STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY

COURT OF COMMON PLEAS

G. Edward Welmaker, Circuit Court Judge

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

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APPEAL # 2011199466

CASE NO. 2010-CP-23-06767

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

v.

HENRY MCMASTER.....Appellant-Respondent.

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# APPELLANT'S FINAL BRIEF OF RESPONDENT-APPELLANT

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2) Did the lower court err in excluding documents based on the deliberative process privilege, when no such protection exists in South Carolina as clarified in *Tobaccoville USA v. McMaster,* 387 S.C.287, 692 S.E.2d 526(2010)? Did the court err in apparently creating an 'investigative process' privilege when none exists in South Carolina?

3) Can either the attorney-client privilege or the work product privilege apply when no outside attorney or legal advisor was retained? Are attorneys employed as regulatory agency staffers eligible for such privileges, when not acting as attorneys?

4) Was it error for the court to permit McMaster to submit a generalized privilege Log and not to clarify which statutory exemption permitted the exclusion of each document? Did the generalized Log deprive Field of due process, preventing him from arguing the merits or applicability of the alleged privilege to each document? Did the court's failure to denote specific exemptions on Exhibit B (Record, pp.28—41) constitute error and deprive Field of due process below and/or in this appeal?

## II. 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 Commissioner, 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] (Record, pp.78—84, 92—95, 281—287)

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

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[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 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 are irrelevant. Appellant herein Henry McMaster was the former Securities Commissioner. Presumably, Hon. Alan Wilson, the new Attorney General, would replace him herein as Appellant. Reference is to 'McMaster', 'Attorney General' and 'Securities Commissioner' interchangeably, in respect of the 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 of the Bodiford report abrogates all privilege 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 also provided.

demands and statutory compliance by Field were not contested by McMaster, who merely claimed all documents not previously delivered to Field were exempt.[3] (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. (Orders and Exhibits A and B, Record, pp.6--41; Record, pp.42--46). Field filed a Rule 59 request to permit inspection of ALL documents, or in the alternative, certain

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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 maintain 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, based in part on the anomaly herein.

[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 were not disclosed. Field has always maintained this deprives him of the ability to contest McMaster's arguments about individual documents and has forced Field into making generalized legal arguments below and to this court. McMaster refuses to release any documents and Field is at a distinct disadvantage in these appeals and requests this Court bear such handicap in mind in its consideration hereof.

documents clearly not generated by the Securities Division, insofar as Field could deduce from Exhibit B.[5] (Record, pp.253—257). The Court denied Field's request with limited explanation (Order 8/18/11 Simmons, J., Record, pp.42--46), but did not elaborate on what exemption, if any, pertained to which documents on Exhibit B. Summary judgment was denied both parties and the court issued a final Order. (Record, pp.47—51)

Field filed this cross-appeal contesting the validity of the Orders excluding any documents on Exhibit B from FOIA inspection based upon any claim of exemption by McMaster or implied by the court.

## III. 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. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994). The appellate court's standard of review herein extends 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).

[5] Field requested all files on Exhibit B and specifically those relating to correspondence received from Katz and Caserta, former members of CIF's original parent company in New Jersey. No privilege argument can be made as to either file and preclusion of them was clear error. All arguments set forth in Field's Brief as Respondent are adopted, as if fully set forth herein to support the Order as to Exhibit A. Field was ultimately and wrongfully indicted by the SGJ, in part, in apparent retaliation for this action and Field's insistence that CIF was destroyed by the Securities Division without just cause or authority.

## IV. 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. and Bryan,* 358 S.C.339, 594 S.E.2d 888(App. 2004). 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 "essential purpose of the FOIA is to protect the public from secret government activity" 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 (emphasis added); 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, and every citizen has standing to make a FOIA claim. *Richard Freemantle v. Joe Preston*, 398 S.C.186, 728 S.E.2d 40 (SC 2012).

### B. IT WAS ERROR FOR THE COURT TO PRECLUDE DISCLOSURE OF ANY DOCUMENTS. NO EXEMPTION APPLIES TO THE DOCUMENTS HELD BY THE SECURITIES DIVISION OR SUPPORTS ANY EXCLUSION. THE SUPREME COURT HAS REJECTED THE 'DELIBERATIVE PROCESS' EXEMPTION. ALL DOCUMENTS SHOULD HAVE BEEN DISCLOSED.

