

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	Civil Action No.: 2018-CP-40-2285
)	
State Election Commission,)	
)	
Plaintiff,)	Order Granting Motion for a
)	Preliminary Injunction
v.)	
)	
James John Todd Kincannon)	
)	
Defendant.)	

Introduction

The State Election Commission (Commission) filed a motion for equitable relief in the form of a preliminary injunction pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. §30-4-110 (Supp. 2017). This appears to be a case of first impression regarding the application of § 30-4-110, as amended by 2017 Act 67, section 5, effective May 17, 2017.¹ Based on the parties' written submissions and oral arguments, the Court GRANTS the Commission's motion for preliminary injunction pursuant to S.C. Code Ann. § 39-4-110 (Supp. 2017).

At the beginning of the hearing, the Court asked if all parties were in attendance. Counsel for the Commission was in attendance. However, John James Todd Kincannon (Kincannon or Defendant) was not present. Counsel for the Commission published a portion of an email addressed to my clerk and copies to

¹ The Commission's Complaint for Declaratory Judgment also had a second cause of action that sought a declaration under Title 7 of the S.C. Code Ann., that there was no binding arbitration required or allowed under the Title. Prior to the hearing on the motion, the Commission withdrew that cause of action by email dated June 17, 2018, with a copy to defendant, to the Court. See Court Ex. 1.

counsel, she had received from the Kincannon at approximately 9:48 a.m. which acknowledged that Mr. Kincannon had notice of the hearing and would not be present. Court Ex. 1. Counsel for the Commission also published the names of the several attachments to the email and provided the Court with a printed copy of each. The Court then instructed the bailiff to call Kincannon's name. The bailiff duly called Kincannon's name, no one appeared and the bailiff reported to the Court that no one was in the hall outside of the Court. The Court conducted the preliminary injunction hearing in Kincannon's absence.

Factual/Procedural Background

Minutes before the March 30 filing deadline for the 2018 election, Defendant John James Todd Kincannon (Kincannon or Defendant") submitted via email what he called "Contingent Candidate Filings" to run either for the Republican nomination for Greenville County Probate Judge or alternatively, if someone filed to run in the Republican primary for the Greenville county Probate Judge, the Republican nomination for Attorney General. See Compl. Ex. 4. The Commission noted three deficiencies in Kincannon's submissions. See Compl. Ex. 10. To date, Kincannon has not challenged the deficiencies detailed in Ex. 10 in any court of law, either state or federal.

Over the course of the four weeks after Kincannon's purported candidate filings, he sent five direct² requests for public records³ under the Freedom of Information Act

² In the explicit requests, Kincannon actually cites to and requests information under the FOIA.

³ "Public record" is defined in § 30-4-20(c).

("FOIA"), S.C. Code § 30-4-100 *et seq.*, *see* Compl. Exs. 6, 11, 12, 14, & 18. Additionally, Kincannon sent numerous requests, to the Commission without using the express term "FOIA requests" (indirect FOIA requests) demanding information, documentation, admissions, and position statements, many under the guise of requesting "evidence" or other information for lawsuits that he threatened to file or needed to complete his order in his alleged arbitration with the Commission. *See e.g.*: Compl. Exs. 12, p.1 ("it is critically important to avoid further needless legal controversy that you respond to my questions in this email so that I can determine, as a matter of law, whether ... "; 19, p. 2 ("Please ,,admit you are wrong about the email issue ..."); 23, p. 1 ("This is a critically important question and I need your answer as soon as possible ..."); 31, p. 1 ("Please tell me every single thing the State Election Commission and the Greenville County Board of Voter Registration and Elections believe is necessary for me to get that two step (sic) process done.").

Kincannon demanded that the Commission participate in a confidential arbitration with him about his purported candidacy for Greenville County Probate Judge and, when it did not, claimed that the Commission had defaulted, *see, e.g.*, Compl. Exs. 42, 51, & 52; sought discovery through FOIA requests and not discovery pursuant to the SCRCF from the Commission in a fictional election protest that Kincannon purported to file on the Commission's behalf against Kincannon's own filing, *see* Compl. Exs. 53-60; threatened to file a federal civil rights lawsuit against Commission officials for \$25,000,000, *see, e.g.*, Compl. Exs. 36 & 42; and questioned the ethics of the Commission, *see, e.g.*, Compl. Exs. 14, 15, 19, & 32. Kincannon sent

at least forty emails to the Commission, and the Commission received another seven emails from his mother's email account, at least some of which Kincannon has admitted that he authored. *See* Compl. Ex. 41.

