein. Privilege is being claimed for attorneys within the Securities Division simply because they are classified as employees of the Attorney General.

The documents generated by the Security Division employees are not work product of legal counsel, but work product of the Division itself engaged in the regulatory process of registration by qualification or oversight of issuers, all of which is certainly subject to disclosure. "The work product privilege offers qualified protection from disclosure of documents "prepared in anticipation of litigation rather than in the ordinary course of business." Pressler, Current N.J. Court Rules, comment 4 on R. 4:10-2(c) (2010)." *Tractenberg v. Twp. Of West Orange,* No. A-2556-08T3(App.Div. 2010). [17] The work product privilege purpose is to protect the adversarial trial process and it does not attach absent litigation. See, *Coastal States Gas, supra* at 865.[18] Documents prepared in the regular course of an agency's business are not privileged. *Hill Tower Inc. v. Dept. of the Navy*, 718 F.Supp. 562,567(N.D. Tex. 1988); *Hennessy v. AID*, No. 97-1113, 1997 WL 537998 (4th Cir. 1997).[19] This is true even if the documents might also aid in the preparation of litigation. *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998).

When the work product privilege has been applied involving the Attorney General as legal counsel, it is when a division of the Attorney General's office really acts as Legal Counsel to a political subdivision of the State or a County under its specific statutory mandate to do so. See, e.g., *Beattie v. Aiken County DSS*, 319 S.C.449, 462 S.E.2d 276 (1995)(General Counsel of SCDSS directs investigation of County DSS). Even criminal

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[17] It is even irrelevant what the status or good faith of the document seeker is; even if he intends to use the records for eventual litigation against the very agency. See, *Gould v. N.Y.C.Police Dept.*, 89 N.Y.2d 267,274 *and Scott, Sardano v. Records Access Officer*, 65 N.Y.2d 294,296.

[18] The possibility litigation might occur is insufficient. "The policies of FOIA would be largely defeated if agencies were to withhold documents created by attorneys simply because litigation might someday occur." *Senate of P.R. v. D.O.J.*, 823 F.2d 574,587(D.C.Cir. 1987) citing *Coastal States, supra,* at 865. Observe, the documents must be created by attorneys acting as advisors to the agency.

[19] The Securities Division and Field stipulated to a closure of any possible investigation involving CIF in February, 2008. Any potential for litigation was foreclosed thereby and any documents generated after Feb. 2008 obviously have no relation to possible future litigation.

investigative reports are not automatically exempt unless they specifically are the work product of the attorney advising the criminal investigative unit. *Burton v. York, supra,* (App. 2004). If this were not the case, the simple way to avoid FOIA would be to have an attorney sit on every board or commission or agency and list every other employee thereof as the attorney's agent. That can not have been what the Legislature intended when it decreed access to government should be free and open.

Even legal memoranda prepared by outside counsel in preparation for litigation may not be eligible for the work product or attorney client privilege. See, *City of Fayetville v. Edmark,* 304 Ark.179, 801 S.W.2d 275(1990), holding "whenever the Legislature fails to specify that any records...are to be excluded from inspection, or it is less than clear in its intendments, then privacy must yield to openness and secrecy to the public's right to know...the burden of confidentiality rests on the legislation itself, and if the intention is doubtful, openness is the result."

Judges Simmons and Welmaker did err in permitting the exemption of those documents listed in general in Exhibit B thereto. All documents of any nature should have been disclosed since none of the statutory exemptions apply as a matter of fact or law. To the extent the existing Orders precluded disclosure in Exhibit B, such were based upon errors of law and should be reversed by this Court. *Bayle v. S.C. Dep't of Transportation*, 344 S.C.115, 542 S.E.2d 736(App.2001).

The Attorney General further sought to protect the information while this is on appeal. That is incorrect.[20] Information obtained pursuant to the FOIA from a public body is not protected by a restraining order. In fact, the South Carolina Attorney General's 1998 "Public Official's Guide to Compliance with South Carolina's Freedom of Information Act," states the FOIA must be construed "liberally to carry out its intent that citizens obtain public information at the least cost, inconvenience, or delay. Consistent with this mandate, my Office has adopted the following guiding principles in opinions construing the FOIA: When in doubt, disclose...." Liberally construing the statute, it is luculent that information obtained pursuant to the FOIA is for the protection of the public in general, not just the individual seeking the information.

There is no provision in the FOIA allowing the disclosure to be subject to a protective order. *Campbell v. Marion County, supra.* ALL documents should be delivered to Petitioner and there should be NO exemptions and no stay pending appeal. To the extent the Court has exempted any documents from disclosure, Petitioner objects. Again, since neither the Court nor the Attorney General has described the content of the document, nor its identity, it is not possible for Petitioner to argue the merit of any single exemption granted.

Petitioner does note, however, the court exempted files entitled "Caserta" and "Katz" from disclosure (Exhibit B). These persons were members of the Board of Directors of the former parent company and debtor of Capital Investment Funding, LLC.

[20] Ironically, in response to illegal Subpoena issued by the very same Securities Division to Petitioner herein and his family members, Petitioner made the same argument that disclosure would unduly prejudice him while appeal was pending. Essentially, Field argued that once the 'cat' was out of the 'bag', the appeal was moot and this caused him permanent and irrevocable injury. The Attorney General vehemently opposed Field's Argument and claimed Field had no right to conceal documents pending appeal. Yet, here they stand making the same argument.

