

**RECEIVED**

**Dec 27 2023**

**SC Court of Appeals**

Exhibit A

**From:** Joe Wilson joew@kiawahisland.org  
**Subject:** Re: Service of Appearances Mcllvain v TOKI  
**Date:** August 1, 2023 at 6:22 PM  
**To:** Brad Mcllvain bradmcllvain@comcast.net



---

Please accept this email as a notice of my appearance in your case. As mentioned, our filing system does not require or generate a hard copy notice.

Joseph C. Wilson, Esquire  
Wilson Law Firm  
P.O. Box 178  
Folly Beach, SC 29439  
Cell: (843) 834-2390

On Aug 1, 2023, at 6:03 PM, Brad Mcllvain <bradmcllvain@comcast.net> wrote:

Joe,


Rule 5 (6) of the SC Rules of Civil Procedure notes "appearances" "shall be served upon each of the parties of record." I am a party of record. I should have been served with your appearance.

Regards,

Brad Mcllvain

Sent from my iPhone

## Exhibit B

**From:** Joe Wilson joew@kiawahisland.org   
**Subject:** RE: Service of Appearances Mcllvain v TOKI  
**Date:** August 2, 2023 at 11:33 AM  
**To:** Brad Mcllvain bradmcllvain@comcast.net  
**Cc:** Ross Appel ross@mklawsc.com



Brad

Here is a more formal Notice of Appearance. Will you accept service by email or do you want hard copies of everything?

Joseph C. Wilson, IV, Esquire  
Wilson Law Firm  
P.O. Box 178  
Folly Beach, South Carolina 29439  
Cell Phone: (843) 834-2390

-----Original Message-----

From: Brad Mcllvain <bradmcllvain@comcast.net>  
Sent: Tuesday, August 1, 2023 6:04 PM  
To: Joe Wilson <joew@kiawahisland.org>  
Subject: Service of Appearances Mcllvain v TOKI

Joe,

Rule 5 (6) of the SC Rules of Civil Procedure notes "appearances" "shall be served upon each of the parties of record." I am a party of record. I should have been served with your appearance.

Regards,

Brad Mcllvain

Sent from my iPhone

Notice of  
Appear...e.docx

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO. 2023-CP-10-03550
 	)	
J. BRADFORD MCILVAIN,	)	
	)	
Plaintiff,	)	
	)	NOTICE OF APPEARANCE
vs.	)	
	)	
THE TOWN OF KIAWAH ISLAND,	)	
	)	
Defendant.	)	
_____	)	

**PLEASE TAKE NOTICE THAT** the undersigned attorneys hereby appear as counsel of record for Defendant The Town of Kiawah Island in this matter.

Respectfully submitted,

/s/ Joseph C. Wilson, IV  
 Joseph C. Wilson, IV  
 Town Attorney  
 Town of Kiawah Island  
 P.O. Box 178  
 Folly Beach, South Carolina 29439  
 (843) 834-2390  
[joew@kiawahisland.org](mailto:joew@kiawahisland.org)

/s/ Ross A. Appel  
 Ross A. Appel  
**McCULLOUGH ▪ KHAN ▪ APPEL**  
 2036 eWall Street, Suite 200  
 Mt. Pleasant, SC 29464  
 (843) 937-0400  
[ross@mklawsc.com](mailto:ross@mklawsc.com)

*Attorneys for Defendant Town of Kiawah Island*

August 2, 2023  
 Folly Beach, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by email in the manner prescribed by the applicable Rule of Civil Procedure.

This \_\_\_\_ day of \_\_\_\_\_, 2023.

\_\_\_\_\_

# Exhibit C

**From:** Joe Wilson joew@kiawahisland.org   
**Subject:** McIlvain v. Town of Kiawah Island; C/A No. 2023-CP-10-03550  
**Date:** August 2, 2023 at 2:48 PM  
**To:** Brad McIlvain bradmilvain@comcast.net  
**Cc:** Ross Appel ross@mklawsc.com, Stephanie Tillerson stillerson@kiawahisland.org, Petra Reynolds preynolds@kiawahisland.org

---



Mr. McIlvain

Today the Town is filing a Motion for Judgment on the Pleadings in the above-captioned matter. You can find the Motion at this link:

<https://www.dropbox.com/t/QpUzPRWAtpQINURT>

The Town will also serve a hard copy by U.S. Mail.

