

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2020-000080

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SC Court of Appeals

Herman Perry Holcomb,

Respondent,

v.

City of North Augusta and
Mayor and City Council of
North Augusta,

Appellants.

**RETURN BRIEF OF RESPONDENT HERMAN PERRY HOLCOMB TO AMICUS
CURIAE BRIEF OF MUNICIPAL ASSOCIATION OF SOUTH CAROLINA**

Dionè C. Carroll
S.C. Bar 78185
Carroll Law Offices, P.A.
107 Pendleton Street N.W.
Aiken, South Carolina 29801
(803) 514-2557
Attorney for the Respondent

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STATEMENT OF THE IDENTITY AND BIAS OF THE AMICUS

The Municipal Association of South Carolina (the “Association”) is an association of municipalities. *See* Amicus Brief at 1. As such, it is a friend of the City of North Augusta, not Respondent Dr. Holcomb (“Holcomb”). This friendship with the City of North Augusta and adversity to Holcomb is confirmed by the close relationship between the Association and the City of North Augusta. The City of North Augusta is a member. B. Todd Glover is Executive Director of the Association. From approximately 2012 to 2019 he worked for the City of North Augusta as the City Administrator for City of North Augusta. Furthermore, City of North Augusta Councilperson McGhee is an Executive Committee member of the Association. He is also adverse to Holcomb who successfully made ethics claims against him.

The Association claims that it “promotes effective municipal government and advises its members on procedures to conduct efficient public meetings” Amicus Brief at 1. From the position promoted in its Amicus Brief, it is evident that the aforementioned promotion and advice is at the expense of the individual citizen. The Association seeks to undermine the Court’s well-reasoned decision below. Without the decision of the Court below, (R. pp.10-19) (the “Order”), individual citizen Holcomb would be denied his legally protected right to be put on Notice in the municipality’s Agenda of matters it is to consider.

The Association’s assertion that “the Order’s analysis would needlessly complicate municipal meeting administration and decrease transparency in local government,” Amicus Brief at 1, is a pleasant sounding and self-serving statement unsupported by any reasonable authority. Instead, departing from the Court’s Order would encourage and facilitate municipal abuse of power, process and the rights of the individual, in this case Dr. Holcomb.

STATEMENT OF THE CASE

Respondent Herman Perry Holcomb (“Holcomb”) adopts by reference his Statement of the Case and the Statement of the Facts set forth in his Final Brief, he previously filed as Appellee in this matter. For context of discussion, however, he recites here facts critical to the argument below.

In the case below, Holcomb filed an Amended Complaint, among other things, seeking declaratory and injunctive relief pursuant to the State Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* (“Amended Complaint”) (R. pp. 24-84). The Amended Complaint sought a declaration that the City Council and Mayor of the City of North Augusta (collectively the “City”) violated FOIA by amending a City Council Agenda to add a new item without following proper procedures.

In the final Order dated October 8, 2019 (R. pp. 10-19), the Court held in favor of Holcomb and declared the conduct of the City in adding an item to the agenda, without adequate process, to be in violation of the Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* The Court also enjoined the City from future similar violations, and awarded Holcomb reasonable attorney’s fees and costs. The City’s Motion to Reconsider was denied and fees were quantified.

STATEMENT OF FACTS

Holcomb is a citizen and resident of the City of North Augusta, County of Aiken, South Carolina. Amended Complaint at 1 (R. p. 25), ¶ 1; Merits Hearing Transcript (“M.H. Tr.”) at 43:7-9 (R. p. 210:7-9). As of the date of the Merits Hearing, Holcomb had lived there for fifty-

eight (58) years, and he is active and outspoken in matters of great importance to his local and statewide community. Amended Complaint at 1 (R. p. 25), ¶ 1; M.H. Tr. at 43:10-11 (R. p. 210:10-11) and 44:2-19 (R. p. 211:2-19).

Appellant City of North Augusta is a municipal corporation of the State of South Carolina located in Aiken County, with a history of prior Freedom of Information Act violations. *See Donohue v. City of N. Augusta*, 412 S.C. 526, 531 (2015).¹ Amended Complaint at 1 (R. p. at 25), ¶ 2. Appellant the Mayor and City Council of North Augusta, is a public body subject to the South Carolina Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* Amended Complaint at 1 (R. p. 25), ¶ 3. The City of North Augusta is a member of the Association. Appellants are referred to collectively herein as the City.