As just some examples of what Kincannon wrote in these emails, he claimed that "[t]here is no judge in the State of South Carolina who has as much expertise in election law as" he does and that he was "a one-man candidate, litigator, and election law expert." Compl. Ex. 14. He asserted that the Commission's application of South Carolina election law was "highly unethical." Compl. Ex. 15. He sought "to shame" the Commission "into abandoning" what he claimed were "unethically frivolous legal positions." Compl. Ex. 19. He wrote that he was "just trying to cripple [the Commission officials'] ability to defend [themselves] effectively in litigation." Compl. Ex. 41. He compared the Commission to the Japanese in World War II and the Soviets in Afghanistan. *See* Compl. Exs. 52 & 35. He proclaimed that "[e]ndlessly screwing with arrogant, capricious bureaucrats to the point that people think there might be something wrong with [him] is one of [his] all-time favorite pasttimes (*sic*)." Compl. Ex. 18.

The Commission responded to Defendant's email requests on April 6, 2018 and April 19, 2018 (respectively Compl. Exs. 13 and 39 (the Commission stated: "Additionally, given the breath of these below enumerated requests, the SEC is considering filing a request for a hearing with the circuit court to seek relief from those unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests pursuant to S.C. Code § 30-4-110.") Based on these numerous, lengthy, and

frequently abrasive communications, the Commission sought declaratory and injunctive relief on April 25, 2018. Along with the Complaint, the Commission filed this motion for a preliminary injunction.

Defendant has not answered the Complaint. He emailed a Demurrer to the Clerk of Court, which he admits was not accompanied by a filing fee and has not been listed on the Clerk of Court's file. *See* Suppl. Ex. 37.

After the Complaint was filed, Kincannon's communications to the Commission initially slowed down. *See* Suppl. Exs. 1-36. But not for too long. He sent a sixth FOIA request on May 23, *see* Suppl. Ex. 24, and a seventh on May 31, *see* Suppl. Ex. 30. He sent his eighth FOIA request on June 11. *See* Suppl. Ex. 34.

During this time, Kincannon has sent other communications to the Commission. In one email, Kincannon asked the Commission to request that the Attorney General authorize the Commission "to obtain an opinion from a neutral legal ethics expert as to the propriety of the McNair Law Firm continuing to service as counsel in this matter despite its support for incumbent candidates and institutional opposition to liberal ballot access laws" and said that payment of any fees to McNair was a contribution to the Democratic nominee for Greenville County Probate Judge. Suppl. Ex. 29. In a third email, Kincannon said that the Commission "fell right into [his] trap! JUST LIKE [HE] KNEW [IT] WOULD!!! Never change, State Election Commission. Never change." Suppl. Ex. 34.

Law/Analysis

The purposes of FOIA are to afford to the citizens transparency in government and to allow citizens to ascertain the activities of public officials.

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

S.C. Code Ann. § 30-4-15 (2007). The FOIA Act was amended in 2017 to allow public bodies to seek relief from abuses of FOIA. S.C. Code Ann. § 30-4-110 provides, in pertinent part:

(A) A public body may file a request for hearing with the circuit court to *seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests*, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure. . . .

(C) If a person or entity seeking relief under this section prevails, the court may order:

- (1) equitable relief as he considers appropriate;
- (2) actual or compensatory damages; or
- (3) reasonable attorney's fees and other costs of litigation specific to the request, unless there is a finding of good faith. The finding of good faith is a bar to the award of attorney's fees and costs.

(D) If a court determines that records are not subject to disclosure, the determination constitutes a finding of good faith on the part of the public body or public official, and acts as a complete bar against the award of attorney's fees or other costs to the prevailing party should the court's determination be reversed on appeal. . . .

S.C. Code Ann. § 30-4-110(Supp. 2017)

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The Complaint is limited to relief under FOIA, seeking only equitable relief in the form of Preliminary and Permanent Injunctions. It does not address the merits or efficacy of Defendant's alleged contingent filings for either the office of Probate Judge in Greenville County or the Office of Attorney General of the State of South Carolina. Further, the Complaint filed pursuant to the provisions of FOIA have no relationship to the criminal action pending against Defendant.

An injunction is equitable relief. *See Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). A litigant must meet three elements to obtain a preliminary injunction: "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). The decision to grant a preliminary injunction is in the sound discretion of the circuit court. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011).

The Commission has met all three elements of the preliminary injunction test, and therefore, it is entitled to the injunction it seeks.

I. Without an Injunction, the Commission Faces Irreparable Harm.

The South Carolina Supreme Court long ago explained that "whether a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law for a wrong, are questions that are not decided by narrow and artificial rules." *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 16 (1939). A court must instead take a "realistic[]" view of the particular situation. *Id.* In this matter, the

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FOIA specifically grants an agency the right for equitable relief when a State agency receives FOIA requests that are “with unduly burdensome, overly broad, vague, repetitive, or otherwise improper.”