Attached is the Notice of Appearance and Cover Letter for the pleadings. A certificate of service will be included by mail.

Joe

Joseph C. Wilson, IV, Esquire  
Wilson Law Firm  
P.O. Box 178  
Folly Beach, South Carolina 29439  
Cell Phone: (843) 834-2390

## Exhibit D

From: "Young, Roger Law Clerk (Max J. Mazurek)" <RYounglc@sccourts.org>  
Date: August 7, 2023 at 1:36:26 PM EDT  
To: Joe Wilson <joew@kiawahisland.org>, Brad McIlvain <bradmilvain@comcast.net>  
Cc: Ross Appel <ross@mklawsc.com>  
Subject: RE: McIlvain v. Town of Kiawah Island; C/A No. 2023-CP-10-03550; Request for Hearing

Mr. Wilson,

Thank you for letting us know. Judge Young is currently reviewing the materials sent in by the parties. I will inform the parties once the Judge has made a determination on how he wishes to proceed.

Thank you.  
Max J. Mazurek  
Law Clerk to The Honorable Roger M. Young, Sr.  
100 Broad Street  
Charleston, South Carolina 29401  
Office: (843) 958-2015  
Email: RYounglc@sccourts.org

From: Joe Wilson <joew@kiawahisland.org>  
Sent: Monday, August 7, 2023 1:25 PM  
To: Brad McIlvain <bradmilvain@comcast.net>; Young, Roger Secretary (Robyn R. Hills) <ryoungsc@sccourts.org>; Young, Roger Law Clerk (Max J. Mazurek) <ryounglc@sccourts.org>  
Cc: Ross Appel <ross@mklawsc.com>  
Subject: RE: McIlvain v. Town of Kiawah Island; C/A No. 2023-CP-10-03550; Request for Hearing

\*\*\* EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Dear Judge Young

The Defendant Town has no objection to working around Mr. McIlvain's vacation plans. We would ask that a hearing be set after August 18, 2023. We will also file an Answer in the meantime if that will satisfy Mr. McIlvain's concerns.

Joe

Joseph C. Wilson, IV, Esquire  
Wilson Law Firm  
P.O. Box 178  
Folly Beach, South Carolina 29439  
Cell Phone: (843) 834-2390

From: Brad McIlvain <bradmilvain@comcast.net>  
Sent: Sunday, August 6, 2023 5:19 PM  
To: ryoungsc@sccourts.org; Young, Roger Law Clerk (Max J. Mazurek) <RYounglc@sccourts.org>  
Cc: Ross Appel <ross@mklawsc.com>; Joe Wilson <joew@kiawahisland.org>  
Subject: Re: McIlvain v. Town of Kiawah Island; C/A No. 2023-CP-10-03550; Request for Hearing

Dear Judge Young,

I am the pro se plaintiff in this FOIA matter. I agree with Mr. Wilson's request for an expedited hearing on this matter. However, I do wish to inform the Court that I will be leaving for a trip to Europe on August 9 and returning August 18, 2023.

As referenced in Mr. Wilson's email, the Town of Kiawah filed a Motion for Judgment on the Pleadings, which appears to be premature because the pleadings are not yet closed - the Town has not yet filed an answer to the Complaint. The Town's response to the Complaint is due on August 23. I plan on filing a written response to the

Motion addressing the arguments contained in the Town's Motion. If acceptable to the Court, that can be done by August 25. A hearing after that date would allow us to determine if there truly are any disputed issues of material fact and address the relevant legal issues.

Respectfully yours,

Brad McIlvain

On Aug 2, 2023, at 3:28 PM, Joe Wilson <joew@kiawahisland.org> wrote:

Dear Judge Young,

I am writing you as the attorney for Defendant Town of Kiawah Island in the above-captioned matter, which is a FOIA Complaint against the Town. Ross Appel is representing the Town along with me. Plaintiff McIlvain is a pro se Plaintiff.

I am writing to you as the Chief Administrative Judge for the Court of Common Pleas, Charleston County to have a hearing set in this matter pursuant to the South Carolina Freedom of Information Act, South Carolina Code Section 30-4-100, which states in relevant part:

Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause.

S.C. Code Ann. § 30-4-100.

The Complaint in this matter was filed on July 21, 2023 and served on the Town on July 24, 2023. In addition, today Defendant filed a Motion for Judgment on the Pleadings. The pleadings can be found at this link:

<https://www.dropbox.com/t/5vgsaW1Yh7BcmLPB>

The Town is prepared to go forward with the initial hearing referenced in Section 30-4-100 at the convenience of the Court.