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 exemptions from FOIA are very narrow and to be construed against the public body seeking to claim such exemptions and the burden is on the Securities Division to conclusively demonstrate such exemptions apply. *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C.452, 611 S.E.2d 496 (2005).[6] The U.S. Supreme Court has held the formulation of agency policy, regulations and ethics and

[6] Not even the U.S. Attorney General, the F.B.I., nor the Internal Revenue Service is exempt from FOIA disclosure of investigative material. See, *Royal Exchange Insurance v. McGrath, 13* F.R.D. 150(S.D.N.Y. 1952); *Zimmerman v. Poindexter,* 74 F.Supp.933 (D. Hawaii 1947); *Timken Roller Bearing Co. v. U.S.,* 38 F.R.D.57(N.D. Ohio 1964). Also, *Jordan v. U.S. Dept. of Justice,* 1978 C.D.C.0170 (D.C.Cir. 77-1240, 1978).

hearing related matters are open to FOIA disclosure. *Dept. of the Air Force v. Rose,* 425 U.S.352 (1976).

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.[7] The State failed to meet its burden on any of the 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. Judge Simmons and Judge Welmaker were in error when they found any portion of the documents were eligible for exemption or exclusion from production under FOIA. "The S.C. 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, ...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, supra,* 354 S.C. at 282 (App. 2003).

[7] 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. All arguments herein also apply to Exhibit A in support of Judge Simmons' Order.

**1. No exemption exists for investigative or deliberative documents in South Carolina. The Supreme Court explicitly rejected such privilege in *Tobaccoville v. McMaster*. No statute exempting the Securities Division reports, investigations or memoranda exists, and the court may not create such an exemption when the Legislature chose not to do so. It was error for Judge Simmons or Judge Welmaker to exclude any 'investigative documents'.**

Judge Simmons deems the excluded documents "material obtained in an investigation" in Exhibit B (Record, pp.28—41). This is incorrect as a matter of law and reversible error. The majority of the arguments made by McMaster and the rationale of the Orders of Judge Simmons and/or Judge Welmaker in favor of nondisclosure are based upon the 'deliberative process' exemption codified only in the federal FOIA. 5 U.S.C.522(b)(5)(2006). The Attorney General claims these documents were part of an investigation.[8] That is irrelevant; **no exemption exists for investigative documents in our State**. None may be created by this court.

**The South Carolina Legislature chose not to adopt the deliberative process exemption**, and our Supreme Court rejected it.[9] The Court refused to recognize the Attorney General's attempt to assert the deliberative process privilege. *Tobaccoville USA*

[8] No investigation existed, other than the annual securities registration review. The Securities Division retroactively used an investigation number from a closed and wholly irrelevant 2004 complaint of a CIF unsecured creditor, which had been resolved immediately by CIF in its favor (pertaining to automatic 'rollover' of the Note.) Any other 'investigation' was closed by agreement in February, 2008.

[9] See, Exemption 5 in the federal act, 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 not exempt. *Dept. of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S.1 (2001). The ultimate objective of the federal exemption for deliberative process "...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). Documents which relate to factual, investigative matters must be disclosed. *Environmental Protection Agency v. Mink,* 410 U.S.73, 93 S.Ct.827(1973); *Soucie v. David,* 448 F.2d 1067 (D.C.Cir. 1971). The privilege is conditional; a citizen's need to know can outweigh the government's need for privacy. See, *Capital Info. Group v. Office of the Governor,* 923 P.2d 29,36 (Ala. 1996), and Weaver & Jones, The Deliberative Process Privilege, 54 Mo.L.Rev.279,315(1989). The exemption is always to be narrowly construed. *Parton v. U.S.D.O.J.,* 727 F.2d 774,776(8th Cir. 1984).

*v. McMaster,* 387 S.C.287, 692 S.E.2d 526(2010). "The AG claims the documents at issue are also protected from disclosure by the deliberative process privilege. South Carolina courts have not previously addressed whether that privilege is recognized in this state. **We decline to adopt this privilege in South Carolina.**" It was clear error for Judges Simmons and Welmaker to implicitly hold otherwise. An 'investigative process' is nothing but a deliberative process in another guise.

