

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Evening Post Publishing Company, d/b/a)
The Post and Courier,)

C.A. No. 07-CP-08-2856

Plaintiff,)

**ORDER GRANTING JUDGMENT IN
FAVOR OF DEFENDANT AND DENYING
MOTION TO COMPEL**

vs.)

Berkeley County School District,)

Defendant.)

CLERK OF COURT
BERKELEY COUNTY, SC
64 GILLY C1 11/19/08
11:11 AM

I. INTRODUCTION

This matter is before the Court on Defendant Berkeley County School District's (hereinafter "District") motion for judgment on the pleadings, and on Plaintiff Evening Post Publishing Company's (hereinafter "Evening Post") motion to compel discovery made pursuant to Rules 12(c) and 37, SCRPC, respectively. These motions were heard by the Court on March 5, 2008. Immediately prior to the hearing on March 5, the Court met with counsel for the parties in chambers, and the District's counsel submitted to the Court for *in camera* inspection the documents sought under the Evening Post's Rule 37 motion along with other confidential documents relating to the District's claim of attorney-client privilege. Additionally, during the hearing counsel for the Evening Post submitted to the Court blank, form school district evaluation documents utilized in 2005 in connection with the Charleston County Board of Education's evaluation of its superintendent. Following the hearing, at the request of the parties and with leave of Court, the parties submitted reply and/or response memoranda to the Court on March 7, 2008. Attached to the District's memorandum was an article from the Evening Post's *Post & Courier* newspaper dated October 18, 2007, and the discovery request and response at issue in the Evening Post's motion to compel. All of these documents were received by the Court without objection.

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Following briefing by the parties and oral argument, the Court took the matter under advisement. Because materials outside the original pleadings were submitted to, and subsequently considered by, this Court, as authorized by Rule 12(c), SCRCF, the Court now treats the District's motion as a Rule 56 motion for summary judgment. Based on the submissions and argument of counsel, as well as the complete record before the Court, the Court hereby finds that the records at issue in this case are exempt from disclosure under the South Carolina Freedom of Information Act (FOIA) and from discovery under Rule 26, SCRCF. The Court, therefore, denies the Evening Post's motion to compel and grants the District's motion for summary judgment pursuant to Rules 12(c) and 56, SCRCF.

II. PROCEDURAL BACKGROUND

This civil action was commenced by the Evening Post on November 26, 2007 with the filing of its complaint against the District. The complaint generally alleges the District violated the FOIA, S.C. Code §30-4-10, et seq., by not making available public records to the Evening Post relating to the 2007 job performance evaluation of the District's Superintendent by the Berkeley County Board of Education (hereinafter "Board"). The complaint seeks both a declaration that the District violated the FOIA and an injunction that the District not withhold public records in violation of the FOIA.

The District filed a timely answer and affirmative defense denying it had violated the FOIA and asserting in relevant part that the public records sought are exempt from disclosure under the FOIA because the records are correspondence of legal counsel and attorney-client privileged records under FOIA, §30-4-40(a)(7). Included with and incorporated by reference into the District's answer and affirmative defense are the affidavits of Frank Wright, Board Chairman, and Kathryn Long Mahoney, attorney with the Board's legal counsel, Childs & Halligan, P.A., along with attachments, supporting the District's allegations that the records at issue are correspondence of legal counsel and attorney-client privileged. Contemporaneous with the filing of its answer and affirmative defense, the District filed its motion for judgment on the

pleadings.

Thereafter, the Evening Post submitted interrogatories and document production requests to the District. The District duly responded to these discovery requests, objecting to the Evening Post's Request to Produce number one, which sought "[a] copy of the questionnaire mailed to board members of Defendant as described in paragraph 3 of the affidavit of Frank Wright dated December 20, 2007." The District's objection asserts that the questionnaire is protected from discovery by attorney-client privilege. On February 6, 2008, the Evening Post filed a motion to compel production of that questionnaire pursuant to Rule 37, SCRPC. Both the District's Rule 12(c) motion and the Evening Post's Rule 37 motion were set for hearing before the Court on March 5, 2008.