Joe

Joseph C. Wilson, IV, Esquire  
Wilson Law Firm  
P.O. Box 178  
Folly Beach, South Carolina 29439  
Cell Phone: (843) 834-2390

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[https://secure-web.cisco.com/1Lp7pYgMOeoVoBiw5sORwp62-h68irIE-4z8wiZKZyh5mC1IYDO9ANOTTDVMApJRuA8feEmm7QHJzGu40W4CZy5YbycHVGBPyHTbtV4brclsBcf6Wvs3\\_a1BpeBiQAqKDwzPY4nbut8BtJOecwR8BSe\\_J3qXeuc--CJIVSRz2cCYVImTLQVrOFC2U8DRXeUHhiVTNPMuQM-JlXvfYadgvelFZqcRcerrmk7WrzMp\\_iPsz055aiGP53zDamwadeCYmby9USzBqAYVaTaH-p3qtghDUxXKW3G7BAS0QuluHZag4cm1nXhFm91k4J7d1HdR7LijYi5qx3bUnasDvLWylwOIZtutlQKze29oBjmOJQGny3-FaWOoAvnDf24ZIODswFVeSn0FhZcCTXrYXH0aStQ6e1AqE-xykCqrqESZdmeZ4hftVuNU8C7A53DvHOJSw0GppFZ1oQ3qUemSlrjs3lw/https://www.dropbox.com/t/5vgsaW1Yh7BcmLPB](https://secure-web.cisco.com/1Lp7pYgMOeoVoBiw5sORwp62-h68irIE-4z8wiZKZyh5mC1IYDO9ANOTTDVMApJRuA8feEmm7QHJzGu40W4CZy5YbycHVGBPyHTbtV4brclsBcf6Wvs3_a1BpeBiQAqKDwzPY4nbut8BtJOecwR8BSe_J3qXeuc--CJIVSRz2cCYVImTLQVrOFC2U8DRXeUHhiVTNPMuQM-JlXvfYadgvelFZqcRcerrmk7WrzMp_iPsz055aiGP53zDamwadeCYmby9USzBqAYVaTaH-p3qtghDUxXKW3G7BAS0QuluHZag4cm1nXhFm91k4J7d1HdR7LijYi5qx3bUnasDvLWylwOIZtutlQKze29oBjmOJQGny3-FaWOoAvnDf24ZIODswFVeSn0FhZcCTXrYXH0aStQ6e1AqE-xykCqrqESZdmeZ4hftVuNU8C7A53DvHOJSw0GppFZ1oQ3qUemSlrjs3lw/https://www.dropbox.com/t/5vgsaW1Yh7BcmLPB)

# Exhibit E

**From:** Toal, Jean JToal@sccourts.org  
**Subject:** Re: Mcllvain v. Town of Kiawah Island; C/A No. 2023-CP-10-03550; Request for Hearing  
**Date:** August 11, 2023 at 4:29 PM  
**To:** Brad Mcllvain bradmcllvain@comcast.net  
**Cc:** Diaz, Eva ediaz@sccourts.org, Joe Wilson joew@kiawahisland.org, Ross Appel ross@mklawsc.com



Dear Mr Mcllvain: I am not able to arrange your participation by phone. I will apprise you of the results of Monday's proceeding.  
Sincerely yours, Jean Toal

Sent from my iPhone

On Aug 11, 2023, at 3:34 AM, Brad Mcllvain <bradmcllvain@comcast.net> wrote:

\*\*\* EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Dear Chief Justice Toal,

When I filed this suit, I was aware that the SC FOIA requires that a hearing be held with ten days of service to all parties. That is why I filed and served by July 24 so that the ten days would occur before my trip.

I would like to participate in the hearing via telephone if that can be arranged. As noted in my previous email to the Court, I can file a response to the Town's Motion by August 25. I am generally available in late August and all of September except for the week of September 11.

Before the hearing, I would like to address two issues. In reading the Town's answer to the complaint, the Town appears to take the position that, unless reflected in the minutes, actions or statements made at the relevant May 2 meeting did not occur. It would be helpful for the Town to confirm if that is its position and provide any authority for that position. I cite to numerous actions and statements made at the meeting and as reflected in the official video recording of the meeting.