Internal investigations of the Securities Division are not exempt from disclosure; the S.C. FOIA must be interpreted according to its plain meaning and no investigative process exemption is enumerated in FOIA. *City of Columbia v. ACLU,* 323 S.C.384, 475 S.E.2d 747(1996).

Nor should this court try to find some other exemption by which to exclude the documents. 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, which is presumed to know the existence of other conflicting sections when later statutes are enacted concerning related subjects. *CP&L Co. v. City of Bennetsville,* 314 S.C.137, 442 S.E.2d 177,179(1994); *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 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..., "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]

For example, the files in Exhibit B designated Redwall 15 (Porter, Record, p.34); Redwall 22 and 24 (Southern First Bank, *Ibid.*), Redwall 25 (James Caserta, Bob Kurtz, *Ibid.*), Redwall 9 (Johnny Hagens, Record, p.31); etc., cannot possibly be exempt. They are not experts for the Division and were advocating their own interests and must have been received after February, 2008, when all prior 'investigations' had been closed by formal agreement between the Securities Division and CIF. See, *Merit Energy Co. v. U.S.Dept. of Interior,* 180 F.Supp.2d 1184 (D.Colo. 2001).[11]

Certain investigations are potentially exempt from production as a matter of statutory law. [12] No such specific statutory exemption exists to shield any investigation

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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).*

[11] Porter was CIF's auditor in 2003 to 2005. Southern First Bank had Field's private bank account. Johnny Hagens was a lawyer who sued CIF on behalf of a note holder in July, 2008, which case was dismissed. Caserta was a member of CIF's parent company in 1999 through 2003 and Kurtz was that company's CFO in 2001. None of these retained the Attorney General as counsel and were all irrelevant to securities registration in 2007. Hagens did not even exist until after the February, 2008, closure agreement and after CIF had declared its statutory winding up.

[12] For example, 'unfounded reports' in DSS case files are specifically shielded from production under S.C.C.A. 20-7-650(F): "...no unfounded reports may be disclosed under any circumstances." All such reports are to be destroyed and the Court noted FOIA reproduction thereof would circumvent the meaning of such mandatory statute. *Beattie v. Aiken County DSS,* 319 S.C.449, 462 S.E.2d 276(1985). Despite this statutory preclusion, the Supreme Court remanded to permit the nonexempt material to be culled and disclosed. *Ibid.* Unfounded reports

conducted by the Securities Division, correspondence to the Division, or the reports or conclusions thereof. It is only for the Legislature to impose such a statutory exemption and it chose not to do so. See, *Soc. Of Prof. Journalists v. Sexton,* 283 S.C.563, 324 S.E.2d 313(1984).

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.C.A.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. The Securities Division is a regulatory agency engaged in the registration and oversight of securities issuers. It is not a law enforcement agency. 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.[13] Nor did the Division allege any potential harm to it in the circumstances specifically enumerated in paragraphs (A) through (E) of

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have the potential for doing enormous harm to the persons wrongfully accused and the Legislature decree is to protect such persons, not DSS.

[13] 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..." Law enforcement agencies are not exempt from FOIA even when 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 Supreme Court, and the Securities Division demonstrated no harm herein. *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C.452, 611 S.E.2d 496 (2005). The State subsequently abandoned this claimed exemption, which 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).

S.C.C.A.30-4-40(3). 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 any and all documents in Exhibit B. See, *Loigman v. Atty. Gen. Kimmelman*, 102 N.J. 98, 505 A.2d 958(1986). Any exemption or preclusion of inspection of records based upon investigation or deliberative process reasons is error and must be reversed.

**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. They are regulators, not legal advisors.**

The only possible 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*.

None of the material contained in Exhibit 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. For the privilege to attach, the attorney must have been acting as a legal advisor when the

communication was made with the expectation of confidentiality of the specific communication. *Marshall v. Marshall*, 282 S.C.534(App. 1984); *S.C.Highway Dept. v. Booker,* 260 S.C.245(1973).

The Securities Division is charged with overseeing and registering securities annually. It is staffed by employees, some of whom happen to be admitted attorneys, but are not employed as such. [14] In the course of registration by qualification, its staff members conduct whatever general review 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 employees —they are the Division. 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 acting solely as regulators and were not in breach of any ethical restrictions. [15] Now, the very same employee-attorneys are attempting to claim they are attorneys, not mere regulators. This is patently unfair.

