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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2021-000794
Case No. 2019-CP-40-05675

Richard A. Harpootlian, Respondent,

v.

South Carolina Department of Commerce; Secretary Robert Hitt in his official capacity; Coordinating Council for Economic Development; and Director Daniel Young in his official capacity, Defendants,

of which South Carolina Department of Commerce and Coordinating Council for Economic Development are the Appellants.

JOINT MOTION TO VACATE PRIOR ORDER AND TO DISMISS APPEAL

Pursuant to Rules 240, 260, and 261, SCACR, the South Carolina Department of Commerce (“Department”) and Coordinating Council for Economic Development (“Coordinating Council,” together which are “Appellants”) and Richard A. Harpootlian (“Respondent”) respectfully move for an order (1) vacating a portion of the lower court’s prior order on appeal (as further described below), and (2) dismissing this appeal. In support thereof, the parties would respectfully show as follows:

1. The underlying suit in this matter was filed on October 8, 2019, by Respondent pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 *et seq.* (“FOIA”), seeking the disclosure of certain information by Appellants.

2. Respondent had submitted certain FOIA requests seeking information concerning two companies that had previously been approved for various economic incentives offered and administered by Appellants (“FOIA Requests”).

3. Appellants provided much of the information sought in the FOIA Requests but withheld certain documents or redacted certain information pursuant to certain FOIA exemptions that they claimed were applicable, including the privacy exemption codified at South Carolina Code § 30-4-40(a)(2), the confidential proprietary information exemption at § 30-4-40(a)(5)(c), and the working papers exemption at § 30-4-40(a)(9).

4. Respondent’s suit challenged Appellants’ withholdings and redactions pursuant to these exemptions.

5. On October 9, 2020, the Honorable Robert E. Hood, Circuit Court Judge, issued an Order Granting in Part and Denying in Part Plaintiff’s and Defendants’ Motions for Summary Judgment finding, in part, that certain of Appellants’ withholdings and redactions violated FOIA (the “Order”). A copy of the Order is attached as Exhibit A.

6. The Order separately addressed the dispute regarding application of the three exemptions: (i) the privacy exemption (Order § III.A); (ii) the confidential proprietary information exemption (Order § III.B); and (iii) the working papers exemption (Order § III.C).

7. The rulings in Order §§ III.A. and III.C were not appealed to this Court.

a. In § III.A, the Order rejected Appellants’ privacy exemption determinations with respect to the names of corporate officers and lawyers involved in obtaining economic incentives for companies locating to or expanding in the State. Appellants did not seek reconsideration of and are not appealing

the rulings in Order § III.A, and the application of the privacy exemption is no longer an issue in this case.

- b. In § III.C, the Order rejected Appellants' determinations with respect to the application of the working papers exemption. Appellants sought reconsideration of the rulings in Order § III.C, and after further proceedings, the parties resolved their dispute regarding the application of the working papers exemption. By separate order issued on June 25, 2021, Judge Hood amended the Order and vacated Order § III.C. Accordingly, the application of the working papers exemption also is no longer an issue in this case.

8. The only disputed issue on appeal to this Court involves Order § III.B, which rejected Appellants' determinations with respect to the application of the confidential proprietary information exemption. Appellants sought reconsideration of the rulings in Order § III.B, which Judge Hood denied by a Form 4 Order issued on June 25, 2021 ("Reconsideration Order").

9. Appellants timely appealed the Order and Reconsideration Order with respect to the application of § III.B.

10. On November 12, 2021, the parties filed a Joint Motion for Stay seeking a 60-day stay because the parties had entered into settlement negotiations to resolve their dispute, which this Court granted.

11. As result of those negotiations, the parties have now entered a settlement agreement intended to fully resolve their dispute, a copy of which is attached as Exhibit B (the "Settlement Agreement").

12. As a condition of the Settlement Agreement and the resolution of this matter, the parties request that the Court (i) vacate § III.B of the Order and the corresponding requirement of

the Order that the Department and Coordinating Council disclose certain unredacted documents in response to the FOIA Requests; and (ii) dismiss this appeal.

13. Proper application of FOIA is of public importance and interest. While the Order has no precedential effect and is limited to the specific facts of this case, allowing § III.B to remain in place even though the parties have resolved their dispute could lead to future confusion about applying the confidential proprietary information exemption set forth at § 30-4-40(a)(5)(c) to future FOIA requests. This is especially so because, as part of the Settlement Agreement, Appellants are updating their FOIA policy and several of the updates relate to this exemption. The parties agree that putting these policy changes in place and vacating Order § III.B will provide greater clarity to the application of FOIA in this State, increase transparency, and substantially benefit the public.

14. The parties, therefore, agree that their execution of the Settlement Agreement, the vacatur of Order § III.B, and the dismissal of this appeal all are in the best interests of the parties and the public.

15. The parties further submit that good cause supports the requested relief and that vacatur of Order § III.B and dismissal of this appeal shall preserve limited judicial resources and also preserve the parties' time and economic resources.

For these reasons, the parties respectfully request that the Court (i) vacate § III.B of the Order and the corresponding requirement of the Order that Appellants disclose certain unredacted documents in response to the FOIA Requests; and (ii) dismiss this appeal, with each party being responsible for their own costs and attorneys' fees.

Attorney Signatures on Next Page

Respectfully submitted,

s/Christopher P. Kenney

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EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Richard A. Harpootlian,

Plaintiff,

C/A No. 2019-CP-40-05675

v.

South Carolina Department of Commerce;
Secretary Robert Hitt in his official capacity;
Coordinating Council for Economic
Development; and Director Daniel Young in
his official capacity,

Defendants,

ORDER

This is a dispute under the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. §§ 30-4-10 *et seq.*, that is before the Court on cross motions for summary judgment by Plaintiff Richard A. Harpootlian and Defendants South Carolina Department of Commerce (Commerce); Secretary Robert Hitt, sued in his official capacity; Coordinating Council for Economic Development (Council); and Director Daniel Young, sued in his official capacity.

After two private corporations that received public subsidies were featured in news reports, Plaintiff served a public records request on Defendants and then filed this action on October 8, 2019, seeking declaratory and injunctive relief in the form of a disclosure order overruling FOIA exemptions invoked by Defendants. Specifically, Plaintiff alleges Defendants withheld and redacted certain categories of information concerning the two projects under the privacy exemption codified at South Carolina Code § 30-4-40(a)(2), the pending contract and confidential proprietary information exemption set forth at § 30-4-40(a)(5)(c), and the work papers exemption at § 30-4-40(a)(9), and asks the Court to declare those withholdings violative of the FOIA.

On October 30, 2019, the Court held a preliminary hearing, as required by South Carolina Code § 30-4-100(A). The parties subsequently conducted discovery and filed motions for summary judgment. On June 10, 2020, the Court heard argument on the motions and took the matter under advisement. Thereafter, the Court asked Defendants to make an *in camera* production of materials withheld under the disputed FOIA exemptions. On September 1, 2020, the Court convened another hearing to question Defendants about the production. The Court has had the opportunity to consider the briefs and arguments of the parties and review Defendants' *in camera* production such that this matter is ripe for a decision. Both motions are **GRANTED IN PART AND DENIED IN PART** and the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

The FOIA requests at issues here were served on August 23, 2019 and requested public records concerning economic incentive deals with two private companies: Viva Recycling of South Carolina, LLC (Viva) and Giti Tire Company (Giti). Prior to the requests being served, public news reports both touted the expected benefits of the projects and scrutinized the benefit.¹ It is undisputed that the purpose of these public-private economic projects, and others like them, is to attract capital investment and spur job creation for the benefit of the State of South Carolina and its citizens. Whether that has or has not happened with the Giti or Viva projects, or on any other particular occasion, is not a matter before the Court. Nevertheless, Plaintiff argues that disclosure of the information withheld by Defendants is necessary for the public to evaluate the benefit of the bargain and hold public officials accountable for these state-funded programs. *See,*

¹ *See, e.g.,* AP staff report, "Giti Tire joins 4 others to make South Carolina the tire king in U.S.," THE POST AND COURIER (P&C) (Oct. 4, 2017); Tony Bartelme and David Wren, "Lax rules left mountains of mosquito-infested, flammable tires in South Carolina," P&C (Apr. 22, 2018); Andrew Brown, "SC tire manufacturer didn't pay contractor because of 'cash flow' problems," P&C (Aug. 19, 2019).

e.g., Pl.’s MSJ, 20 (“[T]his case asks whether the public has the ability to evaluate the benefit of a bargain struck by Commerce and hold elected leaders accountable for how public money is being spent.”).

