

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Clifton B. Newman, Circuit Court Judge

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Unpublished Opinion No. 2023-UP-158 (S.C. Ct. App. filed April 19, 2023),  
Rehearing denied (S.C. Ct. App. June 1, 2023)

Appellate Case No. 2023-000080

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Herman Perry Holcomb,

Petitioner,

v.

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

Respondents.

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RETURN OF RESPONDENTS TO  
PETITION FOR WRIT OF CERTIORARI

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**COUNTER STATEMENT OF QUESTION  
PRESENTED**

- I. Did the Court of Appeals correctly reverse the circuit court’s decision and correctly conclude that the City, by adopting a motion during a meeting to amend a list of proposed projects attached as an exhibit to a Council Resolution already listed on the agenda, did not violate a provision (S.C. Code Ann. § 30-4-80(A)) of the South Carolina Freedom of Information Act (“FOIA”) addressing the adding of a new agenda item?

**COUNTER STATEMENT OF THE CASE**

By his Amended Complaint filed on November 28, 2018 (R. pp. 24-84) (APPX000027-87), the Plaintiff/Petitioner Herman Perry Holcomb (“Holcomb”) sought injunctive relief and a declaration by the circuit court that the Defendants/Respondents (jointly, the “City”) violated S.C. Code Ann. § 30-4-80(A) of the State Freedom of Information Act (S.C. Code Ann. § 30-4-10 et seq.). The violation alleged in the Amended Complaint was that the City Council, by a duly approved motion at a regular Council meeting, added a new project to a list of proposed City projects attached as an Exhibit to a Resolution that was listed on the agenda. The Amended Complaint characterized this action by the Council as “amending the agenda item” (Amended Complaint, paragraph 16) (R. p. 27) (APPX000030) or the Council having “amended the agenda item” (Amended Complaint, paragraphs 15, 18, and 19) (R. p. 27) (APPX000030).<sup>1</sup>

The Answer to the Amended Complaint, among other things, denied any violation of the FOIA by the amendment of the list of projects, and denied that the “agenda” for the meeting was amended. The Answer asserted that only a single page (captioned as “AGENDA: REGULAR CITY COUNCIL MEETING”) of Exhibit 1 to the Amended Complaint was the “agenda” and that the remainder of the documents in Exhibit 1 were the agenda packet (Answer, paragraphs 8, 12,

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<sup>1</sup> Section 30-4-80(A) addresses adding new agenda items, not amending existing agenda items.

14, 23, and 24) (R. pp. 86-89) (APPX000089-91). The Answer further asserted that the amendment of the list of projects attached to the Resolution was not an amendment of an agenda as contemplated by the FOIA (Answer, paragraphs 18, 23, and 24) (R. pp. 87-89) (APPX000090-91). Rather, according to the Answer, the amendment at the meeting was an amendment to the internal content of an item already listed on the agenda (Answer, paragraphs 14, 23, and 24) (R. pp. 86-89) (APPX000089-91).

Concurrently with the filing of the Answer to the Amended Complaint, the City requested an “initial hearing” as provided by S.C. Code Ann. § 30-4-100(A). (R. pp. 90-91) (APPX000093-94). That “initial hearing” was held before the circuit court on January 15, 2019, at which the parties offered witnesses (Petitioner Holcomb and former City Clerk Donna Young), introduced documentary evidence, and presented written and oral argument (R. pp. 168-241) (APPX000174-247).<sup>2</sup> At the conclusion of the hearing, the parties requested that the circuit court rule on the merits of the action, and the circuit court requested submission of proposed final orders from both Holcomb and the City.