Finally, the Town, in its motion, provides extensive argument on implicit waiver of the attorney-client privilege. My understanding of implicit waiver is it applies when a party asserts a claim or defense which puts at issue the advice of legal counsel. That is not the case here: Town Council approved an unqualified, clear motion to waive the privilege, which Mr. Wilson said he needed, and then Mr. Wilson spent extensive time discussing the legal analysis and opinions he had provided to Town Council. In short, this was an explicit, knowing waiver of the attorney-client privilege with respect to the subject matter.

Respectfully,

Brad Mcllvain

Sent from my iPad

On Aug 10, 2023, at 7:23 PM, Diaz, Eva <ediaz@sccourts.org> wrote:

All, regarding the courtroom, we will be in courtroom 3B on Monday, August 14, 2023 at noon, at the Charleston County Judicial Center.

Thank you,

Eva Diaz  
Judicial Law Clerk  
South Carolina Court Administration  
1220 Senate Street, Suite 221  
Columbia, SC 29201  
ediaz@sccourts.org<mailto:ediaz@sccourts.org>  
Office: (803) 734-0833

From: Diaz, Eva  
Sent: Thursday, August 10, 2023 9:59 AM  
To: Brad Mcllvain <bradmcllvain@comcast.net>; Joe Wilson <joew@kiawahisland.org>; Ross Appel <ross@mklawsc.com>  
Cc: Toal, Jean <JToal@sccourts.org>  
Subject: RE: Mcllvain v. Town of Kiawah Island; C/A No. 2023-CP-10-03550; Request for Hearing

Dear all on behalf of Chief Justice Toal:

Dear Sir, on behalf of other business firms.

I have been aware that @Brad McIlvain<mailto:bradmilvain@comcast.net> you are the pro se Plaintiff in the FOIA matter entitled McIlvain v. Town of Kiawah Island; C/A No. 2023-CP-10-03550. There is a very limited time frame for scheduling these types of hearings in Court when FOIA Act claims have been denied. I have been assigned by Judge Roger Young to hear this matter pursuant to the 10-day scheduling rule in the FOIA statute. I have scheduled the hearing for August 14, 2023 at the Charleston County Judicial Center, at 12:00 noon. Given I was appointed today, I intend to at least convene a hearing because of the statutory deadline involved. I will keep you informed what transpires at the hearing. I'm sorry you cannot attend due to your European vacation, but I do not wish violate the statute by not at least convening a hearing. If you have any communication regarding this matter, I'll be happy to receive any response prior to my hearing, including any requests you have for further scheduling.

Any communications may be addressed to both myself, JToal@sccourts.org<mailto:JToal@sccourts.org> and copy my law clerk, Eva Diaz at ediaz@sccourts.org<mailto:ediaz@sccourts.org> .

Sincerely,  
Chief Justice Toal

From: Young, Roger Law Clerk (Max J. Mazurek) <ryounglc@sccourts.org<mailto:ryounglc@sccourts.org>>  
Sent: Thursday, August 10, 2023 8:58 AM  
To: Brad McIlvain <bradmilvain@comcast.net<mailto:bradmilvain@comcast.net>>; Joe Wilson <joew@kiawahisland.org<mailto:joew@kiawahisland.org>>; Ross Appel <ross@mklawsc.com<mailto:ross@mklawsc.com>>  
Cc: Diaz, Eva <ediaz@sccourts.org<mailto:ediaz@sccourts.org>>; Young, Roger Secretary (Robyn R. Hills) <ryoungsc@sccourts.org<mailto:ryoungsc@sccourts.org>>  
Subject: RE: McIlvain v. Town of Kiawah Island; C/A No. 2023-CP-10-03550; Request for Hearing

Mr. McIlvain and Mr. Wilson,

A hearing on this matter has been scheduled before the former Chief Justice Jean Toal on Monday, August 14, 2023, at 12:00 noon at the Charleston County Judicial Center. Courtroom TBD.

The parties will need to contact CJ Toal's law clerk Eva Diaz at ediaz@sccourts.org<mailto:ediaz@sccourts.org> for further details and her briefing requirements.

Please let me know if you have any questions.