For its part, Commerce maintains the exemptions relied upon fall squarely within the FOIA, reflect the longstanding practice of the department, and that disclosure is not necessary to advance the accountability interests Plaintiff cites as the need for disclosure. *See, e.g.*, Defs’ MSJ, 5–18. The Court turns first to the particulars of the FOIA requests at issue before considering specific evidentiary contentions offered by the parties, and Commerce’s historical practice.

A. The FOIA requests, responses, and withholdings.

By way of background, the Giti project concerns the construction of a facility in Chester County (beginning September 2014, to be completed October 2016) subsidized by a fee-in-lieu-of-taxes agreement with the county (i.e., replacing millage taxation), job tax credits, job development credits, special source revenue bond/credit, a utility grant/loan, a \$35 million grant, and a \$4.6 million project from the Rural Infrastructure Authority (RIA). *See* Prelim. Hr’g Tr. 32–35; *see also* Cmpl. at Ex. E, pp. DOC_Giti_Tire_FOIA_000002–06.² There is no dispute that the \$35 million grant from the Coordinating Council and \$4.6 million in RIA funds are public funds “provided by the General Assembly in one form or fashion[.]” Prelim. Hr.’g Tr. 35. The Viva project, on the other hand, never went forward as planned. *See* Manning Dep. 54.

Plaintiff’s public records requests seek similar disclosures from Defendants. As to the Giti project, Plaintiff sought all correspondence, cost-benefit analysis of the deal, state and local grant agreements, and documents relating to any incentive, revitalization agreements, or job

² Hereafter, citations to the FOIA response attached to the Complaint as Exhibit E will simply refer to the Bates number.

development credit (JDC) agreements. *See* Cmplt. ¶ 17. As to the Viva project, the request seeks all correspondence, cost-benefit analysis, state and local incentives or grants, incentive or revitalization or JDC, and loans or bonds issued to Viva or others related to the project. *See id.* ¶ 18. Generally, the public records produced in response to these requests are attached to the Complaint³ and the redactions contained therein conceal categories of information disputed in this case. The categories of items withheld in their entirety are identified on Defendants' privilege log, which details correspondence, reports, and other documents concerning the Giti and Viva projects. *See* Pl.'s MSJ at Ex. C. The Court has had an opportunity to review examples of both the redacted and withheld documents *in camera*.

B. Plaintiff's challenge to Defendants asserted exemptions.

Plaintiff challenges three aspects of Defendants' withholdings. First, Plaintiff argues the records provided in response to the FOIA requests are redacted in a manner that improperly conceals basic information from public view, information like the names of corporate officers and attorneys responsible for securing state assistance for these private companies and their communications with state officials. *See* Pl.'s MSJ, 22–23. Second, Plaintiff observes that certain deal information, like the cost of land, construction, acquisition, and machinery and payroll estimates, are redacted such that it is impossible to evaluate the basis for Commerce's assumptions about the projects' total economic impact on the State. *See* Pl.'s MSJ, 2, 4–5, 28–29. Plaintiff also points to redactions that obscure the total estimated public costs and benefits under these projects, pointing specifically to sources of funding like federal funding, which are redacted to prevent the

³ By letters dated October 9, Commerce furnished 48 additional pages of materials concerning Viva. On October 11, Commerce furnished three additional pages of materials concerning Giti that were inadvertently omitted from the initial production. These responses have been filed with the clerk in conjunction with another case filing.

public from mathematically discerning the monetary value of other withheld information. *See id.* Finally, Plaintiff argues there is “almost no public information” made available about tax credits—typically granted in the form of payroll tax credits—intended to incentivize hiring and reward job creation. *See Pl.’s MSJ*, 13. All of this information, Plaintiff contends, falls outside any valid FOIA exemption and is necessary to evaluate the benefit of the bargain struck by Commerce and to hold elected leaders accountable for its performance.

In support of its position, Plaintiff offered the testimony of Dr. Rebecca Gunlaugsson during the preliminary hearing in this case. Dr. Gunlaugsson is an economist, former director of research at the South Carolina Department of Commerce, and an expert in the field of economic incentive packages. Prelim. Hr’g Tr. 76–78. She offered two observations about the FOIA responses here. First, concerning the Giti deal, she opined that “it vastly overstates the economic impact” of the Giti project to the State, but that “it is not possible for [her] to completely replicate that because a number of elements are redacted from the study.” *Id.* at 78 (“I do not have the underlying calculations or inputs or suppositions for the model.”). Second, Dr. Gunlaugsson observes the FOIA response is “missing a tremendous number of statutorily or agreement required follow up documents which would allow you to go back and look at the economic impact analysis and evaluate it after the fact to verify that it was accurate in the first place.” *Id.* at 79; *see also id.* at 82–83 (describing public records required for this analysis). Thus, Plaintiff argues Dr. Gunlaugsson’s testimony demonstrates it is not possible for the public to evaluate the benefit of the bargain struck by Commerce, even when the person in question is familiar with Commerce and has Dr. Gunlaugsson’s expertise. *See Pl.’s MSJ*, 18. Dr. Gunlaugsson is the only expert to offer an opinion in this case.

With respect to the Giti project, the application promises 1,700 new jobs and a \$560 million capital investment. Plaintiff, however, points to redacted records that conceal the average estimated wage for the promised jobs and the breakout of the anticipated capital investment as examples of impermissible redaction that frustrate the public's ability to evaluate the Giti project. *See* Pl.'s MSJ, 5 (citing DOC_Giti_Tire_FOIA_000003–04). In addition, Plaintiff identifies numerous entries on Defendants' privilege log where email communications, performance agreements, grant awards agreements, memoranda of understanding, and other deal records are all withheld under claim of the personal privacy or confidentiality proprietary exemptions. *See* Pl.'s MSJ, 25–26. With the exception of taxpayer information and the number of tires produced per day (two items Plaintiff does not challenge as subject to disclosure), it is unclear why these items should be exempt. Instead, Commerce takes a very broad view, maintaining information like land cost, JDCs, and progress reports are all “proprietary” and thus exempt. *See* Prelim. Hr'g Tr. 61–64, 66 & 69. Applying this expansive view causes Commerce not only to redact data inputs, but also top-line reports concerning the costs and benefits of the Giti project. *See* DOC_Giti_Tire_000035.

Other aspects of the Giti project and what Commerce considered in furtherance of it remain undisclosed. For example, while Secretary Hitt acknowledged the existence of monitoring or status reports, they were not furnished in response to the FOIA requests and appear to be part of the department's withheld records. *See* Prelim. Hr'g. Tr. 42–44 (“There are a lot of requirements in the performance packages agreement whether companies have to report back to us on a periodic basis specified in each agreement.”). Likewise, Commerce has statutory performance certifications required by South Carolina Code § 12-10-80 reflecting that an applicant has met minimum employment and capital investment levels prior to receiving tax credits from the State. *See* Prelim.

Hr’g Tr. 71–73 (“If the statute requires it, then I would say we probably have it.”). Finally, while Secretary Hitt acknowledged there was likely “a lot of communication” concerning a project like the Giti project (*see* Prelim. Hr’g Tr. 53), only a small number of redacted communications were furnished to Plaintiff. *See, e.g.*, DOC_Giti_Tire_FOIA 000062 (“Just talked to [redacted] He says they are financially sound and committed to Chester.”).

C. Defendants’ practices here comport with Commerce’s longstanding practice in response to public record requests.

The Court finds that Commerce’s redactions and withholdings here are consistent with its longstanding practices when answering FOIA requests. This conclusion is demonstrated by the testimony of Commerce personnel and its written responses to discovery.