Section 30-4-110 allows this Court to grant the Commission, as an agency of the State and a public body under FOIA equitable relief from unduly burdensome, overly broad, vague, unduly repetitive, or otherwise improper requests. I find that the Commission has made a *prima facie* case that both the direct and indirect FOIA requests made by Kincannon are unduly burdensome, overly broad, vague, unduly repetitive, and/or otherwise improper requests. For example, Defendant asked for every email that any staff of the Commission has ever written. Compl. Ex. 14. The request is not limited by time or subject matter. As the Commission stated in its April 19 response to Defendant, responding to such a broad request could ultimately compromise the security of the State’s election infrastructure.

Many of the indirect requests/demands for what Kincannon styles as his first amendment right to public information are more in the nature of discovery requests such as interrogatories and requests for admission. While the Court is unaware of a decision in South Carolina regarding the use of FOIA for discovery, the clear legislative purpose is to ensure openness and transparency in government, as is addressed further below. Defendant’s emails seeking what essentially amounts to discovery are not sent for a proper purpose. As only a brief review of the numerous emails sent by Kincannon demonstrate, the requests are generally vague, repetitive, and for an improper purpose.

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I find that the Commission has made a *prima facie* case that Kincannon's direct FOIA requests and indirect FOIA requests in the form of discovery requests, be they for documents, requests to admit or interrogatories, are unduly burdensome, overly broad, vague, repetitive, and otherwise improper. Under the clear terms of S.C. Code Ann. § 30-4-110, the Commission has a statutory right to equitable relief such as this preliminary injunction here.

Here, the Commission faces irreparable harm if no injunction is entered. As with every election year, this is a particularly busy time for the Commission, as it performs its critical role of ensuring elections run fairly and smoothly. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("A State indisputably has a compelling interest in preserving the integrity of its election process."). The Commission has just overseen the primary, and it is currently preparing for the runoff election on June 26, including runoffs for the offices of Governor and Attorney General. Immediately after that, it will turn to the November general election. This work includes preparing election definitions for all voting machines used in the State, printing ballots, ensuring ballots are timely mailed to military and overseas voters in accordance with federal and state law, overseeing voter registration, training election officials, coordinating voter-outreach activities, and working to secure the State's critical election infrastructure. *See* Compl. ¶ 15.

Kincannon's constant stream of FOIA requests, threatening emails, and improper use of FOIA for admitted discovery purposes such as getting "evidence" for his threatened law suits takes the Commission's attention away from its important

tasks during an election season. Without an injunction that stops any more requests and emails, the Commission will have to spend precious time reviewing and potentially responding to Kincannon rather than preparing for the upcoming elections. That harms not only the Commission, but also voters across South Carolina who need the Commission's focus on its statutory duty of overseeing elections.

II. The Commission Is Likely to Succeed on the Merits.

This element of the preliminary-injunction test does not require a litigant to "prove an absolute right." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005). Instead, a litigant "need only present 'a fair question to raise as to the existence of such a right.'" *Id.* (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)), *holding modified on other grounds by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). As long as a litigant can make a "*prima facie* showing," the injunction should be issued. *Id.*

The Commission has made a *prima facie* showing it is likely to succeed on the merits of this declaratory judgment. Kincannon's FOIA requests, which lack any date restrictions, are incredibly broad and burdensome—one even demanded the entire email account of every Commission staff member. *See* Compl. Ex. 14. Moreover, the requests have been sent for improper purposes. Some requests are clearly designed to be part of his discovery strategy in future litigation. *See, e.g.*, Compl. Exs. 16 & 18. Courts have consistently held using FOIA requests for discovery purposes, is an improper use of FOIA. *See, e.g., Hawkins v. Drug Enf't Admin.*, 347 F. App'x 223, 224

(7th Cir. 2009) ("FOIA's purpose is to ensure an informed citizenry, not to serve as a discovery tool.").

Other FOIA requests were sent in communications that demonstrate Kincannon's lack of good faith (improper purpose) in dealing with the Commission. For example, in an email requesting copies of the statements of intention of candidacy for people running for Attorney General, Kincannon laughed that the Commission "fell right into [his] trap." Suppl. Ex. 34. ; *see also* Compl. Ex. 41 ("I'm just trying to generate good clean evidence so that I can set you up for a massive lawsuit ...").

Kincannon's other emails demonstrate a pattern of harassing and threatening the Commission. Unsatisfied with the Commission's conclusion about his March 30 "Contingent Candidate Filings," Kincannon put forth various theories for why the Commission was wrong and why he should be the nominee for Greenville County Probate Judge or in the Republican primary for Attorney General and threatened to bring suit in federal court regarding his theories.