Best,  
Max J. Mazurek  
Law Clerk to The Honorable Roger M. Young, Sr.  
100 Broad Street  
Charleston, South Carolina 29401  
Office: (843) 958-2015  
Email: RYounglc@sccourts.org<mailto:RYounglc@sccourts.org>

From: Brad McIlvain <bradmilvain@comcast.net<mailto:bradmilvain@comcast.net>>  
Sent: Sunday, August 6, 2023 5:19 PM  
To: Young, Roger Secretary (Robyn R. Hills) <ryoungsc@sccourts.org<mailto:ryoungsc@sccourts.org>>; Young, Roger Law Clerk (Max J. Mazurek) <ryounglc@sccourts.org<mailto:ryounglc@sccourts.org>>  
Cc: Ross Appel <ross@mklawsc.com<mailto:ross@mklawsc.com>>; Joe Wilson <joew@kiawahisland.org<mailto:joew@kiawahisland.org>>  
Subject: Re: McIlvain v. Town of Kiawah Island; C/A No. 2023-CP-10-03550; Request for Hearing

\*\*\* EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Dear Judge Young,

I am the pro se plaintiff in this FOIA matter. I agree with Mr. Wilson's request for an expedited hearing on this matter. However, I do wish to inform the Court that I will be leaving for a trip to Europe on August 9 and returning August 18, 2023.

As referenced in Mr. Wilson's email, the Town of Kiawah filed a Motion for Judgment on the Pleadings, which appears to be premature because the pleadings are not yet closed - the Town has not yet filed an answer to the Complaint. The Town's response to the Complaint is due on August 23. I plan on filing a written response to the Motion addressing the arguments contained in the Town's Motion. If acceptable to the Court, that can be done by August 25. A hearing after that date would allow us to determine if there truly are any disputed issues of material fact and address the relevant legal issues.

Respectfully yours,

Brad McIlvain

On Aug 2, 2023, at 3:28 PM, Joe Wilson <joew@kiawahisland.org<mailto:joew@kiawahisland.org>> wrote:

Dear Judge Young,

I am writing you as the attorney for Defendant Town of Kiawah Island in the above-captioned matter, which is a FOIA Complaint against the Town. Ross Appel is representing the Town along with me. Plaintiff Mclvain is a pro se Plaintiff.

I am writing to you as the Chief Administrative Judge for the Court of Common Pleas, Charleston County to have a hearing set in this matter pursuant to the South Carolina Freedom of Information Act, South Carolina Code Section 30-4-100, which states in relevant part:

Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause.

S.C. Code Ann. § 30-4-100.

The Complaint in this matter was filed on July 21, 2023 and served on the Town on July 24, 2023. In addition, today Defendant filed a Motion for Judgment on the Pleadings. The pleadings can be found at this link:


[https://www.dropbox.com/l/5vgsaW1Yh7BcmLPB<https://secure-web.cisco.com/14dTyqr-3jq82eegNOInOZekLj8jFvXqfbHQ9Xs\\_gQbhZWYJ9yUZJclfdyMu7SihuVGiB8E-bircrNf953c\\_7HNolm\\_9YmKncANUaOFapl2PWvCIEbhusIsFR\\_wqNGv9MXxvbMufUtXRQr5fLoWqIWMSKizOxFkWRPIbUGzXctKry7u medLbsNilBg4R0WwdYkGtFvZVoCF8bGDDLgZpVAKLH88PelikkfRc2WRG6qG4nBTNOk3UH6QIMvEyDRNUV\\_1uppyT-SqNHVfA-38\\_75eJIOTxekopGx-o\\_3pOMasrxNuxFzqq33hrytfG8PqETYSkAmyoRYpaL4HkGnw2\\_SII261\\_0tttG5T5HSbOpUQIbP2fiDfar8rY6\\_18dljgTLBJpYEqvFdGYX Eiu4kdS7LVwbQQdrILvx6zMlc4MzXHPWm1bYiVGpNu8-xscvnm\\_aB\\_ll\\_zWngpEf7H6KJg/https%3A%2F%2Fwww.dropbox.com%2Ft%2F5vgsaW1Yh7BcmLPB>](https://www.dropbox.com/l/5vgsaW1Yh7BcmLPB<https://secure-web.cisco.com/14dTyqr-3jq82eegNOInOZekLj8jFvXqfbHQ9Xs_gQbhZWYJ9yUZJclfdyMu7SihuVGiB8E-bircrNf953c_7HNolm_9YmKncANUaOFapl2PWvCIEbhusIsFR_wqNGv9MXxvbMufUtXRQr5fLoWqIWMSKizOxFkWRPIbUGzXctKry7u medLbsNilBg4R0WwdYkGtFvZVoCF8bGDDLgZpVAKLH88PelikkfRc2WRG6qG4nBTNOk3UH6QIMvEyDRNUV_1uppyT-SqNHVfA-38_75eJIOTxekopGx-o_3pOMasrxNuxFzqq33hrytfG8PqETYSkAmyoRYpaL4HkGnw2_SII261_0tttG5T5HSbOpUQIbP2fiDfar8rY6_18dljgTLBJpYEqvFdGYX Eiu4kdS7LVwbQQdrILvx6zMlc4MzXHPWm1bYiVGpNu8-xscvnm_aB_ll_zWngpEf7H6KJg/https%3A%2F%2Fwww.dropbox.com%2Ft%2F5vgsaW1Yh7BcmLPB>)