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 "limited to communications

[14] 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. See, *State v. Morris*, 656 S.E.2d 359, 376 S.C. 189 (S.C. 2008). The only government official charged with the oversight of the Attorney General is the Attorney General.

[15] The attorney-employees repeatedly assert they do NOT act as attorneys. Any privilege founded on such person's coincidental admission to the bar is specious. This dichotomy and the potential for abuse was noted by the Supreme Court in *State v. Morris, supra.*

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.

If the Attorney General's argument herein were to prevail, the ludicrous result would be for the State 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..." In *Tobaccoville, supra*, the S.C. Supreme Court upheld a limited 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 attorney-client 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.) Such is not the case herein.

The privilege does not apply to the investigative or regulatory process. In *Payton v. New Jersey Tpk. Authority*, 148 N.J. 524, 550-51 (1997), the Court held 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 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.*[16]

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 other attorneys. *Tax Analysts v. Internal Revenue Service,* 117 F.3d 607(D.C.Cir. 1997)(disclosure ordered). The D.C.

[16] 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 external Law Division providing legal advice and simply apply it to any licensed internal attorney, no matter how or where employed.

Court of Appeals reasoned no private attorney has the power to formulate the law to be applied to others or enjoy immunity, 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." There must be a prior agreement as to the confidentiality of the communication between the client and an outside attorney. *Maine v. U.S.Dept. of the Interior*, 298 F.3d 60,71(1st Cir. 2002). 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).

It is illogical to shield the Division's communications or documents under the guise of attorney-client privilege and contradicts the theory underlying such protection. This is especially so when the communications are from non-client third parties made to the Division employees, as regulators or in the process of registering a security, such as the Katz, Kurtz, or Caserta files. *State v. Love*, 275 S.C.55(1980); *Floyd v. Floyd,* 365 S.C.56(App. 2005). It is stretching the concept to bootstrap such files into attorney-client

confidentiality or even work product, when they were transmitted to investigators or regulators by external third parties.

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).[17] But no such broad exemptions exist in South Carolina and none may be created by this Court.

[17] 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. And, had the Securities Division remained under the auspices of the Secretary of State, then the Attorney General would have acted as legal advisor and outside counsel, invoking the privilege. But, such privilege would still not have applied to any persons employed within the Securities Division, who happen to possess law licenses. 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, even when acting as Securities Commissioner.

> 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.") (Emphasis added.)

The documents generated by the Security Division employees are not work product of legal counsel, but work product of the Division employees engaged in the ordinary regulatory process of the 2007 CIF registration by qualification, all of which is certainly subject to disclosure. The Securities Division herein was not preparing for any litigation; none ever took place.

"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).[18] 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. 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. [19]

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[18] 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.

[19] Observe, the documents must be created by attorneys acting as advisors to the agency to gain the privilege, not as agency staffers.

**3. The Securities Division does not have the statutory right to operate in closed session. All of its deliberations are public and its documents should all be disclosed.**

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). Furthermore, it was improper for the Attorney General to drag out this process for several years in an effort to defeat FOIA and to obtain its eventual indictment of Field by the State Grand Jury. It played both ends against the middle to injure Field and the citizens of South Carolina. See, e.g., *Litchfield v. Georgetown County,* 314 S.C.30, 443 S.E.2d 574(1994)(Toal, J. separate opinion).

**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.**

The South Carolina Supreme Court recently narrowly construed the work product privilege for the Attorney General. *Tobaccoville v. McMaster, supra.* In that 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

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).[20] 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). 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 cannot have been what the Legislature intended when it decreed access to government should be free and open.

The work product privilege has been applied involving the Attorney General 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. supra,* (General Counsel of SCDSS directs investigation of County DSS). Criminal 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).

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

[20] 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 February, 2008 obviously have no relation to possible future litigation.

the intention is doubtful, openness is the result." The attorney work product privilege is "intended to encourage effective legal representation...within the framework of the adversary system...the privilege focuses on the...adversary trial process itself...the specific limitation of the privilege to materials prepared in anticipation of litigation or for trial." *Jordan, supra,* citing *Hickman v. Taylor,* 329 U.S. 495(1947)(attorney acting for a client in anticipation of litigation only)(also relied on by the S.C. Supreme Court in *Tobaccoville, supra*)[21].

