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Aug 23 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Erin D. Dean, Special Referee

Case No.: 2019-CP-07-00818
Appellate Case No. 2021-00321

Mare Baracco..... Appellant-Respondent,

v.

Beaufort County..... Respondent-Appellant.

**RESPONDENT-APPELLANT’S
RENEWED MOTION TO MAINTAIN UNDER SEAL CERTAIN DOCUMENTS
CONTAINING PRIVATE AND/OR PRIVILEGED MATERIALS**

In accordance with Rule 240, SCACR, Beaufort County (the “*County*”) moves for an Order of the Court to maintain under seal certain documents containing private or privileged materials. This Motion is based on the following:

1. The Appellant-Respondent (“*Baracco*”) filed the underlying action on April 10, 2019, asserting the County violated the South Carolina Freedom of Information Act (“*FOIA*”). On June 29, 2019, before service of a responsive pleading by the County, Baracco served and filed an Amended Complaint seeking an injunction against the County and attorneys’ fees for the County’s alleged FOIA violations. (R. pp. 31-37).

2. In particular, Baracco challenged the reasonableness of the County's estimated fee for the production of requested documents in response to a series of FOIA requests pertaining to years' worth of emails involving County officials and their personal email accounts, and the propriety of the redactions completed by the County in producing certain documents to Baracco pursuant to another FOIA request involving a real estate transaction. *Id.*

3. On June 2, 2020, the matter came before the Honorable Perry Buckner via WebEx hearing. By written order dated June 3, 2020, Judge Buckner ordered, among other things, that the County provide the basis for any objections to the requested documents (for all FOIA requests) and appointed Erin Dean as special referee to "determine ... whether or not any of the exceptions under the applicable FOIA statute apply." (R. p. 5).

4. In accordance with Judge Buckner's Order and instructions received from the Special Referee, redacted and un-redacted documents were provided to the Special Referee for a determination as to the propriety of the redactions. Ultimately, the Special Referee found the substantial majority of redactions were proper: "After careful review of the un-redacted documents produced to the Court...with the exception of the documents that include Debra Regecz [the County's real estate agent] ... I find the remaining redactions appropriate and subject to exemption pursuant to S.C. Code Ann. § 30-4-40(a)(7)." (R. p. 17).

5. Ms. Baracco has appealed the Special Referee's determination that the redactions were proper. The Special Referee's finding that copying a third party real estate agent on communications between an attorney and a client constitutes a waiver of privilege is an issue raised and addressed in the County's cross-appeal.

6. The Special Referee has already reviewed the documents at issue and, except for a minimal number of such documents as discussed more thoroughly in the Parties' briefing, has determined that the redactions completed by the County were proper under FOIA.

7. The General Assembly's conscious decision to adopt an expansive exemption to FOIA for attorney-client communications highlights that, in the public sector, maintaining candid attorney-client communication serves the public interest by facilitating access to legal advice vital to the operation of local governments.

8. Requiring the public disclosure of documents already determined to be privileged by a neutral party would be irreversible and would render the attorney-client privilege obsolete.

9. The County recognizes that this Court has previously emphasized the presumption of public access to judicial records and, as such, requires an adequate basis to justify sealing such documents. As set forth more thoroughly in the County's Memorandum filed in support of this Motion, ensuring the free flow of information between an attorney and client ultimately serves the broader societal interest of effective administration of justice .

10. The emails, as redacted, appear on their face as privileged. All involve communications with or to an attorney representing the County. Further, the privilege/exemption logs presented by the County accurately and sufficiently provide the information required for the Plaintiff/Petition to ascertain the reasonableness of the privilege assertion.

11. In accordance with Rule 41.1(b), SCRCP, the County hereby identifies, with specificity, the documents or portions thereof for which sealing is necessary. In general, the documents that the County requests remain under seal are certain un-redacted emails produced to the Special Referee for a determination as to whether information contained therein was legally exempted from disclosure in accordance with FOIA. There are two distinct sets of documents.

12. The first set of documents was produced in response to Baracco's FOIA request of February 1, 2019, which was assigned Beaufort County FOIA Request #2019-231 (referred to throughout the briefing and herein as "*FOIA Request No. 1*"). FOIA Request No. 1 asked for copies of all communications related to the sale and purchase of two parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River Road, as well as documents related to the County's October 8, 2018, Community Services Committee Meeting. In response to FOIA Request No. 1, the County produced 306 pages of documents, portions of which were redacted. Each and every page of the produced documents contains a Bates Stamp with the prefix "CountyFOIA#1___" followed by a six digit number.