Generally, Commerce negotiates prospective economic incentive deals, which are reviewed by a subcommittee called the enterprise zone committee followed by the Coordinating Council, which Secretary Hitt chairs. *See* Prelim. Hr’g Tr. 36–39. The Coordinating Council is a statutory entity within Commerce made up of eleven agency heads with authority over two types of discretionary incentives: (1) grants from the Set-Aside Fund, Closing Fund, or Rural Infrastructure Fund (RIF) and (2) Job Development Credits (JDCs). *See* Manning Dep. at 10–12. During Secretary Hitt’s nine-year tenure as head of Commerce, he has done approximately 1,200 economic incentive deals. Prelim. Hr’g Tr. 25 & 28. He explained projects come to the agency directly from existing companies looking to expand or “blind” from a “site selection firm contact” looking at South Carolina as one of many potential location placement sites. *Id.* at 26–27. Secretary Hitt did not, himself, review Defendants’ FOIA response, but generally he expressed agreement with the redactions and withholdings made by his department. *See id.* at 48–49 & 55–56. As to company executives and lawyers, he testified that “people who represent companies are not the company itself, and so we think they have a right of privacy.” *Id.* at 56. By Secretary Hitt’s

description, maintaining the privacy of these individuals has been the “custom in the agency for some time.” *Id.* at 60–61.

Commerce staff and written discovery confirm the same. The primary Commerce staffer responsible for handling FOIA responses is chief legal counsel Karen Manning, Esq., a 22-year veteran of the department. Pl.’s MSJ at Ex. D; Defs’ Interrog. Resp. No. 1 & Ex. E; Manning Dep. 6–7. In answering FOIAs, Ms. Manning communicates with companies regarding proposed redactions and what exemptions Commerce will assert. *See* Defs’ Interrog. Resp. No. 1. For instance, when answering the requests here, Director Young notified Giti via email that Commerce received the FOIA request and Ms. Manning communicated with Giti corporate counsel via phone and email concerning possible redactions. Defs’ Interrog. Resp. No. 3. While Commerce had no direct communications with Viva about the FOIA, Ms. Manning asked its former lawyer whether his name and firm name should be redacted. *See* Defs’ Interrog. Resp. No. 4. However, as to the FOIA directed at the Viva project, Commerce did not redact communications to conceal the identity of the company’s former lawyer because Viva “is no longer located in South Carolina[.]” *Id.* As Defendants’ written discovery responses explain, they view employee names and contact information as information that would constitute an unreasonable invasion of personal privacy if disclosed while serving no “legitimate” public purpose. *See* Defs’ Interrog. Resp. No. 8. Nevertheless, Defendants explain such determinations are made on a “case-by-case” basis, *id.*, with Viva being an example of Defendants choosing not to assert an exemption to withhold the name of the lawyer that previously represented the company. As for economic metrics that outline the purported benefit of a deal—information including an investment breakdown and average salaries or wages—Commerce identified this as the type of information it believes is exempt as confidential proprietary information. *See* Defs’ Interrog. Resp. No. 11.

A Commerce bulletin also confirms the department's broad view of FOIA exemptions to require "limited disclosure" when it comes to its economic development work with prospect companies. *See* Manning Dep. 35. The bulletin, which refers to prospect companies as Commerce's "clients", discusses Commerce's "dual obligation[] of public accountability and protection of private details that are not needed to reveal public costs[.]" *Id.* at 15–16 (quoting Commerce_000032). Notably, this guidance does not contemplate the need to reveal public *benefits*. Finally, after reviewing the scope of information Commerce deems "valuable to a company's competitors (e.g., average or individual wages, investment breakdowns, health plans, financial information, production volumes, et cetera)[,]" Ms. Manning was unsure what categories of information remained subject to public disclosure. *See id.* at 44. Finally, Commerce routinely enters into nondisclosure agreements (NDAs) with prospect companies that require it to invoke FOIA exemptions "to the maximum extent allowed by law" and to notify companies when the department receives requests for company-related information. Defs' Interrog. Resp. No. 4. Nevertheless, in Commerce's view, these NDAs are unnecessary because the FOIA exemptions are coextensive with information subject to the NDAs. *See* Manning Dep. 17–18.

The Court finds that the exemptions asserted by Defendants here are consistent with what appears to be the longtime and documented practice of the department. Whether these practices comport with the FOIA is another question.

II. STANDARD OF REVIEW

"Where an action is filed for declaratory judgment seeking affirmative relief, the movant must prove his material allegations by a preponderance of the evidence." *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there

is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. However, the FOIA is a remedial statute, liberally construed to carry out its purpose—protecting the public from government secrecy. *Glassmeyer v. City of Columbia*, 414 S.C. 213, 219, 777 S.E.2d 835, 839 (Ct. App. 2015) (citing *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864–65 (2001)). “Whether a record is exempt from disclosure depends on the particular facts of the case.” *Id.* (citing *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996)). “Underlying each case, however, is the principle the exemptions in section 30–4–40 of the South Carolina Code (2007) are to be narrowly construed so as to fulfill the purpose of the FOIA.” *Id.* (citing *Evening Post Publ’g. Co. v. City of N. Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005)). “To further advance this purpose, the government has the burden of proving an exemption applies.” *Id.*

III. CONCLUSIONS OF LAW

This case asks the Court to define the limits of FOIA exemptions that conceal aspects of economic incentive deals between the State and private companies. The categories of information at issue would reveal the identity of company executives and lawyers responsible for negotiating public incentives, some of their communications with public officials and employees, and data that would allow the public to evaluate the benefit of the bargain received by South Carolina taxpayers.

In considering this matter, the Court begins with the “essential purpose” of the FOIA “to protect the public from secret government activity.” *Glassmeyer*, 414 S.C. at 219, 777 S.E.2d at 839. Our legislature has deemed it “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.” S.C. Code Ann. § 30-4-15. To that end, the FOIA “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.” *Id.*

In *Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), our Supreme Court held a foundation subject to the FOIA by distinguishing between arms-length commercial transactions where goods or services of value are exchanged for public money and the block-grant diversion of public money, explaining:

[W]hen a block of public funds is diverted *en masse* from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.

Id. at 404, 401 S.E.2d at 165. The Court does not find, and Plaintiff does not contend, that *no* FOIA exemptions can properly be invoked here. Instead, Plaintiff argues Defendants’ reliance on certain exemptions conceals far too much otherwise public information that is otherwise necessary for the public to understand what its government is doing. While the Court does not dispute Commerce’s contention that companies “are very private” and, under normal circumstances, “do not have to reveal this information to the public” (*see* Prelim. Hr’g Tr. 65), the question here is whether the public is entitled to disclosure of certain public information once these companies voluntarily seek and obtain public assistance. The economic incentive deals at issue here concern huge sums of block-grant funding, tax credits, and other public expenditures to the tune of tens of millions of public dollars. As stated above, the wisdom and efficacy of these deals is not a matter the Court can resolve, and the Court makes no judgment about them. However, when, as is the case here, a member of the public seeks public records to make his own determination about the activity of his government, that effort falls squarely within the purpose of the FOIA and those incentive agreements implicate *Weston* such that those concerns are very much present here.

Plaintiff's Complaint challenges Defendants' reliance on FOIA exemptions codified at South Carolina Code §§ 30-4-40(a)(1), (2), (5), and (9). Certain issues are not or are no longer in dispute. The Court turns to those items first.

As indicated in his papers and during hearings, Plaintiff does not challenge Defendants' reliance on South Carolina Code § 12-54-240 to withhold certain taxpayer information. *See, e.g.*, Pl.'s MSJ, 20 n.5. Thus, that taxpayer protected information is not at issue. Additionally, Defendants argue Secretary Hitt and Director Young are not "public bodies" within the meaning of the FOIA. Defs' Mem. MSJ, 4-5. During the June 10 hearing, Plaintiff agreed and consented to Secretary Hitt and Director Young's dismissal. Accordingly, Defendants' motion is **GRANTED** as to Secretary Hitt and Director Young. Finally, Defendants represent that the only document withheld under the "trade secret" exemption codified as South Carolina Code § 30-4-40(a)(1) is a copy of the plant layout for a Giti manufacturing facility. *See* Defs' MSJ Mem., 6. Based on that representation, Plaintiff agrees the plant layout is potentially a trade secret within the meaning of the FOIA and withdraws his challenge to that item.

With these preliminary items resolved, the Court turns to the remaining aspects of this dispute and whether Defendants have carried their burden to show an exemption applies.

A. Defendants' personal, privacy exemption under § 30-4-40(a)(2) are overruled.

The FOIA allows a public body to withhold "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy, including, but not limited to, information as to gross receipts contained in applications for business licenses." S.C. Code Ann. § 30-4-40(a)(2). Defendants contend the identity of corporate officers and lawyers involved in obtaining economic incentive agreements need not be disclosed because doing so violates the personal, privacy exemption of the FOIA. The Court disagrees and holds that the

identity of corporate executives and lawyers involved in economic incentive deals with the State is not personal or private within the meaning of the FOIA.