At the Merits Hearing in this matter, it was evident that the City does not have a policy regarding the composition of City agendas, *see* M.H. Tr. at 70:16-71:20 (R. pp. 237:16 – 238:20); Order dated October 8, 2019 at 2 (R. p. at 11), and FOIA does not contain a definition for “agenda.”

Respondent Holcomb contends in this case that the “Regular Agenda of May 7, 2018,” which was Plaintiff’s Merits Hearing Exhibit 6 (R. pp. at 292-323), constitutes the complete agenda for the May 7, 2018 City of North Augusta City Council meeting. *See* M.H. Tr. at 6 (R.

¹ When Holcomb filed this case against Defendants to enforce his rights under the FOIA, the City totally stopping the long-standing practice of putting the Agenda Complete on the web site before City Council meetings to the detriment of its citizens. *See* Response to Motion for Reconsideration, Exhibit 2, February 1, 2019 email from City Administrator (R. p. 164-165). The Association suggests this move was forced by the case. The City has since reversed its position, however. This temporary cessation demonstrates again abuse by the City of its citizens, evidently in the name of “effective local government” and “public transparency” if one follows the reasoning of the Association. *See* Amicus Brief at 2. Instead, municipalities simply need to take reasonable measures to disclose what is on the Agenda and what is not to protect citizens as contemplated by the FOIA.

p. at 173); M.H. Tr. at 49-52 (R. pp. at 216-219); Order dated October 8, 2019 at 2-3 (R. pp. at 11-12). It is the document that could be found on the City's website at a link called "Agenda 050718 Complete." On the stand at the January 15, 2019 Merits Hearing, Holcomb explained why. Relevant testimony from Holcomb is as follows:

Q And I observe that at the top of Plaintiff's 4, it says Document Central and then it appears that there's a series of links that kind of show us how we got there. So it looks like you clicked on Document Central then city clerk, then counsel agenda's 2018 and then May 18 and that got you to this page. If you wanted to know what was happening in a City of North Augusta meeting, you wanted to see the agenda, what would you look at on this page? Which link would you click in order to do so?

A I would click the Agenda 050718 Complete.

M.H. Tr. at 48:22-49:6 (R. pp. at 215:22-216:6); Plaintiff's M.H. Exhibit 6 (R. pp. at 292-323). (emphasis supplied). Holcomb went on to testify again later confirming his understanding.

Q Okay. And then you talked about the agenda and you indicated, I believe, earlier, that the agenda was what the City called -- what you have called for me the summary agenda, correct?

A That's correct.

Q Okay. And is it your understanding that a complete agenda is still an agenda or not?

A It is the agenda according to it's [sic] cover page.

Q Okay. Is that why you think so?

A Yes.

M.H. Tr. at 62:11-20 (R. p. at 229:11-20). (emphasis supplied).

Counsel for the City attempted to confuse the issue several times during his questioning of Holcomb. However, the above testimony is clear. Holcomb believed that the document called the "Regular Agenda of May 7, 2018," found at City website link "Agenda 050718

Complete” was the agenda for the May 7, 2018 meeting. It is the agenda according to its cover page. *See* Plaintiff’s M.H. Exhibit 6 (R. pp. 292-323).

Holcomb reviewed the materials in advance of the meeting to determine whether it was necessary for him to attend. *See* M.H. Tr. 49-54 (R. pp. 216-221). He decided not to attend because he was satisfied with the projects being considered.

At the Merits Hearing, there was substantial other evidence heard on the issue of what was the scope of the City’s Agenda. *See* M.H. Tr. 1-74 (R. pp. 168-241). As discussed above, on the City’s web site, the link to the complete agenda document was called Agenda 050718 Complete. *See* Plaintiff’s M.H. Exhibit 6 (R. pp. 292-323); M.H. Tr. at 49 (R. p. at 216); Order dated October 8, 2019 at 3 (R. p. at 12). The City contended at the Merits Hearing that Defendants’ Merits Hearing Exhibit 1 (R. p. 329) was the “agenda” for the City Council meeting held on May 7, 2018, rather than the Regular Agenda of May 7, 2018 (R. pp. 292-323).