On March 5, 2008, prior to the motions hearing, the District submitted to the Court for *in camera* review the following records, as required by the holding in City of Columbia v. ACLU, 475 S.E.2d 747, 749-50 (S.C. 1996):

- correspondence from attorney Daryl Hawkins to the Board;
- a memorandum dated August 22, 2007 from Childs & Halligan to all Board members;
- Board member interview questions prepared by Childs & Halligan and attached to the August 22, 2007 memorandum; and
- a memorandum dated September 14, 2007 from Kenneth L. Childs and Kathryn Long Mahoney to all Board members which included a compilation prepared by Childs & Halligan of information from confidential questionnaires and interviews.

During the hearing and attached to its Brief in Opposition to Defendant's Motion for Judgment on the Pleadings or Summary Judgment, the Evening Post submitted a document to the Court titled "Performance Review and Evaluation of the Superintendent, Charleston County School Board," dated October, 2005. Following the hearing and submitted with its Reply Memorandum and Opposition to Plaintiff's Motion to Compel, the District submitted to the Court Defendant's Responses to Plaintiff's Request for Production with attachments, Defendant's Answers to Plaintiff's First Interrogatories, and an article published by the Evening Post dated

October 18, 2007 titled, "Make Floyd's review public, lawyer says." All of these documents were submitted to and received by the Court without objection. Following the submission of the parties' additional memoranda and attached documents on March 7, 2008, the Court took the motions under consideration.

III. FACTUAL BACKGROUND

Based on the arguments of counsel and the record before the Court in this case, the Court makes the following factual findings pursuant to the standard of review established by Rule 56, SCRCF.

The facts relevant to the disposition of this motion are contained in the record, and are undisputed. According to the Complaint, the Superintendent of the District, Dr. J. Chester Floyd, is subject to evaluation by the Board of his performance under his contract with the Board. (Complaint, ¶3.) For the 2006-07 school year, this evaluation was conducted by the Board at its meeting on September 25, 2007. (Answer, Affidavit of Frank Wright, ¶7.)

The evaluation of Dr. Floyd was conducted pursuant to his employment contract with the Board. (Answer, Affidavit of Frank Wright, ¶2, and attachment 1 thereto.) In connection with the evaluation process, Mr. Wright requested legal advice from the law firm of Childs & Halligan (specifically, Kenneth L. Childs and Kathryn Long Mahoney) relating to the Superintendent's legal compliance with his contractual and other obligations, as well as issues relating to the Board's legal obligations under its contract with the Superintendent. (Answer, Affidavit of Frank Wright, ¶4.) Mr. Wright requested legal advice on behalf of the Board from Childs & Halligan in connection with the evaluation process in August 2007. In response to this request, Childs & Halligan sent a confidential memorandum on August 22, 2007, to each of the Board members. To facilitate these confidential communications, documents prepared by Childs & Halligan were sent to all Board members, including a questionnaire to be completed by all Board members individually, along with a list of questions an attorney with Childs & Halligan planned to ask each of the Board members in a confidential and personal telephone interview.

(Answer, Affidavit of Kathryn Long Mahoney, ¶3.)

Following Childs & Halligan's receipt of the individual Board members' confidential correspondence and communications, and based on this correspondence and notes taken by Ms. Mahoney during individual telephone conferences with the Board members, Childs & Halligan prepared a confidential summary of the Board members' communications on the issues identified in the interview questions. Then, on September 14, 2007, Childs & Halligan sent correspondence to all Board members, which correspondence was labeled, "Personal and Confidential: Contains Privileged Attorney/Client Information." (Answer, Affidavit of Kathryn Long Mahoney, ¶7,8.) Additionally, this correspondence of September 14, 2007 indicated that the documents constituted "confidential personnel information that should not be discussed with or disclosed to any third party." This correspondence was sent to the Board members as a basis for Childs & Halligan's further discussion regarding legal issues and obligations surrounding the evaluation. (Id.)

Following the Board members' receipt of this correspondence, at its meeting on September 25, 2007, Mr. Childs and Ms. Mahoney met with the Board during an executive session to provide legal advice to facilitate the Board's discussion of the Superintendent's performance under his contact. The Superintendent's performance was discussed by the Board in executive session as "discussion of an employment matter," pursuant to S.C. Code Ann. §30-4-70(a)(1) and "the receipt of legal advice where the legal advice relates to...matters covered by the attorney-client privilege," pursuant to §30-4-70(a)(2). (Answer, Affidavit of Kathryn Long Mahoney, ¶10.)