The Town is prepared to go forward with the initial hearing referenced in Section 30-4-100 at the convenience of the Court.

Joe

Joseph C. Wilson, IV, Esquire  
Wilson Law Firm  
P.O. Box 178  
Folly Beach, South Carolina 29439  
Cell Phone: (843) 834-2390

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**From:** Joe Wilson joew@kiawahisland.org   
**Subject:** McIlvain v. TOKI; C/A No. 2023-CP-10-03550  
**Date:** August 10, 2023 at 11:52 AM  
**To:** Brad McIlvain bradmclivain@comcast.net  
**Cc:** Ross Appel ross@mklawsc.com, Liz Lademan liz@mklawsc.com

---



Mr. McIlvain

Attached please find the Answer we filed today. We will send a copy by U.S. Mail as well.

Joseph C. Wilson, IV, Esquire  
Wilson Law Firm  
P.O. Box 178  
Folly Beach, South Carolina 29439  
Cell Phone: (843) 834-2390

Answer-  
Filed.pdf

## Exhibit F

**From:** Diaz, Eva ediaz@sccourts.org  
**Subject:** RE: [Kiawah] WOW ... nice spin -- Captain Sam's Spit Preliminary Plat Expires  
**Date:** August 17, 2023 at 12:41 PM  
**To:** Brad McIlvain bradmclivain@comcast.net, Toal, Jean JToal@sccourts.org  
**Cc:** Joe Wilson joew@kiawahisland.org, Ross Appel ross@mklawsc.com

ED

Mr. McIlvain, below is a communication on behalf of Chief Justice Toal in response your email yesterday.

---

Dear Mr. McIlvain:

I have received your email of Wed., Aug. 16, 2023, in which you state as follows: (1) You were surprised that I conducted a hearing on Monday, Aug. 14, 2023 in the matter of *McIlvain v. Town of Kiawah*, 2021-CP-10-03550. (2) You contend that the above referenced hearing was conducted *ex parte*. (3) You were not apprised by me to you directly of the rulings made at the above referenced hearing. Please be advised as follows:

**First**, on July 21, 2023, you filed a Complaint in Circuit Court against the Town of Kiawah seeking an order requiring the Town to release to you a legal opinion issued by Town Attorney Joe Wilson to the Town's Council. On Aug. 2, 2023, Joe Wilson wrote an email to Chief Administrative Judge Roger Young asking that an initial hearing be scheduled in this matter pursuant to S.C. Code section 30-4-100 of the SC Freedom of Information Act. On August 6, 2023, you wrote Judge Young, informing the court that you would be on a trip to Europe from Aug. 9-18, 2023. You contended that the Town of Kiawah's Motion for Judgment on the Pleadings was premature and proposed that you respond by Aug. 25, 2023, hearing to be conducted thereafter. On Aug. 10, 2023, Judge Young assigned me to preside over this matter. I was already scheduled to preside in Charleston on Monday, Aug. 14, 2023 in another matter. On Thurs. Aug. 10, 2023, Judge Young notified you and the Attorneys for the Town of Kiawah that the initial hearing in this matter would be conducted before me on Aug. 14, 2023 at 12:00 PM at the Charleston County Judicial Center. On Aug. 10, 2023, my law clerk, Eva Diaz, notified you and the Attorneys for the Town that this hearing would be conducted at 12:00 PM on Aug. 14, 2023 at the Charleston County Judicial Center. You were specifically informed that I could not delay the initial hearing on this matter until your return from Europe in light of the provisions of the FOIA Act. In your previous email to me of Aug. 11, 2023, you stated that you were familiar with the FOIA 10 day initial hearing provisions before you filed your lawsuit. On Aug. 11, 2023 you sent me an email asking that you be allowed to attend the hearing on Aug. 14, 2023 by telephone. On that same day, I responded to your request by advising you that I was not able to arrange your participation by phone. You were fully advised prior to the hearing that it would be conducted on Aug 14, 2023.

