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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

ON PETITION FOR WRIT TO THE COURT OF APPEALS

Appeal from Aiken County
Judge Clifton B. Newman,
Circuit Court Judge

Opinion/Appellate Case No. 2020-000080 (S.C. Ct.
App. filed April 19, 2023), reh'g denied (S.C. Ct. App.
June 1, 2023).

Herman Perry Holcomb,

Plaintiff/Petitioner,

v.

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

Defendant/Respondent.

REPLY TO RETURN OF RESPONDENTS TO
PETITION FOR WRIT OF CERTIORARI AND
INCORPORATED MEMORANDUM WITH
CITATION OF AUTHORITIES IN SUPPORT

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 Petitioner

Other Counsel of Record:
Danny Crowe
2019 Park St.
Columbia, SC 29201

Bryan Eric Shytle
1411 Gervais St.
P.O. Box 12109
Columbia, SC 29211

INDEX TABLE OF CONTENTS

Index Table of Contents.....i

Table of Authorities.....ii

Reply Arguments in Opposition to Return.....1

1. DEFENDANTS VIOLATED FOIA BY AMENDING THE CITY COUNCIL’S AGENDA WHEN IT ADDED A PROJECT TO THE REGULAR AGENDA OF MAY 7, 2018 WIHTOUT GIVING TWENTY-FOUR HOURS’ NOTICE OR EXIGENT CIRCUMSTANCES. CALLING THE REGULAR AGENDA AN “AGENDA PACKET” IS AN AFTER THE FACT JUSTIFICATION BY DEFENDANTS OF THEIR VIOLATION OF THE RIGHTS OF THE PUBLIC, PROTECTED THROUGH THE FOIA, JUSTIFYING THIS COURT’S SPECIAL CONSIDERATION.1

2. DEFENDANTS’ ARGUMENT THAT STATUTORY INTERPRETATION REQUIRES A FINDING FOR THEM IS WITHOUT MERIT, WHEN THE PLAIN MEANING OF THE STATUTE SUPPORTS THE INTEGRITY OF THE TRIAL COURT’S DECISION, FOR THE PROTECTION OF FOIA GUARANTEED RIGHTS.....6

Conclusion.....7

TABLE OF AUTHORITIES

CASES

Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000)....2

Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219 (1991).....5

Branzburg v. Hayes, 408 U.S. 665 (1972).....6

Burton v. York County Sheriff's Dept., 358 S.C. 339.....4,5

Campbell v. Marion Cty. Hosp. Dist., 354 S.C. 274, 280, 580 S.E.2d 163, (Ct. App. 2003).....2,5

City of Rock Hill v. Harris, 391 S.C. 149, 705 S.E.2d 53 (2011).....6

Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433 (2013).....1

Evening Post Publ'g Co. v. City of North Charleston, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005).....5

Harkins v. Greenville County, 340 S.C. 606, 533 S.E.2d 886 (2000).....2

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IS.C. Const., art. I, § 2.....4

U.S. Const. amend. V and XIV.....5

S.C. Const., art. I, § 2.....4

S.C. Const., art. I, §3.....5

STATUTES

S.C. Code Ann. § 30-4-15 (2007).....1

State Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.*.....passim

Federal Freedom of Information Act (“Federal FOIA”), 5 U.S.C. § 552.....4

RULES

Rule 242, SCACR.....3,7

Rule 242(b)(1), SCACR.....3

Rule 242(b)(4), SCACR.....3

OTHER

L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933).....1

Mtsu.edu, Encyclopedia, Freedom of Information Act of 1966 (1966), by Brandi M. Snow...4