Following the Board's discussion of Dr. Floyd's performance during executive session at its meeting on September 25, 2007, Mr. Wright made a statement in public session that set forth the Board's evaluation of Dr. Floyd's performance for the 2006-07 school year and constituted the Board's evaluation. (Answer, Affidavit of Frank Wright, ¶7, and attachments 3 and 4 thereto.) Accordingly, the Board's evaluation of the Superintendent was made in public

session and has been and continues to be fully available to the Evening Post and the public.

What this lawsuit concerns is not the disclosure of the Superintendent's evaluation by the Board; the evaluation is on the public record. Rather, as set forth in the correspondence attached to the Complaint, the Evening Post seeks disclosure of "each individual School Board member's written evaluations of Superintendent Chester Floyd for the 2006-07 school year." This request is made pursuant to the FOIA. On October 10, 2007, Dr. Floyd responded to the Evening Post's FOIA request, indicating that the District was not in possession of the requested records, but that he understood any responsive documents would be protected by attorney-client privilege, and would not be subject to disclosure under the FOIA because any such records would constitute correspondence of legal counsel and/or information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy, pursuant to FOIA, §§30-4-40(a)(7) and (a)(2). Nevertheless, Dr. Floyd did send to the Evening Post a copy of the minutes of the Board's public discussion and action relating to the Superintendent's evaluation, which constitutes the written report of the Board's evaluation of the Superintendent. (Complaint, correspondence attached thereto dated October 10, 2007.)

The Evening Post was not satisfied by Dr. Floyd's response of October 10, 2007, and sent follow-up correspondence dated October 30, 2007. Again, this correspondence sought records pursuant to the FOIA, and requested any summary or report containing the compiled evaluations for Superintendent Chester Floyd for the 2006-07 year. Again, on November 7, 2007, Dr. Floyd responded to the October 30 FOIA request, reiterating that any summary or compilation of individual Board members' opinions about the Superintendent's performance under his contract had been prepared by legal counsel, including a confidential document based on telephone interviews and correspondence with the legal counsel. Dr. Floyd also reiterated his understanding that any responsive documents would be protected by attorney-client privilege and not subject to disclosure under the FOIA pursuant to §§30-4-40(a)(7) and (a)(2). (Complaint, correspondence attached thereto dated October 30, 2007 and November 7, 2007.)



Thereafter, by letter dated November 14, 2007, the Evening Post again requested under the FOIA "access to each individual School Board member's written evaluations of Superintendent Chester Floyd for the 2006-07 school year, and a summary of those evaluations. (Answer, Affidavit of Frank Wright, attachment 5.) In response to this request, Mr. Wright stated in a letter dated November 20, 2007 that:

...the Board does not maintain copies of documents completed by individual Board members as part of the evaluation process. To the extent individual Board members prepare individual evaluations, those documents are their private records and are not maintained by the Board. The documents developed during this process are protected by attorney-client privilege and constitute attorney correspondence, which the FOIA specifically excludes from disclosure, along with "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." S.C. Code Ann. §§30-4-40(a)(7) and (a)(2) (1991).

The minutes from the September 25, 2007 Board meeting, which Dr. Floyd previously provided to you, reflect in summary fashion the Board's evaluation of the Superintendent's performance for the 2006-07 school year, and constitute the Board's report on this matter. However, as you know, nothing has prohibited representatives from *The Post and Courier* from contacting Board members, as individuals, to ask for individual comments on any matter, as *The Post and Courier* has consistently done in the past.

(Answer, Affidavit of Frank Wright, ¶8, and attachment 5 thereto.)

Consequently, the specific documents sought through this lawsuit are:

1. The August 22, 2007 memorandum from Childs & Halligan to all Board members, which memorandum is labeled "Confidential" and specifically assured that all individual responses and comments would remain anonymous and in complete confidence and that all individual comments provided by Board members during the telephone interviews would remain confidential and shared with the Board only in summary fashion.
2. The Board member interview questions attached to the August 22, 2007 memorandum.
3. Confidential questionnaires anonymously completed by Board members, which were returned to legal counsel.
4. The notes prepared by Kathryn Long Mahoney from interviews conducted by her with eight of the nine Board members via individual telephone

interviews.