**Second**, the above reference hearing was publicly conducted in open court on Aug. 14, 2023. The hearing was taken by an official state court reporter. These proceedings were not in any way *ex parte*.

**Third**, at the close of the hearing, I ruled from the bench on the record. My conclusion was that the legal opinion letter of Town Attorney Joe Wilson to the Town of Kiawah was exempt from mandatory disclosure of a public record under the provisions of FOIA. I directed that a transcript of this hearing be prepared for Mr. McIlvain, the Town and the Court. I specifically mention that your rights to object to this ruling could be pursued by

Court. I specifically mention that your rights to object to this ruling could be pursued by you for further review by this court by your filing of a Motion to Reconsider. In light of your email, I will file a written order reflecting my ruling in this matter.

Sincerely yours,  
JHT

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Additional, Chief Justice Toal has asked I attach a copy of the Order filed today for your reference.

Best,

**Eva Diaz**

Judicial Law Clerk  
South Carolina Court Administration  
1220 Senate Street, Suite 221  
Columbia, SC 29201  
[ediaz@sccourts.org](mailto:ediaz@sccourts.org)  
Office: (803) 734-0833

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**From:** Brad McIlvain <[bradmclvain@comcast.net](mailto:bradmclvain@comcast.net)>  
**Sent:** Wednesday, August 16, 2023 8:49 AM  
**To:** Toal, Jean <[JToal@sccourts.org](mailto:JToal@sccourts.org)>  
**Cc:** Diaz, Eva <[ediaz@sccourts.org](mailto:ediaz@sccourts.org)>; Joe Wilson <[joew@kiawahisland.org](mailto:joew@kiawahisland.org)>; Ross Appel <[ross@mklawsc.com](mailto:ross@mklawsc.com)>  
**Subject:** Fwd: [iKiawah] WOW ... nice spin -- Captain Sam's Spit Preliminary Plat Expires

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Dear Chief Justice Toal,

I read with surprise the following email on the iKiawah list serve. It intimates that you held an ex parte hearing and then rendered a substantive decision on Monday, August 14.

I am surprised for two reasons. First, reading the South Carolina judicial canons I understood that no substantive decisions should be reached at an ex parte hearing. Second, on August 11, you committed to apprise me "of the results of Monday's proceeding." As the Plaintiff, and based on that representation, I expected to hear about the results of the hearing from you before reading about it on a public list serve. I ask that you promptly inform me of the substance of your decision.

Respectfully,

Brad McIlvain



On May 2, 2023 the Town Council for the TOKI held its monthly meeting (the “May Meeting”). Relevant to this matter is the TOKI’s dispute concerning the Kiawah Island Community Association and Architectural Review Board regarding a 2013 Amended and Restated Development Agreement (“Development Agreement”). During the May Meeting, the Town Council of TOKI agreed to have its Town Attorney, Joe Wilson, address some of the concerns regarding the Development Agreement. This is reflected in the Council Meeting Agenda which included “Council Approval of Public Statement from Town Attorney Regarding [the Development Agreement]” and “Town Attorney- Discussion of [the Development Agreement], Architectural Review Board, and Kiawah Island Community Association.” *See* Def.’s Mot. for J. on the Pleadings or, in the Alternative for Summ. J., Ex. 1.

During the May Meeting, the Town Council of TOKI approved the discussion and waived attorney-client privilege as to the discussion of the Development Agreement only. On June 6, 2023, Plaintiff McIlvain submitted a FOIA request seeking a “copy of [the] entire legal memorandum referenced by [Town Attorney] Joe Wilson during the May 2, 2023 Town Council Meeting,” (“Attorney Memorandum”). Def.’s Mot., Ex. 7. The Defendant denied the FOIA request on the grounds that any legal memorandum prepared by the Town Attorney is exempt from production under the South Carolina FOIA. *Id.*, Ex. 8. Following the denial of Plaintiff’s FOIA request, Plaintiff filed this lawsuit requesting the Court 1) determine the Attorney Memorandum as it existed on May 2, 2023 be produced under the South Carolina FOIA; 2) order the Defendant to produce a copy of the requested Attorney Memorandum; 3) award Plaintiff all fees, costs, damages, and fines; and 4) any other appropriate equitable relief as allowed under the South Carolina FOIA. *See* Pl.’s Compl. 9.