Defendants’ M.H. Exhibit 1 is a single page which can be found within Plaintiff’s M.H. Exhibit 6 (R. p. at 294), was also submitted at the Merits Hearing. *See* Answer to Amended Complaint at 2, ¶ 8 (R. p. at 86); *see* Plaintiff’s M.H. Exhibit 5 (R. pp. 290-291); *see* Defendants’ M.H. Exhibit 1 (R. p. 329); *see* M.H. Tr. at 49 (R. p. at 216); Order dated October 8, 2019 at 2 (R. p. at 11).

Holcomb testified that the City’s Exhibit 1 was a less detailed version of the agenda and that to see the full agenda you needed to view the full Agenda 050718 Complete document posted on the City’s web site. *See* M.H. Tr. at 49 (R. p. at 216); Order dated October 8, 2019 at 3 (R. p. at 12). The City took an adverse position.

Holcomb further contended that the City amended by adding an item to the agenda in violation of FOIA during the May 7, 2018 meeting of the City Council when it added an entirely

new project to the complete agenda without adequate notice or findings. M.H. Tr. at 6-8 (R. pp. at 173-175); M.H. Tr. at 56 (R. p. at 223); *see* Plaintiff's M.H. Exhibit 6 (R. pp. 292-323); *see* Plaintiff's M.H. Exhibit 7 (R. pp. 324-328); Order dated October 8, 2019 at 3 (R. p. at 12). The New Savannah Bluff Lock and Dam Project was added to the list of projects contemplated by Resolution 2018-11 scheduled to be considered at the May 7, 2018 meeting of the City Council on the day of the meeting. M.H. Tr. at 6-8 (R. pp. at 173-175); M.H. Tr. at 49-56 (R. pp. at 216-223); Plaintiff's M.H. Exhibit 7 (R. pp. 324-328); *see* Plaintiff's M.H. Exhibit 6 (R. pp. 292-323); Order dated October 8, 2019 at 3 (R. p. at 12).

The New Savannah Bluff Lock and Dam Project had never before been presented at a City of North Augusta City Council meeting as a possible project to be paid for with the anticipated continuation of the Capital Projects Sales Tax as contemplated by the Resolution 2018-11. *See* M.H. Tr. at 55 (R. p. at 222); Order dated October 8, 2019 at 3 (R. p. at 12). It was discussed for the first time in the City Council's Study Session, which was held shortly before the regular City Council meeting. *See* Tr. at 55 (R. p. at 222); Order dated October 8, 2019 at 3 (R. p. at 12).

Final action was taken on the agenda item at the May 7, 2018 meeting to amend and pass Resolution 2018-11 and submit the list of projects to the Aiken County Sales Tax Commission for inclusion in the 2018 referendum. M.H. Tr. at 54-55 (R. pp. at 221-222); *see* Plaintiff's M.H. Exhibit 7 (R. pp. at 324-328); Order dated October 8, 2019 at 4 (R. p. at 13). The final action taken included adding the previously undiscussed New Savannah Bluff Lock and Dam Project. *See* M.H. Tr. at 54-55 (R. pp. at 221-222); *see* Plaintiff's M.H. Exhibit 6, "Regular Agenda of May 7, 2018," at Resolution 2018-11 (R. pp. at 297-298); *cf.* Plaintiff's M.H. Exhibit 7 (R. pp. 324-328), Minutes of May 7, 2018 (amending the list of projects to add "New Savannah Bluff

Lock and Dam” “and passing the Resolution as amended); Order dated October 8, 2019 at 4 (R. p. at 13).

The City is required to publish City Council Agendas on the web site. M.H. Tr. at 71 (R. p. at 238); Order dated October 8, 2019 at 4 (R. p. at 13). The City presented the Regular Agenda of May 7, 2019 as a complete agenda on its web site. Order dated October 8, 2019 at 4 (R. p. at 13).

After consideration of the testimony of witness, evidence presented by the parties, and argument of counsel, the Circuit Court found that the City amended the complete agenda when it added the New Savannah Bluff Lock and Dam Project to the list of projects contemplated by Resolution 2018-11. Order dated October 8, 2019 at 4 (R. p. at 13). The Circuit Court further found that the City did so without twenty-four hours’ prior notice or a finding of emergency or exigent circumstances. M.H. Tr. at 54-56 (R. pp. at 221-223); *see* Plaintiff’s M.H. Exhibit 7 (R. pp. at 324-328); Order dated October 8, 2019 at 4 (R. p. at 13). And, final action was taken with respect to the agenda item on May 7, 2018. M.H. Tr. at 55 (R. p. at 222); Plaintiff’s M.H. Exhibit 7 (R. pp. 324-328); Order dated October 8, 2019 at 4 (R. p. at 13). This addition contemplated a newly noticed project involving hundreds of thousands of dollars of funding.