5. The memorandum dated September 14, 2007 from Kenneth L. Childs and Kathryn Long Mahoney to all Board members and labeled "Personal and Confidential: Protected by Privileged Attorney/Client Information" and which included a compilation prepared by Childs & Halligan of information from the confidential questionnaires and interviews.¹

Accordingly, all of the correspondence sought through this lawsuit is legal correspondence directly between attorneys and the client's constituent Board members expressly made in confidence and for the purpose of providing legal advice to the Board, concerning both the Superintendent's performance under his contract and entitlement to a pay raise thereunder, based "...upon a satisfactory performance evaluation as determined in good faith by the Board majority...." (Answer, Exh. 1, Att. 1, p. 4), along with other related legal issues concerning the Superintendent's performance under, and Board member compliance with, the Superintendent's contract.

IV. LEGAL ANALYSIS

The Freedom of Information Act exempts from disclosure correspondence of legal counsel and records subject to the attorney-client privilege. Section 30-4-40(a)(7). Additionally, and consistent with this exemption from disclosure, the FOIA further authorizes public bodies to meet in executive session for "the receipt of legal advice where the legal advice relates to...matters covered by the attorney-client privilege." Section 30-4-70(a)(2). The District contends that the records sought through this legal action constitute exempt legal correspondence and attorney-client privileged documents. The Evening Post, on the other hand, contends that the records at issue are not exempt under §30-4-40(a)(7), because the assertion of attorney-client privilege is a ruse to avoid disclosure of records pursuant to the FOIA.

Section 30-4-40(a)(7) broadly exempts from disclosure under the FOIA "correspondence or work products of legal counsel for a public body and any other material that would violate attorney/client relationships." In view of the record in this matter, it is beyond

¹ Documents listed in items 1, 2 and 5 above have been reviewed by the Court in camera.

dispute that the documents at issue constitute "correspondence...of legal counsel," as well as material that would violate attorney-client relationships, if disclosed. The resolution of the District's motion is based on the application of the FOIA, §30-4-40(a)(7) to the undisputed facts of this case. In determining the meaning of any statute, it is important to consider the plain meaning of the statute's words. Concerning statutory construction, the South Carolina Supreme Court has explained:

It is elementary that the Court's primary function in interpreting a statute is to ascertain the intention of the legislature, and when the terms of a statute are clear and unambiguous, the Court must apply them according to their literal meaning.

Anders v. S.C. Parole & Comm. Corr. Bd., 305 S.E.2d 229, 230 (1983). Moreover, the issue of interpretation of a statute is a question of law for the Court, and "the words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Vaughn v. McLeod Regional Medical Center, 642 S.E.2d 744, 746-47 (S.C. 2007).

From its plain meaning, three types of records are exempt under §40(a)(7): (1) correspondence of legal counsel for a public body; (2) work product of legal counsel for a public body; and (3) attorney-client privileged records. Therefore, under the ordinary meaning of the FOIA, "correspondence" of legal counsel must be given independent meaning from the other two types of records separately enumerated in §40(a)(7). According to the American Heritage Dictionary, "correspondence" means "a. communication by the exchange of letters. b. The letters written or received." This is exactly the type of records sought in this case, i.e., the correspondence of the Board's legal counsel to the Board members. The plain and ordinary meaning of §40(a)(7), therefore, exempts the records at issue here from disclosure without further analysis into whether these records may also constitute attorney work product or attorney-client privileged documents.

Furthermore, not only are the documents at issue correspondence of legal counsel, their disclosure would violate attorney-client relationships because the documents are protected

by the attorney-client privilege. The scope of the attorney-client privilege under South Carolina law is relatively broad. In addressing the scope of the attorney-client privilege, the United States District Court for South Carolina quoted with approval Professor Wigmore's statement of the essentials of the privilege, which are:

- (1) Where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection may be waived. 8 Wigmore, Evidence, §2292 (McNaughton Rev. 1961).

Duplan Corp. v. Dearing Milliken, Inc., 397 F.Supp 1146, 1160 (D.S.C. 1975).² Consistent with the scope of attorney-client privilege, as applied in South Carolina under the FOIA, the South Carolina Court of Appeals has held that the attorney-client privilege exemption under FOIA "...does not require that a public body actually be engaged in litigation, only that legal advice be rendered." Herald Publishing Company, Inc. v. Barnwell, 351 S.E.2d 878, 882 (S.C. App. 1986); see also, Cooper v. Bales, 233 S.E.2d 306, 308 (1977) (holding minutes of school board meeting reflecting legal advice were protected by the attorney-client privilege and exempt from disclosure under FOIA); Demming v. Housing and Redevelopment Authority of Duluth, Minnesota, 847 F.Supp. 130, 132-133 (D. Minn. 1994).