Communications FROM such persons cannot be privileged under any concept. Even were 30-4-40(7) to be liberally interpreted in favor of the Attorney General, such statute specifically states it protects communications BY the attorney, not those TO the attorney by outside third parties.[21]

The attorney-client privilege belongs to the client and protects communications by the client to the attorney made in confidence. *S.C.Highway Dept. v. Booker,* 260 S.C.245(1973). For the privilege to attach, the attorney must have been acting as a legal advisor when the communication was made. *Marshall v. Marshall*, 282 S.C.534(App. 1984). Here, neither the court nor the Attorney General has delineated who the client was and who the legal advisor was. It is not possible for the Securities Division to be BOTH client and the advisor. And, the members of the Securities Division repeatedly insist they are NOT acting as attorneys, but are merely regulators. They do so to permit them to deal directly with the security issuer.

Here, employees of the Securities Division, who coincidentally happen to be attorneys (i.e. Rowland Corning, Teresa Myers, William Condon) dealt directly with Arthur Field, manager of Capital Investment Funding, LLC (CIF). All such persons were aware CIF was represented by counsel. It would have been unethical for such lawyers to interact directly with Field. However, the Securities Division employee-attorneys maintained they were acting only as regulators. As such, they were merely investigating

[21] To some degree, the problem herein results from the placement of the Securities Division within the Attorney General's purview. Petitioner has consistently argued this is unconstitutional. The Attorney General *should* act as counsel to the Securities Division, but doesn't. Uniquely, in South Carolina, he also acts as Securities Commissioner. His department engages in policy-making, legislative, regulatory, enforcement and prosecutorial conduct without any clear delineation between functions. This FOIA action demonstrates one more reason why the Securities statute is unconstitutional and must be repealed and Securities returned to the Secretary of State.

CIF and gathering information and not restricted from speaking directly with Field. Now, the very same employee-attorneys are attempting to claim they are attorneys, not mere regulators. This is patently unfair.[22]

Even if they were attorneys, then who was the client? The Securities Division cannot be the client since it is their direct employer. And, even were the Division the client, then how can a Division communicate? These employees were not acting as legal advisors to the Division. And, as noted previously, the Securities Division attorneys are not legal counsel to the Securities Division. An examination of the employee flow chart for the Division reveals that none of the employees are listed as counsel.

Correspondence from third parties to the Division are not covered under the attorney-client privilege. The privilege does not cover correspondence with non-clients. *State v. Love*, 275 S.C.55(1980). The files labeled Katz and Caserta (Exhibit B) would fall into such exclusion. See, e.g., *Floyd v. Floyd,* 365 S.C.56(App. 2005).

This case is the opposite of *Tobaccoville USA v. McMaster,* 387 S.C.287(2010), where the Supreme Court upheld an attorney-client privilege in favor of the Attorney General when it acted as informal counsel to the National Association of Attorneys General. Therein, the Supreme Court noted the privilege "may apply to this very narrow factual scenario because the AG, as a paid member, has solicited the NAAG attorneys for legal advice and consultation on matters relating to the tobacco litigation, the MSA, subsequent enforcement of the MSA, and tobacco regulation." (Emphasis added.)

[22] Field has, at all times, asserted the Uniform Securities Act is unconstitutional, since it places the Securities Division under the aegis of the Attorney General and allows for just this type of abuse of power. See the warning of the Supreme Court contained in *State v. Morris.*

In the same case, the Attorney General also claimed the work product privilege, as it does here. The Supreme Court categorically DENIED the work product privilege applied to any of the documents at all. **Documents prepared in the course of the regulatory process are NOT covered by the work product privilege:**

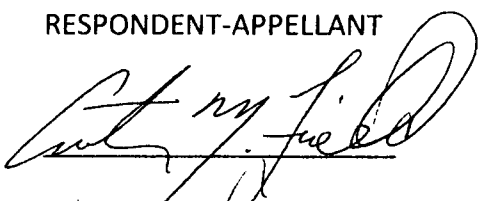
> The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party. See Rule 26(b)(3), SCRCP; *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947). Generally, in determining whether a document has been prepared "in anticipation of litigation," most courts look to whether or not the document was prepared because of the prospect of litigation. See Nat'l *Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992) (document "must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim," as contrasted to "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes.")

The Attorney General in *Tobaccoville, supra,* tried to also hide behind the 'deliberative process' privilege, which the court refused to recognize.

CONCLUSION:

For the foregoing reasons, Respondent-Appellant Field requests the Appellant's appeal be denied and the Orders of Judges Simmons and Welmaker be affirmed except as modified by Respondent-Appellant Field's appeal.

RESPONDENT-APPELLANT



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Final Dated: March 18, 2013

STATE OF SOUTH CAROLINA

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APPEAL FROM GREENVILLE COUNTY

COURT OF COMMON PLEAS

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SC Court of Appeals

G. Edward Welmaker, Circuit Court Judge

Charles B. Simmons, Jr., Master-in-Equity

APPEAL # 2011199466

CASE NO. 2010-CP-23-06767

ARTHUR M. FIELD, PRO SE.....Respondent-Appellant,

v.

HENRY MCMASTER.....Appellant-Respondent.

CERTIFICATE OF RESPONDENT-APPELLANT

The undersigned certified this Final Brief complies with Rule 211(b), SCACR.

3/19/13

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CERTIFICATION OF SERVICE

The undersigned hereby certifies service of the Respondent's Final Brief of Respondent-Appellant upon the opposing party in accord with the SCACR.

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March 26, 2013