In its Order of October 8, 2019, the Court found the City to be in violation of FOIA and enjoined the City from other similar violations. *See* Order dated October 8, 2019 at 9 (R. p. at 18). The Court denied the City’s motion for post-trial relief and granted Holcomb’s motion for attorney’s fees and costs. Order dated October 8, 2019 at 9 (R. p. at 18).

SUMMARY OF ARGUMENT

When interpreting a state statute, there are special considerations when interpreting the South Carolina Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* Specifically, the FOIA says:

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.

“South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government.” *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004), citing, *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). FOIA creates an affirmative duty on public bodies to disclose information. *Burton v. York County Sheriff's Dept.*, 358 S.C. at 347, citing, *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991); *Campbell v. Marion County Hospital District*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003).

Furthermore, the purpose of the FOIA is to protect the public by providing for the disclosure of information. *Id.* The Act is remedial in nature and should be *liberally construed* to carry out the purpose mandated by the legislature. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004) (*emphasis supplied*), citing, *Campbell v. Marion County Hospital District*, 354 S.C. at 281, 580 S.E.2d at 166. Any exception to FOIA's applicability must be narrowly construed. *Evening Post Publ'g Co. v. City of North Charleston*, 363 S.E. 452, 457, 611 S.E.2d 496, 499 (2005).

Through its arguments, the Association seeks to protect municipalities from having to fulfill the will of the legislature as articulated in the FOIA in the name of efficiency, *see* Amicus Brief at 3, when the FOIA's purpose is to protect the public. *See supra*. Instead, FOIA must be liberally construed to carry out its purpose, and any exception must be narrowly construed.

ARGUMENTS

I. **THE CIRCUIT COURT WAS CORRECT AS A MATTER OF LAW IN CONSTRUING THE AMENDMENT OF THE "AGENDA 050718 COMPLETE" AS A VIOLATION OF THE STATE FREEDOM OF INFORMATION ACT ("FOIA") DEFENDANTS CALLED IT AN AGENDA. THE COURT DID NOT NEED TO FURTHER DEFINE AGEND OR ITEM. THE NAME SPEAKS FOR ITSELF.**

[A] public body must provide advance notice of all meetings and keep written minutes, which include statutorily specified information. S.C. Code Ann. §§ 30-4-80, -90. In addition, FOIA provides that a citizen of the State may seek a declaratory judgment and injunctive relief to enforce the provisions of FOIA. S.C. Code Ann. § 30-4-100.

DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, 423 S.C. 295, 301, 814 S.E.2d 513, 516 (2018).

Last minute agenda changes are inconsistent with the obligation imposed by FOIA to guarantee the public reasonable access. *See Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996); *see also* Order dated October 8, 2019 at 5. Order dated October 8, 2019 at 5. Pursuant to the FOIA, every meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of the FOIA Chapter. S.C. Code Ann. § 30-4-60.

Furthermore, although FOIA did not always, FOIA now requires agendas for regularly scheduled meetings and sets forth a specific procedure for amending agendas once an agenda has

been posted. S.C. Code Ann. § 30-4-80(A); *see Brock v. Town of Mount Pleasant*, 415 S.C. 625, 629 n.4, 785 S.E.2d 198, 201 (2016); Order dated October 8, 2019 at 6.

South Carolina Code § 30-4-80(A) requires of a public body in part that, An agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings. . . . Once an agenda for a regular, called, special, or rescheduled meeting is posted pursuant to this subsection, no items may be added to the agenda without an additional twenty-four hours notice to the public, which must be made in the same manner as the original posting. After the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, it only may be added to the agenda by a two-thirds vote of the members present and voting and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda.

S.C. Code Ann. § 30-4-80(A)(emphasis supplied).