In *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), the court of appeals observed that § 30-4-40(a)(2) does not specifically define the type of information contemplated by the exemption, therefore it must “resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public’s need to know on the other.” *Id.* at 352, 594 S.E.2d at 895. Applying that standard, the court reasoned the right to privacy does not prohibit the publication of matter of legitimate public or general interest; to the contrary, “if a person, whether willingly or not, becomes an actor in an event of public or general interest, ‘then the publication of his connection with such an occurrence is not an invasion of his right to privacy.’” *Id.* at 352, 594 S.E.2d at 895 (quoting *Doe v. Berkeley Publishers*, 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998)). In that case, the operation of the sheriff’s department was a “large and vital public interest” that far outweighed the desire to remain out of the public eye. *Id.* While the information at issue here is more complicated, the rule in *Burton* nevertheless controls.

Commerce concedes a corporation lacks any expectation of privacy (*see* Defs’ Interrog. Resp. No. 10), thus the question here is whether disclosing the identity of corporate officers and lawyers impermissibly invades those individuals’ right to privacy. Having reviewed the records in this case, the Court holds it does not. The individuals whose identities are at issue, whether willingly or not, have become actors in a matter of public interest by virtue of their efforts to obtain economic incentives from the State for their respective companies and clients. There is nothing inherently invasive about disclosing their involvement and the Court is persuaded that need for disclosure of their identity is in the public interest and outweighs any one individuals’ interest in

remaining outside public view. Moreover, like the sheriff deputies in *Burton*, these individuals knew or should have known that doing business with the State might include some public scrutiny of that relationship. Where the State is providing millions of dollars in public incentives to private companies, the Court finds no evidence and only conjecture that the modest disclosure sought by Plaintiff imposes any real burden on the individuals involved or that it would chill participation in Commerce's economic incentive deals.

Defendants maintained such disclosures are an unreasonable invasion of privacy absent "any legitimate public purpose" (*see* Defs' Interrog. Resp. No. 8; *see also* Manning Dep. 45–46), but this view is incompatible with the record. For instance, Ms. Manning testified that one of the ways Plaintiff could obtain information about a prospect company's executives is to "go to the company's website." *See* Manning Dep. 48–49. But, as Plaintiff correctly observes, if this information is available on a company website, it cannot be personal and private under the FOIA. Likewise, when pressed as to whether it "would be a legitimate public interest to try to determine whether individuals and companies that are applying for benefits with Commerce are also campaign contributors to the governor or other public officials," Ms. Manning conceded, "It could be." *Id.* at 50. The Court finds this concession particularly probative given Ms. Manning's explanation that one way the public can hold Commerce accountable for the efficacy of its work is to vote for a governor who will appoint a Commerce secretary. *See id.* at 41–42. But, as Plaintiff pointed out to Ms. Manning and during oral argument, denying the public access to understand the benefit of the bargain struck by Commerce or even identify the individuals responsible for securing government assistance forecloses the opportunity to hold a governor accountable using the very mechanism Commerce claims is the public's sole recourse: an election. None of this is to say there is anything improper or untoward about the Giti and Viva deals here or other economic incentive

deals. But Commerce cannot, on the one hand, insist that Plaintiff's quarrel is with elected leaders like the Governor, while, on the other hand, refuse public access to the very information that would allow him to petition the Governor for redress or hold him accountable at the ballot box.

Defendants argue disclosure of executive and lawyer names in public records is unwarranted because the name and contact information of the applicant—i.e., the prospect company—is disclosed. *See* Defs' MSJ mem., 10. The Court rejects this distinction. It has long been recognized that corporations act through individuals. *E.g.*, *State v. Solomon*, 245 S.C. 550, 573, 141 S.E.2d 818, 830 (1965); *Potter Voice Techs., LLC v. Apple Inc.*, 24 F. Supp. 3d 882, 886 (N.D. Cal. 2014) (through employees). In this case, prospect companies engage public employees and public officials through their executives and attorneys. Were Plaintiff seeking the disclosure of manufacturing-level employees this might be a closer call, but he has repeatedly disclaimed an interest in, as to Giti for example, the people making tires. What Plaintiff seeks is the identity of the individuals responsible for negotiating economic incentive deals. That is a matter of public interest and Plaintiff has identified legitimate public purposes in seeking that information.

Accordingly, Defendants' reliance on this exemption is overruled and Plaintiff's motion for summary judgment is **GRANTED** as to withholdings based on the personal, privacy exemption at South Carolina Code § 30-4-40(a)(2).

B. There are no proposed contractual arrangements or closed contracts with proprietary information exempt under § 30-4-40(a)(5)(c).

South Carolina Code § 30-4-40(a)(5)(c) permits a public body to exempt from public disclosure “[d]ocuments of and documents incidental to proposed contractual arrangements and documents of and documents incidental to proposed sales or purchases of property; however: ... (c) confidential proprietary information provided to a public body for economic development or contract negotiations purposes is not required to be disclosed.” S.C. Code Ann. § 30-4-40(a)(5)(c).

Defendants maintain this subsection exempts large categories of public records from disclosure because a public body can withhold confidential proprietary information and doing so here is necessary to prevent putting the recipients of economic incentives at a competitive disadvantage. *See* Defs' MSJ mem., 11. The Court disagrees for two reasons.

First, Commerce offers only conclusory evidence for the proposition that the tire manufacturing industry "is highly competitive in this State." *See* Defs' MSJ mem., 11 (citing Secretary Hitt and Ms. Manning's testimony). Even assuming that is the case, there is nothing in this record that demonstrates that the disclosure of specific public records sought by Plaintiff would place these companies at a competitive disadvantage.

Second, Defendants' formulation of § 30-4-40(a)(5)(c) misapprehends the nature of the exception and reads it as a broad "catchall" category. A better reading of the subsection holds that the exception primarily applies when a contract is proposed or pending, and then includes an exception to the exception that extends exempt status *after* the contract closes but only as to information that remains "confidential and proprietary." Thus, properly read, the purpose of the exemption is to ensure public bodies can negotiate contracts and property conveyances without undermining those efforts or putting the public body on an uneven playing field by requiring an ongoing matter be disclosed to the public. Under the plain language of the section, the exemption does not apply where, as is the case here, the contracts at issue are closed.

However, subsection (a)(5)(c) exception to the exception—i.e., the confidential and proprietary exception—is best read to exclude "confidential proprietary information" from disclosure once the contract or property transaction is closed and otherwise subject to disclosure. Thus, it affords some protections for information shown to be both confidential and proprietary, but these are not defined terms under the FOIA and should not be read to stretch them beyond all

meaning. No party cites any precedent construing these terms and all parties urge the Court to engage in plain-meaning analysis. However, Defendants read these terms to turn on Commerce's application of them on a case-by-case basis. *See* Defs' MSJ mem., 12 ("... Commerce utilizes its experience with private industry and prior responses to FOIA requests to determine on a case-by-case basis whether the information requested includes information that is exempt ..."). Plaintiff maintains that approach is untenable and stretches the statutory language beyond any recognizable meaning. *See* Pl.'s MSJ, 25–27 ("Instead, Commerce appears to be misreading the exemption as a broad catchall."). The Court agrees with Plaintiff.

"Confidential information" is defined as "[k]nowledge or facts not in the public domain but known to some, esp. to those having a fiduciary duty not to misuse the knowledge or facts for their own advantage." CONFIDENTIAL INFORMATION, Black's Law Dictionary (11th ed. 2019). "Proprietary information" is defined as "[i]nformation in which the owner has a protectable interest. *See* trade secret." PROPRIETARY INFORMATION, Black's Law Dictionary (11th ed. 2019). Accordingly, a "trade secret" is defined in part as:

A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information ... that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.

TRADE SECRET, Black's Law Dictionary (11th ed. 2019). Thus, read together, confidential proprietary information for the purpose of § 30-4-40(a)(5)(c) has the following characteristics: (1) it is outside the public domain, (2) it has independent economic value because of the role it plays in some industry or trade, and (3) the owner has an interest in maintaining its secrecy.