Kincannon's recent email withdrawing his FOIA requests does not make this case moot. *See* Suppl. Ex. 40. A case is not moot if the "issue raised is capable of repetition, yet evading review." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26-27, 630 S.E.2d 474, 478 (2006). That is exactly the case here. Although Kincannon has recently claimed that he has no more need to use FOIA, he has said that before, and yet sent multiple more FOIA requests. *See* Suppl. Exs. 3, 24, 30, & 34. He has also said that he would use his "confederates" to send FOIA requests if a court ruled he were not allowed to send the requests himself. Suppl. Ex. 17.

Before the lawsuit was filed, Kincannon has repeatedly argued with the merits of the Commission's conclusions about his filings, *see, e.g.*, Compl. Ex. 14; declared that a new filing period for Greenville County Probate Judge had opened, *see, e.g.*, Compl. Exs. 24 & 26; threatened multimillion-dollar lawsuits, *see, e.g.*, Compl. Ex. 36; concocted a fictional arbitration, *see, e.g.*, Compl. Exs. 42 & 51; and served discovery and subpoenas in an election protest case that Kincannon claimed to file on the Commission's behalf against Kincannon's own filing, in which Kincannon declared himself to be a "self arbitrator," *see* Compl. Exs. 46–49, 53–60. Since the lawsuit was filed, Kincannon's strategy has included attacking the Commission's attorneys, *see, e.g.*, Suppl. Exs. 25 & 26; accusing the Commission's general counsel of being "just an unwitting accomplice [sic] to McNair's scheme," to which he would launch "an unlimited, no-holds barred legal counterstrike," Suppl. Ex. 28; and claiming that the Commission was supporting the Democratic nominee for Greenville County Probate Judge, *see* Suppl. Exs. 29, 30.

None of what Kincannon is doing—from repeated FOIA requests, to threatening lawsuits, to seeking discovery pursuant to FOIA in the fictional proceedings, to repeated insults and vexatious language—is proper. Therefore, the Commission is likely to prevail on the merits of its claims regarding the vague, overly broad, repetitious, unduly burdensome and improper purposes of Kincannon's direct and indirect FOIA claims.

III. The Commission Has No Adequate Remedy at Law.

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Without a preliminary injunction, the Commission will continue spending time dealing with Kincannon's never-ending deluge of FOIA requests, emails, subpoenas, and other documents. The Commission has to take each of Kincannon's requests for information, admissions, documents or answers seriously. Under FOIA, the Commission's failure to respond or respond properly to Kincannon's demands, whether denominated "FOIA" or not, could subject the Commission to costs and/or attorney's fees. *See* S.C. Code Ann. § 30-4-100. Kincannon has up to a year to claim that the requests he made, whether direct or indirect, which the Commission did not answer or did not answer to his satisfaction were not properly answered under FOIA and bring suit. *Id.* FOIA provides that a request for information under the Act must be in writing. Many of Kincannon's email requests ask of responses, admissions information and documents, yet do not reference FOIA. They are still requests for information in writing to the Commission .

No matter what remedy the Commission eventually obtains, no future judgment or decree can give it that time back. *Cf. Bartlett's Familiar Quotations* 320 (17th ed. 2002) (Benjamin Franklin: "lost time is never found again"). A preliminary injunction is the only way to ensure that the Commission can spend time now to ensure that it is doing its job for the upcoming elections.

Conclusion

ACCORDINGLY, THIS COURT FINDS:

The Commission has made a *prima facie* showing that:

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(1) Kincannon's FOIA requests, whether denominated as such or whether denominated as seeking discovery and/or "evidence" for cases he is threatening to file in state or federal court or in political party hearings of his own creation are unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests within the meaning of S.C. Code Ann. § 30-4-110(A);

(2) the Commission will be irreparably harmed if the preliminary injunction is not issued;

(3) the Commission is likely to succeed on the merits of this case; and

(4) the Commission has no adequate remedy at law.

IT IS FURTHER ORDERED THAT:

The Court GRANTS the motion for a preliminary injunction. Kincannon, is hereby:

(1) enjoined and prohibited from making any additional direct or indirect FOIA requests relating to public documents from the Commission regarding Kincannon's filings for any office in the 2018 election cycle while this case is pending; and

(2) enjoined and prohibited from soliciting or otherwise asking or encouraging any other person from making any additional inquiries or demands relating to public documents or discovery from the Commission regarding Kincannon's filings for any office in the 2018 election cycle while this case is pending; and

(3) the Commission is not required to and is relieved from responding to any written requests for public records or discovery submitted by Kincannon or someone

solicited by him relating to Kincannon's filings for any office in the 2018 election cycle while this case is pending,

IT IS SO ORDERED.



The Honorable DeAndrea G. Benjamin
Circuit Court Judge
Fifth Judicial Circuit

6-20, 2018
Columbia, South Carolina