13. The County's *Exemption Log* provides a concise non-confidential description of the documents that were subject to redaction in response to FOIA Request No. 1 with a reference to the corresponding Bates Stamp. (R. pp. 95-96).

14. As noted in the cover letter to the Special Referee with the County's *Exemption Log*, the documents produced "contain handwritten notations from the County Legal Department. These notations are made as part of the redaction process by the County and are mirrored within the *Exemption Log*." (R. p. 93).

15. The second set of documents was produced in response to Baracco's third FOIA request and in compliance with Judge Buckner's Order. FOIA Request No. 3, as defined in the pleadings and briefs contained herein, was originally submitted on March 18, 2019, and requested any and all emails to/from or between a County Councilmember using his personal email address and three County employees. (R. p. 397). These County employees included the County Administrator and two individuals that served as County Attorney, Deputy County Attorney, and Interim County Administrator at various times. (*Id.*). Although originally 667 pages in length,

subsequent revisions to the scope of FOIA Request No. 3 by Baracco reduced the total number of pages produced by the County to 167. (R. pp. 448-614). Each and every page of the produced documents contains a Bates Stamp with the prefix “CountyFOIA#3___” followed by a six digit number.

16. The County’s *Exemption Log* provides a concise non-confidential description of the documents that were subject to redaction in response to FOIA Request No. 3 with a reference to the corresponding Bates Stamp. (R. pp. 84-86, 89-92).

17. In addition to the *Exemption Logs* prepared by the County, the documents proposed to be filed under seal are not redacted in their entirety. Rather, select portions of the produced emails are redacted: those portions that the County contends are exempt under FOIA. Even with the exempt information redacted, the emails produced in response to FOIA Request No. 1 and FOIA Request No. 3 contain sufficient information to render them easily identifiable. (R. pp. 448-614, 630). Any further description of the email communications would require a summary of the emails’ contents, potentially waiving any claims of privilege.

MOTION

In accordance with Rule 220, SCRAP, and Rule 41.1, SCRCPP, the County moves for an Order sealing certain documents, as identified by the corresponding Bates’ stamps and identified in the County’s *Exemption Logs*.

This Motion is based on the pleadings, the extensive briefing of the Parties, and the applicable law, as well as any other evidence, or memorandum of law that the Parties may submit to the Court at or prior to a hearing on this Motion.

{*Remainder of Page Intentionally Omitted. Signature Page to Follow.*}

August 22, 2022

s/ E. Richardson LaBruce

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**MEMORANDUM IN SUPPORT OF
RENEWED MOTION TO MAINTAIN UNDER SEAL CERTAIN DOCUMENTS
CONTAINING PRIVATE AND/OR PRIVILEGED MATERIALS**

August 22, 2022

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*Attorney(s) for Respondent-Appellant Beaufort
County*

The Respondent-Appellant, BEAUFORT COUNTY, by and through its undersigned counsel, respectfully submits this Memorandum in support of its *Renewed Motion to Maintain Under Seal Certain Documents Containing Private and/or Privileged Materials* (the “*Motion*”).

PERTINENT BACKGROUND INFORMATION

The Appellant-Respondent (“*Baracco*”) filed the underlying action on April 10, 2019, asserting the County violated the South Carolina Freedom of Information Act (“*FOIA*”). On June 29, 2019, before service of a responsive pleading by the County, Baracco served and filed an Amended Complaint seeking an injunction against the County and attorneys’ fees for the County’s alleged FOIA violations. (R. pp. 31-37). In particular, Baracco challenged the reasonableness of the County’s estimated fee for the production of requested documents in response to a series of FOIA requests pertaining to years’ worth of emails involving County officials and their personal email accounts, and the propriety of the redactions completed by the County in producing certain documents to Baracco pursuant to another FOIA request involving a real estate transaction. *Id.*

On June 2, 2020, the matter came before the Honorable Perry Buckner via WebEx hearing. By written order dated June 3, 2020, Judge Buckner ordered, among other things, that the County provide the basis for any objections to the requested documents (for all FOIA requests) and appointed Erin Dean as special referee to “determine . . . whether or not any of the exceptions under the applicable FOIA statute apply” following an in camera review by the Special Referee. (R. p. 5). In accordance with Judge Buckner’s Order and instructions received from the Special Referee, redacted and un-redacted documents were provided to the Special Referee for an in camera determination as to the propriety of the redactions.