On October 7, 2019, the circuit court signed and filed the proposed Order submitted by the City. (R. pp. 1-9) (APPX000004-12). That Order found as fact, based on the hearing testimony of former City Clerk Young, that Defendants’ Hearing Exhibit 1 (R. p. 329) (APPX000335) (also introduced as the first page of Plaintiff’s Hearing Exhibit 5 (R. p. 290) (APPX000296) and the third page of Plaintiff’s Hearing Exhibit 6 (R. p. 294) (APPX000300) was the “agenda” for the May 7, 2018, Council meeting and that the remainder of the documents contained in Plaintiff’s Hearing Exhibit 6, by whatever name, contained information and documents in addition to the “agenda.” (R. p. 5) (APPX000008). The October 7 Order also found as fact that the action in

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<sup>2</sup> Pertinent portions of the testimony are set out in the Statement of Facts in this Return.

question by the City Council at its May 7 meeting was an amendment of a list of projects attached as an Exhibit to a Resolution listed on the agenda. (R. p. 4) (APPX000007). The October 7 Order concluded that no item was added to the agenda and that no violation of the FOIA occurred. (R. pp. 6-8) (APPX000009-11).

On the afternoon of October 8, 2019, the office of the Clerk of Court sent an e-mail to the attorneys for the parties advising that the October 7 Order was filed “in error” and would be removed from public view. (Clerk e-mail attached to Defendants Rule 52/59 Motion) (R. p. 108) (APPX000111). The circuit court then filed its October 8 Order. That Order was the proposed Order that had been submitted to the circuit court by Holcomb's attorney.

The October 8 Order found that documents on the City website at a link entitled “Agenda 050718 Complete” were the “agenda” for the May 7 Council meeting, and that the City amended the agenda when, by motion at the meeting, it substituted a new project on the list of projects attached to the Exhibit to the Resolution. (R. pp. 11-13) (APPX000014-16). The circuit court concluded that the City “must treat what they call an ‘agenda’ on their website as an agenda for FOIA purposes,” and that the City violated the FOIA when it amended the Resolution Exhibit. (R. pp. 16-17) (APPX000019-20). The circuit court Order closed by stating that “It enjoins Defendants from future similar violations, and awards Plaintiff reasonable attorney’s fees and costs.” (R. p. 18) (APPX000021).

The City filed, on October 18, 2019, a motion, pursuant to Rules 52 and 59(a)(2) and (e), SCRCF, for alteration and amendment of findings and judgment or, alternatively, for a new trial. (R. pp. 92-108) (APPX000095-111). On that same date, Holcomb filed a motion to determine the amount of attorney’s fees and costs with supporting affidavits by Holcomb’s attorney and Attorney Kenneth R. Moss (R. pp. 109-154) (APPX000112-157).

The circuit court held a hearing on the two motions on December 5, 2019. (R. pp. 242-284) (APPX000248-290). An Order denying the City’s motion and awarding Holcomb attorney’s fees of \$10,518.00 and costs of \$699.92 was filed on December 30, 2019. (R. pp. 20-23) (APPX000023-26). A timely Notice of Appeal by Respondents of both the October 8, 2019, and December 30, 2019, Orders of the circuit court was filed and served on January 17, 2020. (R. p. 167) (APPX000173).

In addition to the briefs of the parties (APPX000337-486), the Municipal Association of South Carolina was allowed to file an amicus brief (APPX000491-508) to which Holcomb responded with a brief (APPX000519-540). The Court of Appeals issued its per curiam unpublished Opinion on April 19, 2023, reversing the circuit court orders. (APPX000541-543). Holcomb's Petition for Rehearing (APPX000544-555) was denied by Order of the Court of Appeals filed June 1, 2023. (APPX000556).

### **STATEMENT OF THE FACTS**

The action by the City Council at its regular meeting on May 7, 2018, complained of by Holcomb, was its amendment of a list of projects attached as an Exhibit to a Resolution listed on the agenda. Plaintiff’s Hearing Exhibit 6 (R. pp. 292-323) (APPX000298-329) (which is identical to Exhibit 1 to Plaintiff’s Amended Complaint) (R. pp. 30-61)) (APPX000033-64) contains the Resolution (“Resolution No. 2018-11 Identifying North Augusta Projects for the Aiken County Capital Projects Sales Tax<sup>3</sup> IV”) and the Resolution’s attached Exhibit A (a listing of six broadly described projects). (R. pp. 297-298) (APPX000303-304). The Minutes for the May 7 meeting (R. pp. 324-328) (APPX000330-334) prepared by then City Clerk Donna Young (who also testified

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<sup>3</sup> The Capital Projects Sales Tax Act is codified at S.C. Code Ann. § 4-10-300 et. seq.

at the hearing before the circuit court), reveal that, following introduction of the Resolution by motion and second, a further motion was made, seconded, and passed unanimously, to

amend the list of projects to add “New Savannah Bluff Lock and Dam” under the list of projects under the Public Works and Transportation Projects title . . .