REPLY ARGUMENTS IN OPPOSITION TO RETURN

- 1. DEFENDANTS VIOLATED FOIA BY AMENDING THE CITY COUNCIL'S AGENDA WHEN IT ADDED A PROJECT TO THE REGULAR AGENDA OF MAY 7, 2018 WIHTOUT GIVING TWENTY-FOUR HOURS' NOTICE OR EXIGENT CIRCUMSTANCES. CALLING THE REGULAR AGENDA AN "AGENDA PACKET" IS AN AFTER THE FACT JUSTIFICATION BY DEFENDANTS OF THEIR VIOLATION OF THE RIGHTS OF THE PUBLIC, PROTECTED THROUGH THE FOIA, JUSTIFYING THIS COURT'S SPECIAL CONSIDERATION.**

Our General Assembly enacted the FOIA based on the premise "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." S.C. Code Ann. § 30-4-15 (2007). In furtherance [***7] of that purpose, the FOIA subjects a "public body" to record disclosure and open meeting requirements.

Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 442 (2013).

Furthermore,

[t]he FOIA serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in government. An informed electorate is essential to a healthy democracy because members of the public cannot meaningfully cast their votes if they are ignorant of what actions the government has taken and the rationale for those actions. Furthermore, secret government activity creates fertile ground for fraud and corruption, especially in the area of [*451] public expenditures where, without transparency, the public can be kept unaware of misappropriations and conflicts of interest. [***23] As Justice Brandeis wrote, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933). Finally, regardless of whether governmental activity conducted in secrecy actually is nefarious or corrupt, the public cannot be expected to possess a high level of trust in that which is hidden from its view.

Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 450-451 (2013). Reversal of the trial court's decision, which required strict compliance with the State FOIA, allowed Defendants to

evade the protections of State Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* to the detriment of the public, and it is subject to repetition, justifying the Supreme Court’s special consideration.

Ordinarily, “the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings.” *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165–66 (Ct. App. 2003) (citations omitted); *see also Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000); *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165–66 (Ct. App. 2003). When the Court of Appeals reversed the trial court’s decision, it disturbed factual findings, when there significant evidence which reasonably supported the judge’s findings.

Among many other significant things, the trial court below made findings of fact that “[t]he final action taken [by Defendants] included adding the brand new Savanna Bluff Lock and Dam Project to the complete agenda.” (R. pp. 10-19 at 13)¹ The Court further found “[t]he 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 Tr. at 55.” (R. pp. 10-19 at 12) Most importantly, it found that,

Defendants presented the Regular Agenda of May 7, 2019 as a complete agenda on its web site. It 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. It did so without twenty-four hours prior notice or a finding of

¹“R” references in this Reply are references to the original Record on Appeal page number. “APPX” references are references to page numbers to the appendix filed with the original Petition for a Writ of Certiorari. Those page numbers are designated by an “APPX” prefix. The Index to the Appendix uses the titles of appendix documents as they appear in the South Carolina Appellate Case Management System.

emergency or exigent circumstances. Tr. at 54-56; see Plaintiff's Exhibit 7. Final action was taken with respect to the agenda item on May 7, 2018. Tr. at 55; Plaintiff's Exhibit 7.

(R. pp. 10-19 at 13) It was a mistake to disturb any of those Findings of Fact since to do so would require the existence of "no evidence which reasonably supports the judge's findings."

Reversal of the trial court's decision effectively permitted the Defendants to rename the Regular Agenda for the May 7, 2018 meeting an "agenda packet." *See* (R. pp. 10-19 at 11-13 (where the court discussed that the Defendants characterize the Regular Agenda an "agenda packet" in their arguments once they got to trial, rather than calling it by its title)); *Cf.* Return at 12. The reversal of the trial court decision thereby legally allowed the Defendants, and in the future, similarly situated municipalities, to play with language in order to thwart FOIA. It makes a bait and switch maneuver legally available. In this case, Defendants were allowed to call a document a Regular Agenda and on appeal rename it an agenda packet, thereby avoiding the protections of FOIA. This is clearly a novel issue, *see* Rule 242(b)(1), SCACR, this honorable Court should take up for the protection of the public.

Substantial constitutional issues are also directly involved, *see* Rule 242(b)(4), SCACR, as they are imbedded in the important FOIA that protects the rights of the public to have access to government. *Cf.* Return at 10. The trial court explained it best in its October 8, 2019 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.