In providing redacted and un-redacted documents to the Special Referee, the County produced appropriate *Exemption Logs* identifying the documents that were redacted with specificity, as well as providing the corresponding FOIA exemption that justified the redactions. The Special Referee determined the substantial majority of redactions were proper: “After careful review of the un-redacted documents produced to the Court...with the exception of the documents that include Debra Regecz [the County’s real estate agent] ... I find the remaining redactions appropriate and subject to exemption pursuant to S.C. Code Ann. § 30-4-40(a)(7).” (R. p. 17).

Ms. Baracco has appealed the Special Referee’s determination that the redactions were proper. The Special Referee’s finding that copying a third party real estate agent on communications between an attorney and a client constitutes a waiver of privilege is an issue raised and addressed in the County’s cross-appeal. Given that Ms. Baracco has challenged the propriety of all of the redactions, all documents submitted to the Special Referee – both redacted and un-redacted – are proposed to be included within the Record on Appeal and become judicial records.

RULE 41.1, SCRPC, ANALYSIS

“Public access to court records may be restricted in certain situations, such as matters involving juveniles, legitimate trade secrets, **or information covered by a recognized privilege**. Restrictions may be based on a statute or the court's inherent power to control its own records and supervise the functioning of the judicial system.” *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 11, 630 S.E.2d 464, 469 (2006)(emphasis added). As set forth in *Ex parte Capital U-Drive-It, Inc.*, the Supreme Court acknowledged that it would rely upon the factors outlined in Rule 41.1, SCRPC, to determine whether documents or portions thereof included within an appeal would remain sealed. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 12, 630 S.E.2d at 469. An analysis of

these twelve factors weighs heavily in support of protecting the sanctity of the attorney-client privilege and allowing the documents to remain sealed.

FACTOR 1. ENSURING THE PARTIES' RIGHT TO A FAIR TRIAL OR HEARING.

Allowing the records to remain under seal will not impact the fairness of the appeal. Although the *Exemption Logs* reference a number of FOIA exemptions, the majority of redacted material falls under the following: "Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." See S.C. Code Ann. § 30-4-40(a)(7). The *Exemption Logs* and the redacted portions of the documents provide a sufficient basis for a facial determination of the existence of privilege. By permitting the Special Referee and the Court of Appeals to review the un-redacted documents in camera, all Parties can be assured that a second independent and neutral party has determined whether the exemptions apply and the documents, or portions thereof, were appropriately redacted.

FACTOR 2. THE NEED FOR WITNESS COOPERATION.

This factor is irrelevant as there is no witness cooperation implicated by this motion.

FACTOR 3. THE RELIANCE OF THE PARTIES UPON EXPECTATIONS OF CONFIDENTIALITY OF THE PROCEEDING.

The documents were produced as part of an in camera review conducted by the Special Referee and following an order of Judge Buckner. Given that FOIA empowers South Carolina trial courts with the responsibility to review alleged FOIA violations, including but not limited to questions regarding the applicability of exemptions, the County fully and reasonably relied upon its expectations of confidentiality. Finding otherwise would effectively gut FOIA's exemptions as the mere act of challenging an exemption would open such documents to the public.

FACTOR 4. THE PUBLIC OR PROFESSIONAL SIGNIFICANCE OF THE PROCEEDING.

While the County acknowledges that the *South Carolina Freedom of Information Act* may present issues of significant public interest, it denies that the Petitioner's appellate issues meet such a heightened standard. The only two questions raised by the Petitioner on appeal that may qualify as novel issues of statutory interpretation were not presented to the trial court nor preserved for appellate review. More importantly for a Rule 41.1, SCRCP, analysis, the underlying documents and the communications contained therein are neither publically nor professionally significant. The documents that the County seeks to retain under seal are examples of routine communications between County officials and their in-house counsel.

For example, as to FOIA Request No. 1, the County's attorneys were brought into these communications due to their legal knowledge and the existence of potential legal issues regarding the acquisition of real estate and the potential development of a Department of Special Needs home in a residential subdivision. (R. pp. 71-72). The communications were predominantly centered on the process by which a local government could acquire this real estate and the various title issues revealed by the title work, in particular various restrictive covenants. *See Matrix Financial Services Corporation v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011)(recognizing certain aspects of real estate acquisition constitute the practice of law).