(R. p. 325) (APPX000331).

At the merits hearing before the circuit court, Donna Young, the City Clerk at the time of the subject Council meeting, testified that, among her official duties as City Clerk, were preparation of the Council meeting minutes, the meeting agenda, and the other agenda information made available to the Council and the public. (R. pp. 232-236) (APPX000238-242). Ms. Young identified Defendants’ Hearing Exhibit 1, a single page captioned as “AGENDA: REGULAR CITY COUNCIL MEETING,” as “the May 7th, 2018 agenda” and as “the regular agenda.” (R. pp. 232-234 and 329) (APPX000238-240 and APPX000335).<sup>4</sup> Ms. Young testified that Defendants’ Hearing Exhibit 1 was the agenda posted on the City bulletin board in advance of the City Council meeting as the agenda required to be posted by the FOIA. (R. pp. 235-236) (APPX000241-242).

Young also testified that the documents referred to in Plaintiff’s Hearing Exhibit 1 (R. p. 286) (APPX000292) as “agenda attachments” and “agenda information” were included with the agenda in the “agenda complete.” (R. pp. 234-235) (APPX000240-241). Young testified:

Agenda information is additional information. When I post in Document Central, I will post an agenda, I will post an agenda memo, and then I post a document that is entitled, Agenda, whatever the date would be, which in this case would be 050718 Complete. And that information is actually a link . . . I create that document in order to distinguish that we have an agenda, an agenda memo and then a complete. And the complete just means that this is all of the attachments to the back of the agenda and the agenda memo . . .

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<sup>4</sup> This page also is in Plaintiff’s Hearing Exhibit 5 and Plaintiff’s Hearing Exhibit 6. (R. pp. 290 and 294) (APPX000296 and APPX000300).

Q. All right. What do you call these other documents that accompany the agenda on the website? Do you have a name for those?

A. What do I call the documents? That's the agenda packet that would go out to the mayor and council and directors. In order to be more transparent, we started including that on the website in order for the citizens to be able [to] look at any attachments to the agenda.

(R. p. 234, line 18-p. 235, line 13) (APPX000240, line 18 – APPX000241, line 13).

The sophistry of Holcomb's position on "what is an agenda?" is illustrated both by statements of Holcomb's position in an exchange between his attorney and the circuit court and by Holcomb's own testimony. This exchange between the circuit court and Holcomb's attorney occurred at the January 2019 merits hearing and prior to Holcomb's testimony at the hearing:

THE COURT: The page that Mr. Crowe handed up [later introduced as Defendants' Hearing Exhibit 1], it says Agenda Regular City Council Meeting; Call to Order, Invocation; Roll Call; Approval of Minutes; Unfinished Business; New Business; Recognizing Visitors and Adjournment.

You're [sic] position is that that is not really an agenda or that it was not published or?

MS. CARROLL: No, Your Honor, we read that it's - - that is an agenda.

THE COURT: All right.

MS. CARROLL: And it is our position and it was always Mr. Holcomb's understanding, which he will testify to, that that was an initial summary agenda. That's on the website. There's an agenda tag and then immediately under that, you'll see there's a link, still there now. And it says Agenda 050718 Complete. Complete, the finished agenda. So Mr. Holcomb always took it as and understood it to be that the first paper is the summary or preliminary agenda and that it was completed for the second document. That's what they call it. And if you look at Exhibit 1 to the complaint, I have enclosed the entire tag two, which I said on the website is called the Agenda, with the date, Complete, and it has the North Augusta logo on the top,

South Carolina Riverfront, and then it's called Regular Agenda of May 7, 2018.