An agenda was posted in advance of the meeting. *See Answer to Amended Complaint*. The statute requires that the agenda be posted on a website maintained by the City. The City posted both a summary agenda and what it represents as an “Agenda 050718 Complete” on its website. Neither the complete agenda posted by the City nor the shorter document the City identified at the Merits Hearing as its “agenda” included any reference to the New Savannah Bluff Lock and Dam Project. *See Plaintiff’s M.H. Exhibit 6, the “Regular Agenda of May 7, 2018”* (R. pp. 292-323).

The Act requires twenty-four hours’ notice of the agenda. *See S.C. Code Ann. § 30-4-80(A)*. No new or additional notice as contemplated by the statute was given before the May 7, 2018 hearing. Under the statute, if a municipality fails to give proper notice, after the meeting begins, an item upon which final action can be taken may only be added to the agenda by a two-

thirds vote and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda. *See* S.C. Code Ann. § 30-4-80(A).

Although the first prong, a two-thirds vote, appears to have been satisfied in the instant case, no finding was made by the body that an emergency or an exigent circumstance existed as would be necessary to add an item to the agenda. *See* Plaintiff's M.H. Exhibit 7, Minutes of May 7, 2018 (R. pp. 324-328). Without satisfying both prongs, the amendment attempted by the City at the May 7, 2018 City Council meeting violates FOIA, entitling Holcomb to declaratory and injunctive relief and consequently attorney's fees and costs. *Cockrell v. Trs. Of Dist. 20 Constituent Sch. Dist.*, 299 S.C. 155, 156, 382 S.E.2d 923, 924 (1989).

Holcomb was awarded all three, and the lower court correctly did so because neither the agenda nor the "Agenda 050718 Complete" (having a cover page indicating it was the "Regular Agenda of May 7, 2018") made any reference to the New Savannah Bluff Lock and Dam Project. Instead, an item was added to the agenda when the City added the New Savannah Bluff Lock and Dam Project to the complete agenda and voted that the project should be sent up to the state to be funded. *See* Plaintiff's M.H. Exhibit 7 (meeting minutes) (R. pp. 324-328). If the City did not want the Agenda 050718 Complete/Regular Agenda of May 7, 2018 (it had a cover page reading "REGULAR AGENDA OF MAY 7, 2018" (R. p.30; Amicus Brief at 3)) to be treated as an agenda, it should not have called it an agenda on its cover, on its electronic site or anywhere else.

Merriam-Webster dictionary online at <https://www.merriam-webster.com/dictionary/item> defines "item" as:

- 1:** a distinct part in an enumeration, account, or series : **ARTICLE**
- 2:** an object of attention, concern, or interest

3: a separate piece of news or information

4: a couple in a romantic or sexual relationship

5 obsolete : WARNING, HINT

“Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. at 148, 694 S.E.2d at 530 (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)); *Lambries v. Saluda City Council*, 409 S.C. 1, 10–11, 760 S.E.2d 785, 789–90 (2014), superseded by, *Atkins v. Wilson*, 2016 S.C. App. Lexis 28 (S.C. Ct. App. 2016).

It is clear and unambiguous that the New Savannah Bluff Lock and Dam Project was an item added to the list of projects contemplated by Resolution 2018-11 scheduled to be considered at the May 7, 2018 meeting of the City Council on the day of the meeting. It was “a distinct part in an enumeration, account, or series” of projects. It was certainly “an object of attention, concern, or interest” to Holcomb, necessitating this lawsuit, and it is “a separate piece of news or information,” which if known to Mr. Holcomb would have commanded his presence at the meeting. The Association seeks to make ambiguous that which is plain on its face and not subject to interpretation. Its arguments should, therefore, be rejected.

The Association, in its Amicus Brief at 5, suggests that because the City Clerk did not post the full regular complained of Agenda everywhere that Agendas are posted, it is not the real Agenda and that only the single page summary posted on the City “bulletin board” is the Agenda. This fallacious reasoning would require a citizen seeking notice of what is to be

considered at a meeting to look at every location agendas are posted to verify that citizen is looking at the correct agenda. This contradicts the purpose of FOIA, which has as one of its central tenants the protection of citizens. *See* discussion *supra*. This fallacious reasoning must be rejected.

II. THE CIRCUIT COURT WAS CORRECT IN FINDING AND CONCLUDING THAT THE DOCUMENT POSTED ONLINE AT A LINK CALLED THE “AGENDA 050718 COMPLETE” AND HAVING A COVER ENTITLED “REGULAR AGENDA OF MAY 7, 2018” CONSTITUTED THE MEETING “AGENDA” FOR PURPOSES OF FOIA. THE MUNICIPALITIES ARE IN A POSITION OF POWER AND DUTY TO THE CITIZENS UNDER FOIA.