Further, the attorney-client privilege protects all communications relating to the rendition of legal services and advice, and not merely the legal advice itself or communications by attorneys performing a strictly legal function. See, e.g., In Re: LTV Securities Litigation, 89 F.R.D. 595, 600-602 (N.D.Tex. 1981) (holding that the attorney-client privilege "...protects from forced disclosure any communication from an attorney to his client when made in the course of giving legal advice.") Additionally, the attorney-client privilege protects not only the giving of

² See also, Drayton v. Industrial Life & Health Ins. Co., 31 S.E.2d 148, 152 (S.C. 1944) ("The general rule excludes from evidence confidential communications of professional nature between attorney and client...."); S.C. State Hwy. Dept. v. Booker, 195 S.E.2d 615, 619-20 (S.C. 1973) (stating: "South Carolina recognizes privilege in civil matters in attorney-client relations...[t]his privilege is based on the wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor...."); State v. Thompson, 495 S.E.2d 437 (S.C. 1998) (expansively applying attorney-client privilege).

professional advice, but also the giving of the information to the lawyer to enable him to give sound and informed advice. The United States Supreme Court has explicitly discussed the broad scope of the attorney-client privilege:

...the privilege exists to protect not only the giving of professional legal advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice. [Citation omitted.] The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.

Upjohn Co. v. United States, 449 U.S. 383, 390 (1981). Singularly, information gathered in the course of the attorney-client relationship does not become discoverable or outside of the scope of the attorney-client privilege solely because the client makes other use of the information, or because non-lawyers could have gathered the information or made the communications, as non-lawyers would not bring to bear the same training, skills and background possessed by attorneys and necessary to make professional, independent analysis and legal recommendations. Id. See also, In Re: LTV Securities Litigation, 89 F.R.D. at 601.

The scope of the attorney-client privilege also recognizes that communications with attorneys may need to extend to consideration of moral, economic, social and political factors consistent with a lawyer's duty to exercise independent professional judgment and to render candid legal advice with reference to not only the law but other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. See Model Rules of Professional Conduct, Rule 2.1.

Finally, the predictability of confidentiality is central to the role of the attorney and critical to the client's ability to receive effective and comprehensive legal advice; consequently, the attorney-client privilege protects from forced disclosure any communications from any attorney to his client when made in the course of giving legal advice. Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1370-71 (8th Cir. 1997). Communications from an attorney to a client are privileged if the statements reveal, directly or indirectly, the substance of a confidential

communication by the client. Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D.Ill. 1980).

The letters, questionnaires, and notes prepared by the Board members and Childs & Halligan at issue in this case fall squarely within the attorney-client privilege. The United States Supreme Court's Upjohn decision specifically found questionnaires and notes of legal counsel reflecting responses to interview questions prepared by attorneys and answered by employees of the client to be protected by the attorney-client privilege, even though they did not relate to actual litigation. Likewise, the Minnesota Supreme Court in Kobluk v. Univ. of Minn., 574 N.W.2d 436 (Minn. 1998), specifically held that a matter committed to a professional legal advisor is prima facie so committed for the sake of legal advice and that attorney consultation and advice concerning the review of a professor's promotion, and subsequent denial of tenure, was legal advice for the purpose of establishing the attorney-client privilege. See, also, Spectrum Systems v. Chemical Bank, 581 N.E.2d 1055 (NY 1991), and Shew v. Freedom of Information Commission, 714 A.2d 664 (Conn. 1998) (both cases finding that communications with legal counsel relating to and/or constituting personnel decisions and investigations constituted legal advice).