They call it the regular agenda. That their agenda is more detailed than some other agendas doesn't make it not an agenda. If they call it an agenda, I suggest to Your Honor that it is an agenda.

(R. p. 184, line 14-p. 185, line 17) (APPX000190, line 14 – APPX000191, line 17).

THE COURT: So your position in effect is that everything that is published pertaining to the meeting, that all of the entire posting of things has to be on the agenda or the agenda involved in the posting of items or?

MS. CARROLL: It's our position, Your Honor, that this is a detailed agenda and I am not suggesting—

THE COURT: The detailed agenda consists of 32 pages.

MS. CARROLL: Yes, Your Honor, very large. However, I'm not contest -- I'm not suggesting that it couldn't be amended. I'm not suggesting to Your Honor that some of what is in the agenda isn't - - isn't backup material. What I'm suggesting, your Honor, is that it cannot do what it is specifically prohibited by the statute, which is add an entirely new project. This is a detailed agenda, its got its backup and everything, you know, backup. That puts the information about it.

(R. p. 186, lines 1-17) (APPX00019, lines 1-17).

Holcomb himself also plainly was aware of the difference between an agenda and the “agenda complete.” His testimony on direct examination included the following:

I prepare by going to the Agenda Complete, which also contains the agenda. But the agenda is only a summary of what the city's going to discuss at the meeting of council.

The Agenda Complete also has supporting information that gives the public the opportunity to study and to find out more about what the agenda items are going to be discussed.

(R. p. 211, line 21-p. 212, line 3) (APPX000217, line 21 - APPX000218, line 3).

Q. And there's another link on there that's called Agenda 050718. How do you--why would you look at the complete one instead of this one?

A. I wouldn't look at that one because that agenda is actually part of Agenda 050718 Complete.

(R. p. 216, lines 13-17) (APPX000222, lines 13-17).

Holcomb also testified on cross examination concerning the difference between the agenda and the "agenda complete":

Q. As I recall your testimony when you started, you said an agenda complete also contains the agenda; is that correct?

A. That's correct.

Q. All right. So agenda complete means something in addition to the agenda?

A. I'm only calling it what the city calls it.

Q. Well, I'm asking you a question about your understanding of your testimony, an agenda complete includes the agenda, but it includes other things as well, correct?

A. That's correct.

**Q. So agenda complete is something more than just an agenda?**

**A. That's correct.**

Q. All right. And I think you said the agenda is only a summary of what's to be discussed; is that right?

A. That's right.

(R. p. 225, lines 4-21) (APPX000231, lines 4-21) (Emphasis supplied).

This testimony by Holcomb also is clearly contrary to his attorney's later argument to the circuit court at the motions hearing:

So the point is here that this statute is to be liberally construed to protect people like Mr. Holcomb. Mr. Holcomb got on the stand and

explained that the way that they presented this made him to believe that the agenda complete or, as it is called on its cover sheet, the regular agenda of May 7, 2018, was what he thought was the real agenda; that the one page was the summary, a beginning; it was developed; and this is the agenda that was finally arrived at.

(R. p. 258, lines 3-11) (APPX000264, lines 3-11).

To the contrary, Holcomb's testimony showed that he plainly knew the difference between an agenda and the agenda complete.

Holcomb's cross-examination testimony at the merits hearing further illustrated his awareness of the meaning of an agenda:

Q. Okay. So there's a thing called an agenda that's included in the agenda complete, right?

A. That's right.

Q. Good. The agenda is a summary of what's going to be discussed, correct?

A. Correct.

Q. The agenda complete contains additional detail, additional information: is that correct?

A. I'll have to explain my answer, Your Honor.

**Q. Well, let me rephrase. Is agenda complete something greater than the document called the agenda?**

**A. Yes.**

(R. p. 227, lines 3-14) (APPX000233, lines 3-14)(Emphasis supplied).