FACTOR 5. THE PERCEIVED HARM TO THE PARTIES FROM DISCLOSURE.

The perceived harm Baracco from non-disclosure is minimal, as evidenced by the earlier *Motion to Seal* that was filed with the consent of Baracco. The communications do not involve Baracco nor are they relevant to the action at hand. Rather, at issue is whether the County has the legal right under the *South Carolina Freedom of Information Act* to exempt portions of the communications contained within the emails. The harm that would follow from disclosure, on the other hand, is significant and would erode the foundation of the attorney-client privilege.

FACTOR 6. WHY ALTERNATIVES OTHER THAN SEALING THE DOCUMENTS ARE NOT AVAILABLE TO PROTECT LEGITIMATE PRIVATE INTERESTS.

The County submits that less drastic measures are not available as the communications intended to remain sealed are privileged. The County does not request that any orders, opinions, dispositive motions, pleadings or other essential documents be sealed; rather, the County seeks to protect privileged communications from disclosure.

The most common alternative to sealing is redaction. In most cases involving public records, redaction would be sufficient. In this case, however, at issue is the scope of the redactions performed and whether the redactions complied with the exemption standards of FOIA. For these reasons, the County contends that sealing un-redacted versions of these same records for in camera review by the appellate court is the only acceptable alternative.

FACTOR 7. WHY THE PUBLIC INTEREST, INCLUDING, BUT NOT LIMITED TO, THE PUBLIC HEALTH AND SAFETY, IS BEST SERVED BY SEALING THE DOCUMENTS.

If the Court were to find this case of such public significance due to its FOIA ramifications, then filing an appeal would fundamentally erode the attorney-client privilege and the other exemption rights granted to public bodies. The attorney-client privilege is central to the American system of justice. As stated by the Supreme Court of Texas in evaluating a similar exemption to the Texas Public Information Act:

In the governmental context, the attorney-client privilege applies with “special force.” “[P]ublic officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest.” The notion that “sound legal advice or advocacy serves public ends” is not rationally debatable. After all, the government conducts its business on behalf of the public

(residents, voters, taxpayers, and ratepayers), and a fully informed servant is a more capable servant. The attorney-client privilege “encourag[es] government officials formulating policies in the public's interest to consult with counsel in conducting that public business.”

Paxton v. City of Dallas, 509 S.W.3d 247, 260 (Tex. 2017)(internal citations and footnotes omitted).

A determination has already been made by the South Carolina General Assembly that the public interest is not advanced by the forced disclosure of privileged materials. As discussed more thoroughly in the briefing submitted as part of this appeal and cross-appeal, the attorney-client privilege must be vigorously defended as full and frank communication between elected officials and their attorneys is essential to a properly functioning public body.

FACTOR 8. THE PUBLIC INTEREST IN THE PROCEEDING.

All FOIA cases carry with them a certain degree of public interest; however, the public interest is not necessarily in the content of the documents. Instead, the public interest is rooted in the process and ensuring that public bodies are complying with public records laws.

FACTOR 9. THE PRIVATE OR PUBLIC STATUS OF THE LITIGANT.

As a body politic of the State of South Carolina, Beaufort County has a public status; nevertheless, the County contends that its public status alone should not shred the protective veil of the attorney-client privilege. The County does not submit that these documents be sealed in an effort to avoid annoyance or criticism but rather to protect against the disclosure or waiver of the attorney-client privilege.

FACTOR 10. WHETHER THE RELEASE WOULD ENHANCE THE PUBLIC’S UNDERSTANDING OF AN IMPORTANT HISTORICAL EVENT.

The County contends that the release of these documents would not enhance the public's understanding of an important historical event as there is no such important historical event associated with these documents.

FACTOR 11. WHETHER THE PUBLIC ALREADY HAS ACCESS TO THESE RECORDS.

The public does not already have access to these records in an un-redacted form. Redacted versions of the documents have and/or will be publicly filed as part of the Record on Appeal.

FACTOR 12. WHETHER A PARTICULAR DECISION WILL SUSTAIN OR OFFEND THE FUNDAMENTAL INTERESTS OF PUBLIC ACCESS.