When a City like the City of North Augusta presents its agenda in a way that misleads, it undermines FOIA. The City made up a detailed agenda it called “Regular Agenda of May 7, 2018.” *See* Plaintiff’s M.H. Exhibit 6 (R. pp. 292-323); *see also* discussion *supra*. The City put the Regular Agenda of May 7, 2018 on the City website under a tab called “Agenda 050718 Complete.” *Id.* The City included in this complete agenda an apparent comprehensive list of projects, never mentioning any other project that might be added, and never having a prior publicly noticed meeting where the possibility of the New Savannah Lock and Dam Project being added was discussed until the hour before the City Council meeting. *Id.* By doing this, the City gave Holcomb and other members of the public confidence that they knew what was on the agenda, thus providing comfort that the decision that was being made was clear and not a secret. Order at 8-9 (R. pp. at 17-18); *see also* Plaintiff’s Exhibit 6 (R. p. at 298), M.H. Tr. at 62:18 (“It’s the agenda according to its cover page.”) (R. p. 229:18); *see also* discussion *supra*.

The City’s cavalier manner of amending the materials it called an agenda complete, without providing statutorily required notice, harmed and deceived the public. All the City needed to

do was to make it clear that the Agenda 050718 Complete was not an “agenda” to insulate itself from liability. Since Defendants told the public on the City website there was a complete agenda, by calling the document the Agenda 050718 Complete, it was only reasonable for the public to rely on that document in preparing for a meeting.

In fairness, and in the spirit of the liberal construction required when applying FOIA, the City must treat what they call an “agenda” on their website as an agenda for FOIA purposes. *See Campbell*, 354 S.C. at 281, 580 S.E.2d at 166 (FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature); *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004); Order dated October 8, 2019 at 5 (R. pp. at 14).

The complete agenda was amended by the Appellants at the City Council meeting when it added the New Savannah Bluff Lock and Dam Project. Twenty-four hours’ notice was not given, and no finding that an emergency or an exigent circumstance existed was made. The City has, therefore, violated FOIA and is subject to declaratory and injunctive relief.

The Association is condescending to its membership and citizenry, suggesting that among municipalities are the “unwary” or “unsophisticated,” while appearing unconcerned that the municipalities are in a position of power and duty to the citizenry. The citizens have far less access to information and decision-making power than the municipalities have. The FOIA was designed and adopted to protect the citizens. This Court should uphold the decision below that protects the citizens from potential abuses of power.

III. THE ASSOCIATION ATTEMPTS TO LIMIT FOIA AND LIMIT THE RESPONSIBILITY OF MUNICIPALITIES IN CONTRAVENTION OF THE FOIA.

The Order dated October 8, 2019 makes it clear that the City should not repeat the specific behavior it pursued that gave rise to this suit. *See* Order dated October 8, 2019 at 9 (R. p. at 18). The City of North Augusta has made a habit of abusing FOIA, which evidently the Association supports. *See* Amended Complaint at 1 (R. p. at 25); *see also* *Donohue v. City of N. Augusta*, 412 S.C. 526 (2015). Attempting to avoid compliance with FOIA by claiming confusion makes it appear the City, once again, has no intention of changing that behavior, regardless of what the Court's Order says. The Association's Amicus Brief implausibly promotes the appalling notion that the municipalities are not sophisticated enough to label supporting documents properly and that they therefore will not provide them to the public for fear of being required to do so. This is not a reasonable position.

Any violation of FOIA must be considered irreparable injury. *Burton v. York Cty. Sheriff's Dep't.*, 358 S.C. at 355. A violation was found in this case. The Court found that final action taken at the May 7 City Council meeting included adding the brand new New Savannah Bluff Lock and Dam Project to the complete agenda of the meeting. Order dated October 8, 2019 at 4 (R. p. at 13). "[The City] did so without twenty-four hours prior notice or a finding of emergency or exigent circumstances" as required by FOIA. *Id.*

The Court acknowledged in its Order that last minute agenda changes are inconsistent with FOIA's design to guarantee the public access to certain activities of the government, *id.*, that FOIA requires an agenda be posted on a public website for regularly scheduled meetings and that no items may be added inconsistent with the advance notice requirement without a two-

thirds vote and finding of emergency or exigent circumstances. *Id.* at 6; S.C. Code Ann. § 30-4-80(A). The City failed to follow FOIA's requirements.