## ARGUMENT

- I. THE COURT OF APPEALS CORRECTLY REVERSED THE CIRCUIT COURT'S DECISION AND CORRECTLY CONCLUDED THAT THE CITY, BY ADOPTING A MOTION DURING THE MEETING TO AMEND A LIST OF PROPOSED PROJECTS ATTACHED AS AN EXHIBIT TO A COUNCIL RESOLUTION ALREADY LISTED ON THE AGENDA, DID NOT VIOLATE A PROVISION (S.C. CODE ANN. § 30-4-80(A)) OF THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT (“FOIA”) ADDRESSING THE ADDING OF A NEW AGENDA ITEM.

The opinion of the Court of Appeals reversing the circuit court decision succinctly and soundly addressed and ruled on the determinative issues in this case. Accordingly, Respondents urge that further discretionary review by this Court is not necessary to consider and decide those issues, and that the petition for a writ of certiorari should be denied.

Holcomb contends in his Petition to this Court (at page 4) that the criteria for certiorari set out in Rule 242(b), SCACR, are met in this case by “a novel question of law presented” and by “substantial constitutional issues directly involved in this important Freedom of Information Act decision” and by “conflict with decisions of this Court.” However, conflicting decisions of the State appellate courts are nowhere cited in Holcomb’s Petition or elsewhere in the case, and to Respondents’ knowledge, none exist. Petitioner’s references to any constitutional violations first appeared in his petition for rehearing and, to Respondents’ knowledge, constitutional arguments were not offered previously in the Amended Complaint, to the circuit court, or in brief to the Court of Appeals.

Finally, the case is “novel” only in the sense that no other reported appellate cases have involved the forced wordplay foisted here by Holcomb. Although the rationale for the circuit court's adoption of Holcomb's misinterpretation of the FOIA is not understandable to Respondents, the reasons for the rejection of that misinterpretation by the Court of Appeals are clear and clearly stated in its Opinion. The meaning of the word “agenda” argued by Petitioner and adopted by the

circuit court decision is strained, is not supported by any cited authority, and, as appropriately determined by the Court of Appeals, is contrary to the word's plain and ordinary meaning.

The FOIA does not address, much less preclude, amendment of a Resolution or Ordinance during a Council meeting. Concerning the procedure at a Council meeting, § 30-4-80(A) only addresses **adding new agenda items** to an existing agenda; it does not forbid amendments of items already listed on an agenda. This is apparent from the clear language of the pertinent sentences of subsection (A):

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**. (Emphasis added).

The Resolution at issue was already an agenda item; it was not added to the agenda. The projects listed in the Resolution exhibit were not listed on the agenda. (R. p. 329) (APPX000335). The content of the Resolution (more precisely, the list of projects in the exhibit to the Resolution) was amended at the meeting; the agenda for the meeting was not amended. Adding a new item to the agenda at a meeting is a markedly different action from amending the content of an item already listed on the agenda.

The agenda for the meeting (R. p. 329) (APPX000335) listed the Resolution identifying sales tax projects as an agenda item (Item 6). The agenda did not list the specific projects contained in the Exhibit to the Resolution. The Minutes establish that the agenda was not amended, and that

no agenda item was added to the agenda. (R. pp. 324-327) (APPX000330-333). Further, the purpose of notice to the public underlying the FOIA was served; the public was fairly on notice, by the listing of the title of the Resolution, that projects for the Capital Projects Sales Tax would be the subject of Council discussion and Council action.

Section 30-4-80(A), by its clear and explicit language, restricts only the addition of items to an agenda; it does not prohibit the amendment of the content of an item that already appears on an agenda. The circuit court's acceptance of Holcomb's contentions and argument, that he was entitled under the FOIA to notice of any additional specific projects proposed to be listed in the Resolution's attached Exhibit, embraced a forced construction of the FOIA that expands the clear and explicit language of section 30-4-80(A).

In finding a FOIA violation, the circuit court transformed the FOIA's restrictions in section 30-4-80(A) on "adding to the agenda" into a prohibition on amending the content of a Resolution already listed on the agenda. The circuit court undertook that expansion of section 30-4-80(A) without the benefit of legal authority, in opposition to the hearing testimony, and contrary to the clear language of the FOIA and the plain meaning of the word "agenda." Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. Timmons v. Tricentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970).