Plaintiff argues, and the Court agrees, that this reading of § 30-4-40(a)(5)(c) would properly render information like the Giti tire formula or the number of tires produced each day as

“confidential and proprietary” and thus exempt, but that most of the entries on Defendants’ privilege log lack any clear indicia to support the conclusion they fall within the exception. *See* Pl.’s MSJ, 26. Indeed, the fact that Secretary Hitt testified a land sale that occurred as part of the Giti project remained confidential and proprietary five years later even though the transaction was memorialized in the register of deeds (*see* Prelim. Hr’g Tr. 61–64) suggests Defendants’ reading of this exemption has allowed the exception to swallow the rule. The Court rejects this view.

Thus, with the exception of protected taxpayer information and the number of tires produced each day, Defendants’ reliance on this exemption is overruled and Plaintiff’s motion for summary judgment is **GRANTED** as to withholdings based on the confidential and proprietary exemption at South Carolina Code § 30-4-40(a)(5)(c).

C. Defendants have not met their burden under the working papers exemption at § 30-4-40(a)(9).

The working papers exemption shields from disclosure memoranda, correspondence, documents, and working papers relative to efforts by a public body “to attract business or industry to invest within South Carolina[.]” S.C. Code Ann. § 30-4-40(a)(9). The parties acknowledge, and the Court agrees, the exemption is “broad” and designed to protect “information shared by a private company or developed by Commerce during negotiations and prior to that company committing to invest and create jobs in South Carolina.” *See* Defs’ MSJ mem., 16. However, Plaintiff urges the Court to construe the exemption narrowly by requiring a temporal nexus demonstrating the withheld record was used “to attract” or used “prior to” the company committing and then hold Defendants have failed to meet their burden of establishing the exemption applies. *See* Pl.’s MSJ, 29–30. The Court agrees with the parties’ reading of the exemption and, based on the record here, the Court holds Defendants have failed to prove a sufficient temporal nexus to support their withholdings under the working papers exemption.

The Court's holding turns on the statute's plain meaning as it is only designed to protect papers and communications while the public body is pursuing a deal (i.e., attracting the business), not after. In 1998, then Attorney General Charlie Condon read the statute to require precisely that while warning that, in keeping with the spirit and purpose of the FOIA, "[a]ny and all doubts regarding the applicability of the exemption should be resolved in favor of public disclosure, particularly if the records in question involve the expenditure of public monies or taxpayer dollars." 1998 WL 113845, at *3 (S.C.A.G. Feb. 25, 1998). "Where a public body makes a claim that the exemption contained in § 30-4-40(a)(9) is applicable to a particular document, it possesses the burden of demonstrating that the exemption is indeed applicable." *Id.* Placing the burden of establishing the right to invoke an exemption on the public body asserting it also comports with controlling precedent. *See Glassmeyer*, 414 S.C. at 219, 777 S.E.2d at 839.

Commerce's claims here do not establish the necessary temporal markers to support the conclusion that all § 30-4-40(a)(9) withholdings preceded deal finalization. In holding Defendants have not met their burden, the Court is mindful of Commerce's expansive view of FOIA exceptions generally and the department's liberal application of them in this case to justify its public record withholdings. The FOIA does not permit a public body to paint with so broad a brush. Even where there is a legitimate exemption, "the burden is on the agency to justify its claim that there is no segregable material in a document that is largely exempt, and this burden should not be transferred to the court in making a generalized claim of exemption" 1998 WL 113845, at *3 (quoting 37A Am.Jur.2d Freedom of Information Acts, § 79). Here, the Court has insufficient evidence to conclude Defendants have met their burden.

Accordingly, the Court holds Defendants have not met their burden to rely on the working papers exemption, the exemption is overruled, and Plaintiff's motion for summary judgment is **GRANTED** as to withholdings based on South Carolina Code § 30-4-40(a)(9).

IV. CONCLUSION

For the reasons set forth above, Plaintiff's motion and Defendants' motion are both **GRANTED IN PART AND DENIED IN PART**. Secretary Hitt and Director Young are **DISMISSED WITH PREJUDICE**. The remaining Defendants are **ORDERED** to disclose unredacted and withheld public records consistent with this Order.

AND IT IS SO ORDERED.

The Honorable Robert E. Hood
Circuit Court Judge, Fifth Judicial Circuit

_____, 2020
Columbia, South Carolina.



Richland Common Pleas

Case Caption: Richard A Harpootlian vs South Carolina Department Of Commerce ,
defendant, et al
Case Number: 2019CP4005675
Type: Order/Summary Judgment

So Ordered

s/ R.E. Hood #2164

EXHIBIT B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2021-000794
Case No. 2019-CP-40-05675

Richard A. Harpootlian, Respondent,

v.

South Carolina Department of Commerce; Secretary Robert Hitt in his official capacity; Coordinating Council for Economic Development; and Director Daniel Young in his official capacity, Defendants,

of which South Carolina Department of Commerce and Coordinating Council for Economic Development are the Appellants.

SETTLEMENT AND MUTUAL RELEASE AGREEMENT

This Settlement and Mutual Release Agreement ("Agreement") is made and entered into as of January 12, 2022 ("Effective Date"), by and between the South Carolina Department of Commerce (the "Department") and Coordinating Council for Economic Development (the "Coordinating Council") and Richard A. Harpootlian ("Harpootlian").

WHEREAS, the underlying suit in this matter was brought by Harpootlian pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 *et seq.* ("FOIA"), seeking the disclosure of certain information by the Department and Coordinating Council;

WHEREAS, Harpootlian had submitted certain FOIA requests seeking information concerning two companies that had previously applied for various economic incentives offered and administered by the Department and Coordinating Council ("FOIA Requests");

WHEREAS, the Department and Coordinating Council provided much of the information sought in the FOIA Requests but withheld certain documents or redacted certain information pursuant to certain FOIA exemptions that it claimed were applicable, including the privacy exemption codified at South Carolina Code § 30-4-40(a)(2), the confidential

proprietary information exemption set forth at § 30-4-40(a)(5)(c), and the working papers exemption at § 30-4-40(a)(9);

WHEREAS, Harpootlian filed suit in the Richland County Court of Common Pleas challenging the Department's and Coordinating Council's withholdings pursuant to these exemptions;

WHEREAS, on October 9, 2020, the Honorable Robert E. Hood issued his Order Granting in Part and Denying in Part Plaintiff's and Defendants' Motions for Summary Judgment finding, in part, that certain of the Department's and Coordinating Council's withholdings and redactions violated FOIA (the "Summary Judgment Order");

WHEREAS, the Department and Coordinating Council sought reconsideration of the Summary Judgment Order, and after further proceedings, the parties resolved their dispute regarding the application of the working papers exemption at § 30-4-40(a)(9) and Judge Hood vacated the portion of Summary Judgment Order addressing the application of such exemption;

WHEREAS, Judge Hood also issued a Form 4 order denying the Department's and Coordinating Council's reconsideration request with respect to the portion of the Summary Judgment Order addressing the application of the confidential proprietary information exemption set forth at § 30-4-40(a)(5)(c);

WHEREAS, the above-captioned appeal was initiated by the filing of notices of appeal by the Department and Coordinating Council from the Summary Judgment Order and Judge Hood's Form 4 order denying their reconsideration request;

WHEREAS, the Department, Coordinating Council, and Harpootlian (each, a "Party" and collectively, the "Parties"), who are the only parties of record in the above-captioned appeal, have varying legal positions regarding the remaining issues in this case;

WHEREAS, the above-captioned appeal, the underlying civil action, and Harpootlian's challenge to the Department's and Coordinating Council's responses to the FOIA Requests are collectively referred to in this Agreement as the "Dispute"; and

WHEREAS, the Parties have reached an agreement to settle the Dispute under certain terms and conditions.

NOW, THEREFORE, the Parties hereby mutually agree to the following terms and conditions to settle and resolve all issues arising from the Dispute:

1. **Agreed Dismissal of Appeal and Vacatur of Prior Order.** Within two (2) business days of the Effective Date, the Parties agree to submit a joint motion to the Court of Appeals pursuant to Rules 260 and 261, SCACR, requesting (a) the vacatur of section III.B of the Summary Judgment Order, which granted summary judgment in favor of Harpootlian as to document withholdings and redactions based on the confidential and proprietary information exemption of South Carolina Code § 30-4-40(a)(5)(c), and the corresponding

requirement of such order that the Department and Coordinating Council disclose certain unredacted documents in response to the FOIA Requests; and (b) dismissal of the appeal. The Parties agree to submit a copy of this Agreement with the joint motion and to advocate that the Court of Appeals grant the joint motion in its entirety.