Much like judicial records, the vast majority of records generated by a governing body are presumed accessible to the public. Throughout this process, the County has consistently recognized the importance of public access to public records. Accessibility enhances legitimacy; nevertheless, our courts and our legislature have recognized the attorney-client privilege as an acceptable exception to this general standard. The public benefits from the preservation and protection of the attorney-client privilege.

FOIA's judicially enforceable right to access public records is subject to certain well-recognized exceptions, including the right of the public body to exempt from disclosure "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." *See* S.C. Code Ann. § 30-4-40(a)(7). Similarly, the public's right of access to judicial documents and judicial records is a "qualified right." *Company Doe v. Public Citizen*, 749 F.3d 246, 265 (4th Cir. 2014).

Although, there is relatively little case law or instruction on the attorney-client privilege for governmental clients in South Carolina, nothing exists to suggest that attorneys representing governmental clients are categorically less entitled to offer the protections afforded by the attorney-client privilege. At its core, the attorney-client privilege protects communications

between attorneys and clients in which legal advice was sought or rendered, and which was intended to be and was in fact kept confidential, unless otherwise waived. A strong position on the attorney-client privilege is critical and benefits the public by encouraging employees and officials to divulge potentially problematic information to the attorney and promote full and frank discussion between counsel and the government's representatives.

The effective administration of justice is best served by ensuring the free flow of information between attorney and client. The General Assembly's conscious decision to adopt an expansive exemption to FOIA for attorney-client communications highlights that, in the public sector, maintaining candid attorney-client communication serves the public interest by facilitating access to legal advice vital to the operation of local governments. Eliminating the privilege, whether through FOIA or otherwise, has disastrous consequences that are irreversible. As such, it is clear that the overriding public interest is best served by permitting privileged materials to be filed and maintain under seal.

For all of the foregoing reasons, Beaufort County respectfully requests that this Court grant the County's Motion and allow the un-redacted documents to remain under seal.

Respectfully submitted,

August 22, 2022

s/ E. Richardson LaBruce
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Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent-Appellant's Renewed Motion to Maintain Under Seal Certain Documents Containing Private and/or Privileged Materials and Memorandum in Support of Renewed Motion to Maintain Under Seal Certain Documents Containing Private and/or Privileged Materials on the Appellant, Mare Baracco by depositing a copy in the United States mail, postage prepaid on August 23, 2022, addressed to its attorney of record Thomas R. Goldstein, Attorney, P.O. Box 71121, Charleston, SC 29415-1121 and also by providing a copy by electronic mail at email tgoldstein@cobblaw.net on August 23, 2022:

August 23, 2022

s/ E. Richardson LaBruce
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Also admitted in:
* Georgia
† New York
‡ Ohio

□ Court Certified Mediator
• Court Certified Arbitrator / Mediator

August 23, 2022

Via United States Mail,
With Copy via E-Mail (tpclark@sccourts.org)

Hon. Jenny A. Kitchings
Clerk of Court
S.C. COURT OF APPEALS
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: Mare Baracco v. Beaufort County; 2019-CP-07-00818
Appellate Tracking No.: 2021-00321
Our File No. 6868.002 – Beaufort County

Dear Ms. Kitchings:

Please find enclosed the following documents submitted on behalf of the Respondent-Appellant Beaufort County:

1. A Motion to Maintain Under Seal Certain Documents Containing Private and/or Privileged Materials (the “*Motion*”);
2. A Memorandum in Support of the Motion (the “*Memo*”); and,
3. Proof of Service of the same.

I will also file the Motion and the Memo electronically. In support of the Motion, I am also mailing to the Court certain “Confidential Information to be Submitted to the Court in Connection with the Motion,” which Confidential Information we intend to remain under seal. (the “*Confidential Information*”).

In accordance with the Court’s instructions and the South Carolina Rules, the Confidential Information is submitted in support of the Motion and is not intended to become publically available. For the convenience of the Court, the Confidential Information has been bound in the same manner as the Record on Appeal. The pagination for the Confidential Information begins on Page 749, where the Record on Appeal ends.

epc

The Confidential Information will be mailed out today.

With best regards, I am

Sincerely yours,



E. Richardson LaBruce
FINGER, MELNICK, BROOKS & LABRUCE, P.A.

ERL/

Enclosures: Listed.

cc: Thomas Goldstein, Esq.