The contentious circumstances around the evaluation process of the Superintendent last summer and fall are significant to the Court's decision. The evidence before the Court documents serious disagreements between Board members and the Superintendent, including requests by a Board member for a criminal investigation of the Superintendent, along with other assertions which gave rise to concerns about the Board's ability to comply with contractual obligations to the superintendent, as well as concerns about good faith contractual compliance and possible litigation. Serious legal issues or legalities were present concerning the Board's evaluation of the Superintendent's performance in light of the Board's contractual obligations, and the Superintendent does have special rights under his contract and by virtue of his status as a public employee. Additionally, the information reflected in Childs & Halligan's

communications with Board members and the summary prepared by Childs & Halligan was necessary to supply a basis for legal advice concerning the Board's compliance with its contractual obligations to the Superintendent as well as to avoid legal complications relating to contractual compliance and other matters. See, Upjohn Co.; Kobluk; and Shew.

Childs & Halligan's correspondence, questionnaires and interview notes are exactly the kind of documents protected in Upjohn, and were created under circumstances similar to those in Kobluk and Shew. Ultimately, records reflecting interviews and data necessary for the rendering of legal advice concerning personnel matters are considered to be part and parcel of the legal advice—even if the interviews and information could have been conducted and developed by non-lawyers, and even if the information could also be used for business purposes.³ Here, the relevant facts were the Board members' opinions, concerns, criticisms and praise relating to the Superintendent's performance. Although this underlying information could have been gathered and summarized by non-lawyers, under the circumstances of the Board's request for legal advice, Childs & Halligan would not have had the degree of confidence it had with respect to this information, its completeness, and the candor of Board members, nor would it have been developed with an eye toward the legally relevant.⁴ This is precisely why courts recognize that the attorney-client privilege protects investigations performed by legal counsel or under their direction and supervision made in connection with rendering legal advice.

Accordingly, this not a situation in which lawyers simply referred to non-privileged information in providing legal advice, but where a request for legal advice led to the development of privileged information upon which legal counsel could rely as a basis for legal

³ As stated by the court in LTV, "Moreover, while in-house accountants or lay investigators could have been employed to investigate the events in question, neither would have brought to bear the same training, skills and background possessed by attorneys and necessary to make the professional independent analysis and legal recommendations sought by the LTV Board of Directors." LTV, 89 F.R.D. at 601.

⁴ For example, in the article written by Mr. Andy Paras and published by Evening Post on October 18, 2007, Mr. Paras writes, regarding Board member Jim Royce: "Jim Royce, who has been a critic of Floyd, said the evaluations would have probably been written differently had the school board members known they could be made public."

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advice asked for and given in an effort to minimize the risk of, and avoid litigation, while at the same time ensuring the Board fulfilled its legal obligations under its contract with the Superintendent. As a result, the documents concerning and reflecting communications between Childs & Halligan and the Board and its members properly are protected by the attorney-client privilege, and are exempt from disclosure under the FOIA, 30-4-40(a)(7).

Public Policy Considerations

The Evening Post has expressed concerns about the possible over-use of attorney-client privilege to defeat the public policy expressed in the FOIA. The Court respects these concerns; however, it is the FOIA itself that expressly recognizes in plain statutory language the attorney-client privilege as an exemption to both the disclosure of records and public meetings. Sections 30-4-40(a)(7) and 70(a)(2). Additionally, only two reported cases exist in South Carolina involving the assertion of the attorney-client privilege as an exemption under FOIA, and both of these cases upheld the reliance on the attorney-client privilege exemption. See Herald Publishing Co. v. Barnwell, 351 S.E.2d 878 (S.C. App. 1986); Cooper v. Bales, 233 S.E.2d 306 (S.C. 1977). In light of the privilege's limited use as an exemption under the FOIA despite being approved of by the courts, it is doubtful that it would now be over-used. Further, any sudden over-reliance upon the privilege to circumvent the General Assembly's intent of the FOIA could easily be remedied by the General Assembly, particularly given the political power of the press. Moreover, the General Assembly's broad exemption in the FOIA of correspondence of legal counsel and attorney-client privileged records clearly manifests both its intent that public bodies be able to seek legal advice and communicate freely and fully with legal counsel with confidence that these communications will not necessarily be subject to public disclosure, as well as its recognition of the fact that open dialogue between lawyer and client is essential to effective representation and ultimately sound decision-making by public bodies with respect to the myriad legal issues they face; thereby serving the greater public good.