2. **FOIA Policy Updates.** The Department and Coordinating Council shall implement and make available to the public the “Freedom of Information Requests Policy, FAQs, and Fee Schedule” attached as Exhibit A, which shall reflect the following general changes to the Department’s and Coordinating Council’s FOIA policies and procedures:

(a) **Confirmation of Projects with Average Wages Below \$15.00/Hour.** In response to FOIA requests seeking such information, for any project approved on or after January 1, 2022 and locating in a Tier I, II or III County, the Department and Coordinating Council shall confirm whether a project has average wages below \$15.00/hour, excluding the top five percent of full-time positions. The Coordinating Council will review the wage threshold in the first quarter of each year to ensure it reflects updates based on average county wages published annually by the South Carolina Department of Revenue.

(b) **Disclosure by Project of Average Wages for JDC Eligible Jobs.** In response to FOIA requests seeking such information, for any project approved on or after January 1, 2023, the Department shall disclose the average wage for jobs on which a company claims job development credits.

(c) **Reporting of Aggregate Average Wages.** The Department shall report aggregate average wages by incentive qualification for job development credit projects starting with the report due in 2023 for the 2022 calendar year.

(d) **Disclosure of Names of Those Involved in Incentive Negotiations.** In response to FOIA requests seeking such information, the Department shall not withhold or redact from otherwise public records the names of corporate executives and lawyers involved in incentive deals with the State.

(e) **Enforcement of Clawbacks Absent Special Circumstances.** For companies that do not meet grant performance requirements, the Coordinating Council shall enforce pro rata clawbacks as set forth in performance agreements unless a modification of performance requirements is in the best interest of the State. Repayments and modifications, if any, must be reported annually.

The Department and Coordinating Council shall continue to implement the policy changes set forth in Section 2(a)-(e) unless and until otherwise required by law. Nothing in this Agreement shall prevent or preclude the Department or Coordinating Council from making revisions or additions to other portions of its FOIA policies and procedures.

3. **Additional Consideration.** The Department and Coordinating Council shall continue its efforts with respect to the following items:

(a) Cost Benefit Analysis. The Coordinating Council has consulted with various experts, including Dr. Rebecca Gunnlaugsson, to update the cost benefit analysis used in evaluating whether a proposed project should receive discretionary incentives. The Coordinating Council shall continue this review of the cost benefit analysis and make further updates to the analysis consistent with this review as appropriate.

(b) Transparency/Accountability Reporting. The Coordinating Council has added a significant amount of new information to its annual reports, which are publicly available online. The Department also has made incentive data available online via the platform, "InformSC." The Department and Coordinating Council shall continue this additional reporting related to all projects approved for discretionary incentives.

(c) GEAR Program. The Coordinating Council shall continue working with the South Carolina Department of Revenue to implement and use the Governmental Enterprise Accounts Receivable (GEAR) program to recover outstanding repayment of grant funds by delinquent business entities that have failed to meet performance requirements.

4. **Mutual Release.**

(a) In consideration of the mutual covenants and other good and valuable consideration set forth in this Agreement, the receipt and sufficiency of which the Parties acknowledge, the Parties, on behalf of themselves, their heirs, successors, and assigns, by operation of law or otherwise, do hereby forever release, discharge, acquit, and hold harmless each other, of and from any and all claims, cross-claims, counterclaims, demands, causes of action, suits, debts, liens, contracts, agreements, accounts, warranties (expressed or implied), promises, liabilities, judgments, demands, arbitrations, damages, losses, costs, attorneys' fees, or expense of any nature whatsoever, in law or equity, whether known or unknown, suspected or unsuspected, claimed or unclaimed, fixed or contingent, relating to, connected with, resulting from, or touching upon or in any way arising out of the Dispute or out of the facts giving rise to the Dispute, whether accrued or hereafter to accrue, from the beginning of time through the Effective Date.

(b) For avoidance of doubt, Harpootlian acknowledges and agrees that he hereby releases any request, claim, or demand that the Department or Coordinating Council provide or disclose any additional information in response to the FOIA Requests or pursuant to the Summary Judgment Order and that the Department and Coordinating Council have no further obligation to provide or disclose any additional information in response to the FOIA Requests or pursuant to the Summary Judgment Order. The Department and Coordinating Council state that they have provided all responsive information to the FOIA Requests except as disputed concerning the portion of the Summary Judgment Order addressing the application of the confidential proprietary information exemption set forth at § 30-4-40(a)(5)(c).

(c) In connection with the waiver and release of claims set forth in this Agreement, each Party acknowledges that it is aware that it may discover facts in addition to or different from those that it may now know or believe to be true with respect to the subject matter hereof. Nonetheless, it is the intention of each Party to hereby fully, finally, and forever, settle and release all of the claims related to the Dispute, and the waiver and releases given in this Agreement will be and remain full and complete releases notwithstanding the discovery or existence of any such additional or different facts. Notwithstanding the foregoing, this Agreement does not in any way release the Parties of their obligations pursuant to this Agreement or to enforce this Agreement.

5. **Covenant Not to Sue.** Each Party agrees not to initiate or cause to be initiated on their behalf, any complaint, charge, claim, or proceeding against another Party before any local, state, or federal agency, court, or other body relating to or involving in any manner whatsoever the Dispute or the FOIA Requests.

6. **No Admission of Liability.** The Parties understand and agree that this Agreement is made in compromise of disputed claims, and that this Agreement, the consideration set forth in this Agreement, and the taking of any action pursuant to this Agreement, is not, and shall not be construed as, an admission of liability by any of the Parties, as the same is and always has been expressly denied.

7. **Representations and Covenants.** Each Party represents, covenants, and agrees that it (a) has the full right and authority to enter into this Agreement and that the person executing this Agreement on its behalf has the full right and authority to commit and to bind fully such Party, (b) has read and understands this Agreement, (c) has investigated the facts pertinent to this Agreement as it deemed necessary, (d) has not executed this Agreement in reliance on any promise, representation, or warranty not contained in this Agreement. The Parties have included this clause to preclude any claim that any Party was fraudulently induced to execute this Agreement and to preclude the introduction of parol evidence to vary, interpret, supplement, or contradict the terms of this Agreement.

8. **Public Information.** The Parties stipulate and agree that the terms of this Agreement constitute public information and may be provided to third parties pursuant to a request under FOIA.

9. **Miscellaneous Provisions.**

(a) **Effect of Waiver.** No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

(b) **Integration.** This Agreement, including the exhibits appended hereto, constitutes the complete and entire understanding and agreement between the Parties and supersedes any previous communications, representations, or agreements, oral or written, related to the subject matter of this Agreement.

(c) Modifications. No modification, amendment, or waiver of any of the provisions contained in this Agreement, nor any future representation, promise, or condition in connection with the subject matter of this Agreement, shall be binding upon any Party unless made in writing and signed by the Parties. A waiver of any term or condition of this Agreement will not be deemed to be, and may not be construed as, a waiver of any other term or condition thereof. All amendments or modifications of this Agreement shall be binding upon the Parties despite any lack of additional consideration so long as the same shall be in writing and executed by the Parties hereto in accordance with the other terms of this Agreement regarding modifications.

(d) No Assignment or Transfer of Claims. Each Party expressly covenants and represents that no portion of any claim that is the subject of the release provisions of this Agreement, has been, or will be, assigned or transferred by that Party to any person or corporation in any manner whatsoever, including by way of subrogation, operation of law or otherwise.

(e) Construction. This Agreement shall be construed without regard to the Party or Parties responsible for its preparation and shall be deemed as prepared jointly by the Parties hereto. In resolving any ambiguity or uncertainty existing herein, the Parties agree that no consideration or weight shall be given to the identity of the Party drafting this document.

(f) All Terms Contractual. Each of the Parties hereto acknowledges and agrees that the terms of this Agreement are contractual and not merely recitals and are the result of negotiations between Parties of equal bargaining positions. All recitals are incorporated by reference into this Agreement.