If any documents listed in Exhibit B were excluded based upon the theory of a work product privilege, such exclusion was error and the documents should be disclosed to Field under FOIA.

### C. IT WAS ERROR FOR THE LOWER COURT TO FAIL TO CLARIFY WHICH EXEMPTION SUPPORTED THE EXCLUSION OF EACH DOCUMENT DETAILED ON EXHIBIT B AND TO PERMIT MCMASTER TO SUBMIT A GENERALIZED PRIVILEGED LOG DENYING FIELD DUE PROCESS. FIELD IS ENTITLED TO COURT COSTS BELOW AND FOR THIS APPEAL.

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 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). As noted by Judge Simmons (Order, 8/18/11, Simmons, J. Record, p.42), the Attorney General "submitted a Log consisting of 18 pages with rather generic, broad based reasons it felt disclosure was not required." The Log

[21] And the disclosure of the Bodiman report effectively waived any claim to this privilege. See, *U.S. v. Nobles,* 95 S.Ct. 2160, 422 U.S.225(1975).

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).

Field was relegated to presenting his arguments before Judge's Simmons and Welmaker in a generalized fashion and was deprived of the ability to argue about any individual document or folder. [22] This deprived Field of due process of law. Absent sufficient information concerning the documents and the privilege claims, Field could not present his arguments adequately and had to rely on the court's *in camera* review and secret decision. (See, e.g., Transcript, Record, pp.289-318)

Judge Simmons did a remarkable job of sifting through thousands of documents, but Exhibit B (Record, pp.28—41) provides almost no clue why any document or group of documents is excluded or pursuant to which exemption such exclusion is made. This is error. Field is entitled to know, and this appeal is unduly hampered by the lack of such information, resulting in the denial of due process.

Field was the prevailing party below and is entitled to fees and costs for the initial action and this appeal. *Sloan v. Friends of the Hunley, Inc. and Lasch,* No.26986 (S.C. 6/13/2011).

## V. CONCLUSION

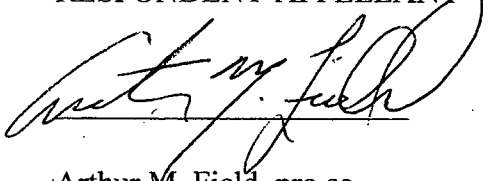
All documents of any nature should have been disclosed since none of the statutory exemptions apply as a matter of fact or law. To the extent the existing Orders precluded disclosure in Exhibit B, such were based upon errors of law and should be

[22] Field did note documents in folders attributed to Katz, Kurtz and Caserta and requested the court release those, which request was denied. Field's request was still made in general form, since he had no knowledge of what comprised the Katz, Kurtz or Caserta files. Field objected to the Log and the limited identification of files and folders. (E.g., Record, pp-258—262)

reversed by this Court. *Bayle v. S.C. Dep't of Transportation*, 344 S.C.115, 542 S.E.2d 736(App.2001).

For the foregoing reasons, it is respectfully requested the cross-appeal be granted and the Orders of the lower courts be reversed insofar as they permit the exclusion of some or all of the documents and further that McMaster and the Securities Division be ordered to deliver all documents on Exhibit B to Field forthwith. Alternatively, it is requested this matter be remanded to provide for additional review and determination of which documents, if any, fall under an exemption permitted by South Carolina law, or be remanded for the court to clarify upon which exemption it relied in excluding each document listed in Exhibit B.

RESPONDENT-APPELLANT



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Dated: October 19, 2011

Final: March 19, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY

COURT OF COMMON PLEAS

G. Edward Welmaker, Circuit Court Judge

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

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APPEAL # 2011199466

CASE NO. 2010-CP-23-06767

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

v.

HENRY MCMASTER.....Appellant-Respondent.

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# CERTIFICATION OF RESPONDENT-APPELLANT

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The undersigned certifies this Brief complies with 211(b), SCACR.

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STATE OF SOUTH CAROLINA

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## CERTIFICATION OF SERVICE

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

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March 26, 2013