(R. pp. 10-19 at 17-18 (in an order proposed substantially by Plaintiff/Petitioner Holcomb). The notice and opportunity to be heard of the Plaintiff and other members of the Public, guaranteed by FOIA and the state and federal Due Process Clauses were thereby denied. *See* U.S. Const. amend. V and XIV and S.C. Const., art. I, §3.

Furthermore, the First Amendment to the United States Constitution protects freedom of speech and press, as does the South Carolina Constitution. U.S. Const. amend. I and S.C. Const., art. I, § 2. The public cannot hold the government or its representatives and employees accountable for governmental actions if those actions take place behind closed doors, in a way that prevents public access.

In 1966 Congress adopted the Federal Freedom of Information Act ("Federal FOIA"), 5 U.S.C. § 552, based on the principle that government should be transparent to the governed. *See* Mtsu.edu, Encyclopedia, Freedom of Information Act of 1966 (1966), by Brandi M. Snow. Presumably, South Carolina adopted its FOIA for the same reasons, as discussed in the following cases.

"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.*, thus allowing adequate notice and opportunity to be heard. It sets forth the process that is due in meetings to put the public on notice and allow it to be heard. 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.C. 452, 457, 611 S.E.2d 496, 499 (2005).

FOIA is designed to help citizens exercise First Amendment freedoms. It also allows them notice and an opportunity to be heard, guaranteed by the Due Process Clauses of the State and Federal Constitutions. *See* U.S. Const. amend. V and XIV and S.C. Const., art. I, §3. When Plaintiff complained that the FOIA had been thwarted by the government, by definition, he was complaining that his Constitutional rights had been deprived. No further preservation was necessary. The trial court understood, heard, and articulated a well-written order that protected those freedoms. The Court of Appeals reversed the trial court. Holcomb raised then all the implications of the denial of the rights protected by the FOIA, which had previously been protected.

In 1972 the Supreme Court opined in *Branzburg v. Hayes* that the First Amendment rights would be “eviscerated” without some form of protection for gathering information from government sources. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Reversal of the trial court’s decision has the potential of eviscerating the First Amendment, free speech and FOIA rights of South Carolinians.

2. DEFENDANTS’ ARGUMENT THAT STATUTORY INTERPRETATION REQUIRES A FINDING FOR THEM IS WITHOUT MERIT, WHEN THE PLAIN MEANING OF THE STATUTE SUPPORTS THE INTEGRITY OF THE TRIAL COURT’S DECISION, FOR THE PROTECTION OF FOIA GUARANTEED RIGHTS.

The rule of statutory interpretation doctrine of "plain meaning" means, absent ambiguity, the court will look to the plain meaning of the words used to determine their effect.

However plain the ordinary meaning of the words used in a statute may be the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

City of Rock Hill v. Harris, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011). At page 13, of the Return, Defendants accuse that “[t]he circuit court orders . . . rest on a forced statutory construction that expands the meaning of “agenda” . . .” Return at 13.

Respectfully, nothing could be more forced than wholesale changing an “agenda” into an “agenda packet,” without prior notice, as the Defendants have attempted to do in this case. Such a reading leads to absurd results. Allowing municipalities to conduct this sort of practice inevitably denies the public its statutorily and constitutionally protected rights. For

this reason, and other reasons raised in the Petition for Writ of Certiorari, this Court should grant the request for certiorari review. *See* Rule 242, SCACR.

CONCLUSION

It was an error to determine that the Regular Agenda of May 7, 2018 may be amended without following the State Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* notice requirements. The subject reversal thwarted FOIA and invites future interference with the FOIA. The dispute is infused with considerations governing review articulated in Rule 242, SCACR and involves a matter of great public importance. This honorable Court should, therefore, grant the Petition for Writ of Certiorari.

Respectfully submitted,

August 10, 2023

/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 Petitioner Holcomb