(g) Successors and Assigns. This Agreement shall inure to the benefit of, and shall be binding upon, each Party's respective successors, assigns, affiliates, subsidiaries, parent companies, predecessors, divisions, operating companies, officers, directors, agents, employees, representatives, shareholders, investors, accountants, and attorneys, individually and in the capacity indicated.

(h) Fees and Costs. Each Party shall bear its own attorneys' fees, expenses, and costs incurred in connection with the negotiation, drafting, and performance of this Agreement.


(i) Headings. Section and paragraph headings are for convenience only and shall not be considered for any purpose in construing this Agreement.

(j) Other Documents. Each of the Parties hereto agrees that it will execute and deliver all such other documents and instruments as may be necessary and appropriate to effectuate the terms hereof.

(k) Counterparts. This Agreement may be executed in counterparts and by facsimile or PDF signature, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

SOUTH CAROLINA DEPARTMENT OF COMMERCE

By: 
Name: Harry M. Lightsey III
Title: Secretary

COORDINATING COUNCIL FOR ECONOMIC DEVELOPMENT

By: 
Name: Daniel Young
Title: Executive Director

RICHARD A. HARPOOTLIAN

Richard A. Harpootlian

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COORDINATING COUNCIL FOR ECONOMIC DEVELOPMENT

By: _____
Name: Daniel Young
Title: Executive Director

RICHARD A. HARPOOTLIAN



Richard A. Harpootlian

EXHIBIT A

**SOUTH CAROLINA DEPARTMENT OF COMMERCE
FREEDOM OF INFORMATION REQUESTS
POLICY, FAQs & FEE SCHEDULE**

I. POLICY STATEMENT

At the Department of Commerce, we take public accountability and ~~transparency disclosure~~ seriously and always endeavor to comply with the letter and spirit of the South Carolina Freedom of Information Act, S.C. Code Section 30-4-10, et seq. (FOIA) (<https://www.scstatehouse.gov/code/t30c004.php>) because the public has a right to know how public dollars are spent, whether in pursuit of economic development or the operation of state government generally. We also take very seriously our obligation to protect the private proprietary and competitive business information of ~~South Carolina companies or company clients~~ and will continue to do so within the limits established by South Carolina law and this policy. In keeping with these dual obligations of public accountability and protection of private details that are not needed to reveal public costs, the Department of Commerce will ensure that requesters receive the information sought that is not exempt from public disclosure or is required to be disclosed pursuant to this policy.

II. FREQUENTLY ASKED QUESTIONS

A. How Do I Submit a FOIA Request?

Requests must be in writing by email or letter, which may be mailed, emailed, hand-delivered or faxed.

B. Where Do I Send a FOIA Request?

To ensure prompt receipt, requests should be sent to either of the following employees:

Karen B. Manning, Chief Legal Counsel (kmanning@sccommerce.com)
Alex Clark, Director of Marketing & Communications (aclark@sccommerce.com)
South Carolina Department of Commerce
1201 Main Street, Suite 1600
Columbia, SC 29201

Requests not sent to one of these employees will be redirected to Ms. Manning or Ms. Clark upon receipt.

C. Are There Any Charges for a FOIA Request?

Our state's FOIA law allows public bodies to charge reasonable fees associated with responding to FOIA requests. The Department of Commerce's standard fees are reflected in the Fee Schedule set forth in Section III below. However, the Department of Commerce will endeavor to respond to FOIA requests free of charge when disclosure of the information requested primarily benefits the public and when requests are not unduly burdensome. Fees will NOT be charged for the following:

1. Search, retrieval, and scanning of public records that require one (1) hour or less of staff time.
2. Redaction of public records.
3. Copies of 50 pages or fewer.
4. Electronic copies, which will be provided whenever practicable.

**SOUTH CAROLINA DEPARTMENT OF COMMERCE
FREEDOM OF INFORMATION REQUESTS
POLICY, FAQs & FEE SCHEDULE**

When fees do apply, a deposit not to exceed 25 percent of the total reasonably anticipated cost to make the public records available may be required prior to searching for or making copies of responsive records. The full amount of the total cost must be paid at the time of the production of the responsive public records.

D. How Can I Reduce the Cost of a FOIA Request?

FOIA requests that are vague and/or extremely broad often capture significant amounts of information that requesters are not seeking and can be costly for the agency and requesters to search for and disclose. Identifying information sought with as much specificity as is known will reduce the cost of a FOIA request. The Department of Commerce will work with requesters to reduce costs by narrowing the scope of requests and encourages requesters to contact Ms. Manning (803.737-1603) or Ms. Clark (803.737-1998) for assistance.

E. Will the Agency Create a List or Spreadsheet in Response to a FOIA Request?

Public bodies are not required to create a public record that does not exist. However, the Department of Commerce may create a list or spreadsheet in response to a FOIA request if it reduces the cost of response. Fees may apply if creation of the list or spreadsheet requires more than one hour of staff time.

F. How Long Will It Be Before I Get Information After Filing a FOIA Request?

The Department of Commerce will notify a requester of the availability of records and a cost estimate, including a 25 percent deposit (if applicable), as expeditiously as possible, but no more than 10 business days after receipt of the request. If the records sought are more than 24 months old, the Department of Commerce will respond in 20 business days. Whenever practicable, responsive public records will be provided at the same time as the initial response, but no more than 30 calendar days after the initial response (or receipt of a deposit) or 35 calendar days for records older than 24 months. Deadlines may be extended with the consent of the requester. If a request is unintelligible, vague or overbroad, the Department of Commerce will contact the requester to better ascertain the subject matter sought and reduce costs.

G. What Types of Information are Exempt from Disclosure Under FOIA?

The Department of Commerce's primary mission is to recruit private taxable investment and job creation to the state. When the Department of Commerce engages with prospective companies in the recruitment process, typically those interactions are pursuant to a nondisclosure agreement with the company (or the company's consultant) that requires that the agency maintain the confidentiality of the company's potential location or expansion plans (including the fact that the discussions are occurring) as well as the company's confidential business information. South Carolina's FOIA law provides broad exemptions related to the economic development recruitment process and requires limited disclosure when projects accept incentives and locate or expand in our state. Based on available exemptions (or other applicable statutory provisions), when requesters are seeking information regarding economic development recruitment and incentives, the following categories of public records will be withheld:

1) Working Papers Related to Private Company Recruitment (§30-4-40(a)(9))

This exemption covers all information related to recruitment of a private company to locate or expand in South Carolina. However, once companies commit to locate or expand in our state, the final incentive

**SOUTH CAROLINA DEPARTMENT OF COMMERCE
FREEDOM OF INFORMATION REQUESTS
POLICY, FAQs & FEE SCHEDULE**

agreement is subject to public disclosure after the project announces, or if a project chooses not to announce, once the incentive agreement has been finalized and the project is moving forward.

Generally, and subject to other exemptions where applicable, public records related to the implementation of a project pursuant to a final incentive agreement, including records related to the expenditure of public funds, are nonexempt.

2) Proposed Contracts & Incidental Documents (§30-4-40(a)(5))

This exemption covers information related to proposed contracts, including incentive agreements. Once the agreements are final, documents that are incidental to those agreements are also subject to disclosure. Accordingly, the Department of Commerce when requested, will disclose applications for discretionary incentives, and cost benefit analyses related to those incentives.

3) Confidential Information Provided for Economic Development (§30-4-40(a)(5)(c))

a. General Rule

Even after contracts become final, confidential business information of a company will be withheld or redacted. Typically, information withheld would be valuable to a company's competitors (e.g., average or individual wages, investment breakdowns, health plans, financial information, production volumes, etc.).¹

b. Average Wage Exceptions

Notwithstanding the foregoing, except in Tier IV counties, for any project approved on or after January 1, 2022 that has average wages of less than \$15.00/hour after excluding the top five percent of full-time positions to be created at the project, the Department of Commerce will confirm in response to a FOIA request related to discretionary incentives that such project has average wages (excluding the top five percent of positions) that are less than \$15.00/hour. The Coordinating Council shall review the average wage threshold in this disclosure requirement at its first quarter meeting to ensure the threshold appropriately reflects updated average county per capita wages as published annually by the South Carolina Department of Revenue.