The Court further explained what it was prohibiting and why, indicating that since the City,

told the public on the City website there was a complete agenda, by calling the document agenda 050718 complete, it was only reasonable for the public to rely on that document in preparing for a meeting. . . . Defendants must treat what they call an "agenda" on their website as an agenda for FOIA purposes. The complete agenda was amended by the Defendants at the City Council meeting when it added the New Savannah Lock and Dam Project.

Order dated October 8, 2019 at 8(R. p. 17). The addition of the item was done without following FOIA procedures. The conduct subjected them to declaratory and injunctive relief.

Order dated October 8, 2019 at 7 and 8 (R. pp. at 16 and 17).

The Court concluded by explaining that the public had a right to know how their government is functioning and attend public meetings, among other things. *Id.* at 8 (R. p. at 17). The Court further explained how the City's conduct misled the public by giving Holcomb and other members of the public [false] confidence that they knew what was on the City's agenda, thus providing comfort that the decision that was being made was "clear and not a secret." *Id.* at 9 (R. p. at 18).

In short, the Court prohibits the City from calling something posted by the City an agenda and then failing to treat it with the procedures FOIA requires for agendas. The purpose of this is to protect the public from the harms described in the Court order, which acknowledges a FOIA violation. FOIA violations always constitute irreparable harm. Any conduct of this kind is prohibited by the Court Order. *See* Order dated October 8, 2019 at 9 (R. p. at 18).

If the City calls it an agenda, it simply has to treat it like an agenda.

CONCLUSION

The lower court concluded very clearly why this decision must be affirmed in its final order:

The public and the people who make up the public, like Plaintiff Holcomb, have a right to know. Taxpayers have a right to know how their government is functioning. They have a right to attend public meetings, to obtain public records at the lowest possible cost and the right to know how the tax money they pay is being spent.

When a City like the City of North Augusta presents its agenda in a way that misleads, it undermines FOIA. Defendants made up a detailed agenda it called "Regular Agenda of May 7, 2018." Defendants put the Regular Agenda of May 7, 2018 on the City website under a tab called "Agenda 050718 Complete." Defendants included in this complete agenda an apparent comprehensive list of projects, never mentioning any other project that might be added, and never having a prior publicly noticed meeting where the possibility of the New Savannah Lock and Dam Project being added was discussed until the hour before the City Council meeting. In this manner, Defendants gave Plaintiff and other members of the public confidence that they knew what was on the agenda, thus providing comfort that the decision that was being made was clear and not a secret.

Then, without warning or adequate legal notice, Defendants suddenly added a very significant project. It did so on the day final action was taken, during a City meeting. And, it amended the list of projects without making a finding of emergency or exigent circumstances. In this manner, Defendants violated FOIA and failed to fulfill their obligations to the public and the Plaintiff. For the foregoing reasons this Court declares the conduct of Defendants in amending a document represented to the public as an agenda to add an item, without adequate process, a violation of FOIA.

Order dated October 8, 2019 (R. pp. 10-19).

For all the foregoing reasons so well stated by the lower Court, and because FOIA must be liberally construed to effectuate its purposes as discussed in this Brief, this honorable court should affirm the lower court opinion in its entirety. Pursuant to Rule 220(c), SCACR, this honorable Court may affirm the ruling below for any ground appearing on the record, and the record from the lower Court clearly demonstrates that the City violated the South Carolina FOIA when it added an item to a document it represented to the

public as an agenda without proper procedures; the injunction is clear, specific and necessary to protect the public from irreparable harm. Citizens should not have to work so hard at great personal expense, over well more than three (3) years, to secure and defend the legal protections afforded by FOIA. Dr. Holcombe should be awarded all his fees and costs accrued over the life of this case, and the Association should dedicate its time to educating its membership of municipalities in order to protect the citizens and implement the duly enacted FOIA requirements of law.

Respectfully submitted,

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/s/Dionè C. Carroll
Dionè C. Carroll
S.C. Bar 78185
Carroll Law Offices, P.A.
107 Pendleton Street N.W.
Aiken, South Carolina 29801
(803) 514-2557
Attorney for the Respondent