Likewise, nothing in the FOIA or state law requires a school board to evaluate a

superintendent's performance. Accordingly, no law or public policy is being skirted or violated, nor would the public be denied access to information the legislature determined it ought to have by keeping individual school board members' personal opinions about a superintendent's contractual performance in confidence. To the contrary, the FOIA expressly recognizes the sensitive nature of such evaluation data and the value of confidential discussion of public employees' performance. Section 3-4-70(a)(1) provides: "A public body may hold a meeting closed to the public for one or more of the following reasons: (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee...." Consequently, there is no public policy providing that the public has a right to know the individual Board members' thoughts about the Superintendent's performance. In fact, had the Board's over-riding concern been to ensure that no record would be created regarding this matter and that no issue of disclosure of records under FOIA would ever exist, it would have been fully in its rights to create no "paper trail" and to simply have oral discussions regarding the Superintendent's performance in executive session pursuant to §70(a)(1).

However, when the Board asked Childs & Halligan for legal advice concerning this and related issues, Childs & Halligan determined to develop performance data in a systematic and comprehensive manner, in order to have complete and legally defensible data with respect to the provision of the Superintendent's contract that requires "[t]he Superintendent's annual compensation shall be increased upon a satisfactory performance evaluation determined in good faith by the Board majority...." (Answer, Wright Aff., Att. 1, p. 4.) This information was determined to be necessary by legal counsel to advise the Board concerning its obligations under the contract, the significance of contractual language, and the scope of its evaluation (which ultimately was determined to be very brief and summary—limited only to a finding by the Board that a majority of the Board determined the Superintendent's performance to be satisfactory). Much of this legal advice was given orally to the Board Chairman and to the Board in executive session on September 25, 2007, held under §30-4-70(a). Given the circumstances

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surrounding the Superintendent's evaluation on September 25, 2007, it was reasonable for the Board to seek legal advice in advance of the evaluation, and the communications between Board members and Childs & Halligan relating to the Board's evaluation properly constitute attorney-client privileged communications.

In summary, the Evening Post's counsel clarified at the hearing that what is sought through this case is primarily the nine individual performance assessment forms of the Board members. In seeking these records, the Evening Post is seeking to make public the individual assessments which the Board itself has never seen, the Superintendent has never seen, and which have been kept confidential in the files of Childs & Halligan. Moreover, the individual assessment forms do not constitute the Board's evaluation of the Superintendent; rather, the Board's evaluation of the Superintendent is simply what was stated by Mr. Wright in open session on September 25, 2007. During this public meeting, Mr. Wright asked the Board if any other Board members had any comments—none were made. Accordingly, the public interest in knowing the Board's assessment of the Superintendent's performance has been satisfied. Likewise, any member of the public is free to ask any Board member his or her opinion of the Superintendent's performance (this is different, however, than asking a Board member for a copy of his or her confidential performance assessment completed at the request of the Board's legal counsel). Accordingly, the Board's evaluation of the Superintendent has been made public; the Board asserts attorney-client privilege over only those records reflecting individual thoughts and opinions of Board members expressed with legal counsel and which served as a basis for legal advice.

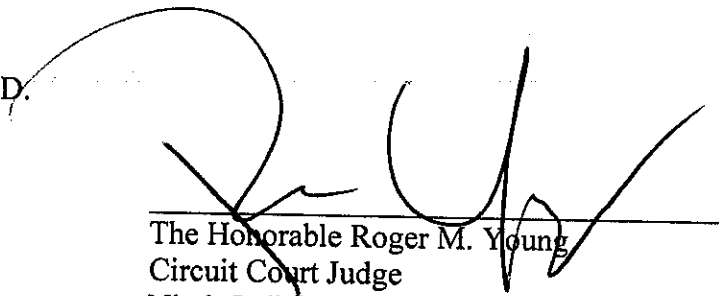
V. CONCLUSION

Because the records sought through this lawsuit and in Plaintiff's motion to compel are both correspondence of legal counsel and privileged attorney-client communications made in confidence and in connection with rendering legal advice, the District has properly asserted these records to be exempt from discovery under Rule 26, SCRCP, and from disclosure

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under §30-4-40(a)(7). The Court therefore grants summary judgment to the District on the Evening Post's claim against it, and hereby enters judgment in favor of the District and denies the Evening Post's motion to compel.

AND IT IS SO ORDERED.



The Honorable Roger M. Young
Circuit Court Judge
Ninth Judicial Circuit

May 12, 2008
Cher, South Carolina