As part of the reasoning in its orders, the circuit court also conflated the meaning of the word "agenda" to include agenda background documents (the "agenda packet") that were made available to the public in advance of the meeting. Holcomb's basic grievance, as illustrated by his hearing testimony, was that he did not receive what he felt was adequate advance notice of the City Council's amendment, at the Council meeting, of a list of proposed capital projects contained

in an Exhibit to a Resolution on proposed capital projects directed to the County Council. Because the list of proposed capital projects in the Resolution Exhibit was contained in the agenda packet, Holcomb contended that the motion by the City Council at its meeting to amend the list of proposed projects was the equivalent of an amendment of the agenda.

The circuit court orders (like Holcomb's controlling contention) rest on a forced statutory construction that expands the meaning of "agenda" to include the complete packet of supporting documents concerning the agenda items. Petitioner, and the circuit court, attempted to conflate the word "agenda" to include an "agenda packet." However, the General Assembly is familiar with the concept of an "agenda packet" as a term defined and used in Regulation 12-604.3 ("Agenda Packets") in the Regulations for General Retention Schedules for Municipal Records, S.C. Code of Regulations R. 12-604.3. "Agenda packets" are described in R. 12-604.3 as the "[r]ecord of items submitted for municipal council's consideration." It is clear that the Legislature, had it intended to do so, could have used the term "agenda packet" in § 30-4-80(A), or elsewhere in the FOIA, to include the actual "items submitted for municipal council's consideration" in the definition of "agenda." The rules of statutory interpretation, as set out earlier in the City's main brief to the Court of Appeals at pp. 11- 12 (APPX000351-352), disapprove of such forced construction. Courts must apply the terms of a statute according to its literal meaning, without resort to subtle or forced construction in an attempt to limit or expand the scope of the statute. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994).

The circuit court's expansive definition of "agenda" is not supported by the law or the facts and properly was reversed by the Court of Appeals. The core of Holcomb's argument was that the City should have provided him more advance notice that a project (of which he disapproved) would be added to the project list. However, the FOIA, and the only section of the FOIA relied on by

Holcomb in this case, do not address that situation. The FOIA simply does not provide the requirement sought by Holcomb and fashioned by the circuit court's interpretative stretch.

The agenda for the Council meeting on May 7, 2018, is represented by Defendants' Hearing Exhibit 1. (R. p. 329) (APPX000335). The word "agenda" is not defined in the FOIA; however, its plain and ordinary meaning, as explained by the Court of Appeals in its Opinion, is consistent with the Black's Law Dictionary definition of "agenda" (submitted to the Court by City's attorney at the hearing) as "a list of things to be done, as items to be considered at a meeting, usu. arranged in order of consideration." Black's Law Dictionary, "Agenda" (11<sup>th</sup> ed. 2019). This definition also is further supported by the testimony of the City Clerk and, indeed, by the testimony of Holcomb, as discussed in the Statement of Facts above.

Additionally, the arguments advanced below by Holcomb and his attorney, and adopted by the circuit court in its orders, that the City "must treat what they call an 'agenda' on their website as an agenda for FOIA purposes" (R. p. 17) (APPX000020) are circular and unavailing. The City calls the single page list of items for the meeting an "agenda" (see the heading of Defendants' Hearing Exhibit 1 of "AGENDA: REGULAR CITY COUNCIL MEETING") (R. p. 329) (APPX000335). Other modifying adjectives added by the City to the word "agenda" (as in "regular agenda" or "agenda complete") or added by Holcomb and adopted by the circuit court (as in "detailed agenda" or "summary agenda" or "initial summary agenda" or "preliminary agenda") do not implicate the FOIA. The FOIA does not use those terms and does not address amendments or additions to documents described by such word combinations.

**CONCLUSION**

For the reasons stated herein, Respondents request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

*s/Danny C. Crowe*

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