Additionally, for any project approved on or after January 1, 2023, the Department of Commerce will disclose in response to a FOIA request, the average wage for the jobs on which a company claims job development credits.

c. Aggregate Average Wage Reporting

Aggregate average wage information included in job development credit quarterly reports submitted electronically starting in 2022 will be collected and reported in the annual report of the South Carolina Coordinating Council for Economic Development based on incentive approval category² starting with the report due on or before May 15, 2023.³

¹ Company trade secrets will also be protected under S.C. Code §30-4-40(a)(1).

² For purposes of job development credits, qualifying businesses are approved based on the categories set forth in S.C. Code Section 12-6-3360(A) and include manufacturing, distribution, research and development, processing, corporate office, certain tourism facilities.

**SOUTH CAROLINA DEPARTMENT OF COMMERCE
FREEDOM OF INFORMATION REQUESTS
POLICY, FAQs & FEE SCHEDULE**

4) Status or Amount of Tax Credit Claims (§12-54-240)

The status or amount of job development or job tax credit claims is confidential taxpayer information. Unauthorized disclosure of confidential taxpayer information results in fines and jail time, and accordingly, will be withheld.

5) Private Company Employee Contact Information (§30-4-40(a)(2))

~~Names and eContact information for individuals employed by or on behalf of a private company employees will typically be withheld from otherwise nonexempt public records. Notwithstanding any other FOIA exemption that may apply, Commerce will not invoke the personal, privacy exemption under FOIA §30-4-40(a)(2) to withhold the identity of corporate executives and lawyers communicating with public officials concerning an economic incentive deal absent a public interest justification for disclosure of that information.~~

H. Can I Find Out Whether a Company Has Performed as Promised?

1. Job Development Credits

~~Whether a company is claiming job development credits is confidential taxpayer information pursuant to S.C. Code Section 12-54-240. See Section G.4. above. However, companies approved for job development credits are not eligible to claim the credits unless they certify to the Department of Revenue that the company has met its minimum job and investment commitments. Thereafter, companies must maintain the committed jobs and investment and may not claim job development credits for any quarter in which the company does not maintain the minimum requirements.~~

2. Grants

~~Companies that benefit from discretionary grants awarded to counties are required to enter into Performance Agreements with the South Carolina Coordinating Council for Economic Development and the county Grantee. In its annual report, the Coordinating Council lists all companies that have met performance requirements during the prior year. Any company that does not meet performance requirements as set forth in its Performance Agreement will be required to repay a pro rata portion of any grant funds disbursed pursuant to the terms of the Performance Agreement; provided, however, that the Coordinating Council may negotiate and approve modified terms of repayment (or conclude performance has been satisfied) at its discretion when actual performance achieved or other facts and circumstances justify the modified terms and such modification is in the best interest of the State of South Carolina. Any repayments or modifications to terms of performance required will be disclosed in the annual report of the Coordinating Council. Additionally, Performance Agreements and performance repayments are subject to disclosure pursuant to FOIA.~~

~~qualified service related facilities, extraordinary retail establishments, service and retail in Tier IV counties, agricultural packaging and professional sports teams.~~

~~³ A test group of companies claiming job development credits will be required to file quarterly reports electronically using a newly developed system starting in the first quarter of 2022 with the remainder of companies claiming credits being phased in over the remaining quarters. Full electronic reporting will be in effect for 2023.~~

**SOUTH CAROLINA DEPARTMENT OF COMMERCE
FREEDOM OF INFORMATION REQUESTS
POLICY, FAQs & FEE SCHEDULE**

III. FEE SCHEDULE

- Labor Fee (for search, retrieval, and scanning).....\$45.00/hr
- Copies.....\$.10/page
- Color Copies.....\$.25/page
- Postage.....Actual

RECEIVED

Jan 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
Robert E. Hood, Circuit Court Judge

Case No. 2019-CP-40-05675

Richard A. Harpootlian, Respondent,

v.

South Carolina Department of Commerce; Secretary Robert Hitt in his official capacity; Coordinating Council for Economic Development; and Director Daniel Young in his official capacity, Defendants,

of which South Carolina Department of Commerce and Coordinating Council for Economic Development are the Appellants.

PROOF OF SERVICE

This is to certify that the undersigned counsel, a shareholder with the law firm Willoughby & Hoefler, P.A., has caused to be served this day one (1) copy of Appellants South Carolina Department of Commerce and Coordinating Council for Economic Development and Respondent Richard A. Harpootlian's **Joint Motion to Vacate Prior Order and to Dismiss Appeal** via electronic mail at the email addresses reflected in the Attorney Information System and as set forth below:

Richard A. Harpootlian, Esquire
Christopher P. Kenney, Esquire
Richard A. Harpootlian, P.A.
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

A copy of the email serving counsel as stated above is attached hereto as Exhibit 1.

s/John W. Roberts
John W. Roberts, S.C. Bar No. 78889

January 14, 2022
Columbia, South Carolina

EXHIBIT 1

Elizabeth P. Kurtz

From: John Roberts
Sent: Friday, January 14, 2022 1:49 PM
To: Elizabeth P. Kurtz
Subject: FW: Richard A. Harpootlian v. S.C. Department of Commerce and Coordinating Council for Economic Development | Appellate Case No. 2021-000794
Attachments: 2022-01-14 Joint Motion to Vacate Prior Order and for Dismissal.pdf; 2022-01-14 Filing Ltr re Joint Motion to Vacate and Dismiss.pdf; 2022-01-14 POS Joint Motion to Vacate and Dismiss.pdf

From: John Roberts
Sent: Friday, January 14, 2022 1:30 PM
To: Dick Harpootlian <rah@harpootlianlaw.com>; Chris Kenney <cpk@harpootlianlaw.com>
Cc: Tracey Green <TGreen@Willoughbyhoefer.com>
Subject: Richard A. Harpootlian v. S.C. Department of Commerce and Coordinating Council for Economic Development | Appellate Case No. 2021-000794

Counsel,

Good afternoon. Attached are copies of the Joint Motion to Vacate Prior Order and to Dismiss Appeal, filing letter, and proof of service (without a copy of this email) we will be filing later this afternoon in the above-referenced matter.

Thank you.

John

John W. Roberts, Esquire
WILLOUGHBY & HOEFER, P.A.
930 Richland Street
Post Office Box 8416
Columbia, South Carolina 29202
Telephone #: (803) 252-3300
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Confidentiality Notice: The information contained in this transmittal, including any attachment, is privileged and confidential information and is intended only for the person or entity to which it is addressed. If you are neither the intended recipient nor the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any disclosure, copying or distribution or the taking of any action in reliance on the contents of this transmittal is strictly prohibited. If you have received this transmittal in error, please contact the sender immediately by telephoning the sender at (803) 252-3300 and, also, please delete this transmittal from any computer or other data bank. Upon request, we will reimburse your reasonable costs of notifying us of a transmission error. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. This advice may not be forwarded (other than within the taxpayer to which it was sent) without our express written consent.

WILLOUGHBY & HOEFER, P.A.

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**ALSO ADMITTED IN WASHINGTON, D.C.
***ALSO ADMITTED IN CALIFORNIA
****ALSO ADMITTED IN NORTH CAROLINA

January 14, 2022

VIA ELECTRONIC FILING BY EMAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
ctappfilings@sccourts.org

RECEIVED

Jan 14 2022

SC Court of Appeals

RE: *Richard A. Harpootlian v. South Carolina Department of Commerce and Coordinating Council for Economic Development;*
Appellate Case No.: 2021-000794

Dear Ms. Kitchings:

Attached for electronic filing by email in accordance with Supreme Court Order 2021-08-25-02, part (b)(2), and pursuant to Rules 240, 260, and 261 of the South Carolina Appellate Court Rules, please find the **Joint Motion to Vacate Prior Order and to Dismiss Appeal** of Appellants South Carolina Department of Commerce and Coordinating Council for Economic Development and Respondent Richard A. Harpootlian.

By copy of this letter, we are serving counsel for the parties via email as permitted by Order 2021-08-25-02, part (d)(1), and attached is a proof of service to that effect. Pursuant to Rule 203(d)(1)(B)(iii), no filing fee is required because Appellants are entities of the State of South Carolina.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



John W. Roberts

JWR/epk

Attachments

cc: Richard A. Harpootlian, Esquire
Christopher P. Kenney, Esquire

OFFICES:

COLUMBIA | 930 RICHLAND STREET, COLUMBIA, SC 29201 | 803.252.3300 | FAX 803.256.8062
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