#### **ANALYSIS & FINDINGS**

South Carolina's Freedom of Information Act allows municipalities to withhold any public records that contain "correspondence or work product of legal counsel for a public body and any other material that would violate attorney-client relationships." S.C. Code Ann. § 30-4-40(a)(7) (emphasis added). FOIA's free standing exemption for attorney work product has been recognized by the South Carolina Supreme Court. *See Beattie v. Aiken Cnty. Dep't of Soc. Servs.*, 319 S.C. 449, 453, 462 S.E.2d 276, 279 (1995) ("[T]he FOIA enumerates certain exemptions, including information of a personal nature and work product of legal counsel.).

**1. The Attorney Memorandum from the Town Attorney to Town Council is protected by the Attorney-Client Privilege.**

The Attorney Memorandum prepared by the Town Attorney contains legal analysis and advice in great detail on the issue of the Development Agreement to TOKI. Upon the Court's *in camera* review, the Attorney Memorandum contains confidential communications of legal concepts that are subject to protection. There is no question this Attorney Memorandum meets the requirements for the attorney-client privilege to apply. *See Tobacoville USA, Inc. v. McMaster*, 387 S.C. 287, 293, 692 S.E.2d 526, 529-30 (2010) (quoting *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981)).

Thus, "[t]he attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." *State v. Owens*, 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992). "This privilege is based upon a wise policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to this professional advisor...." *Id.* Absent a waiver, the Attorney Memorandum is not subject to disclosure under a FOIA request.

Further, the Attorney Memorandum is also work product prepared for the TOKI.

**2. The TOKI has not explicitly waived privilege regarding the Attorney Memorandum.**

The attorney-client privilege belongs solely to the client and can only be waived by the client. *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980). Any waiver of the attorney-client privilege must be “distinct and unequivocal.” *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 829 S.E.2d 707, 168 (2019); *State v. Thompson*, 329 S.C. 72, 495 S.E.2d 437, 439 (1998).

Based on the review of the Meeting Minutes and video footage of the May Meeting, the TOKI never voted to waive attorney-client privilege of the Attorney Memorandum. In other words, the Town Council of TOKI, did not distinctly or unequivocally waive the FOIA exemption covering the Attorney Memorandum. Rather, the Town Council only voted to waive the attorney-client privilege to discuss some of the issues related to the Development Agreement. In no way did the Town Council address the Attorney Memorandum.

Further, the Court agrees individual council members cannot waive the attorney-client privilege. Rather, the waiver can only be asserted by Town Council of the TOKI as a whole, not by individual members. *See Wilson v. Preston*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008). In order for a matter of this type to be subject to disclosure, the Town Council would have to specifically vote to disclose the Attorney memorandum.

Plaintiff asserts the Town Council of TOKI through implied subject matter waived the privilege and its exemption in the FOIA when they voted to waive the attorney-client privilege to discuss the two agenda items and issues pertaining Development Agreement during the May Meeting. Our law on implied subject matter waiver in South Carolina was first discussed in the federal district court case of *Duplan Corp. v. Deering Milliken, Inc.*, which construed South Carolina law on attorney client privilege and found that implied subject matter waiver does not apply to attorney work product privilege. 397 F. Supp. 1146, 1190 (D.S.C.). Further, our South

Carolina Supreme Court found that the attorney client privilege is absolute and there can be no implied waiver in the exemptions section or implied waiver by failure of the public body to timely respond to a record request. *See Litchfield Plantation Co. v. Georgetown Cnty. Water & Sewer Dist.*, 314 S.C. 30, 443 S.E.2d 574, 575 (1994).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based on the forgoing, the pleadings, submissions by the parties, the in camera review of the attorney-client legal memorandum at issue, applicable legal authority, oral argument of counsel at the hearing, this Court makes the following findings of fact and conclusions of law:

1. I find that the Attorney Memorandum includes legal analysis and advice in a great deal of detail on the issue of the Development Agreement involving the Kiawah Island Community Association and Architectural Review Board.
2. I find the Attorney Memorandum is confidential document protected by the work product and attorney-client privileges.
3. I find the Town Council of TOKI waived the attorney-client privilege only to discuss some issues related to the Development Agreement in open session.
4. I find the Town Council of TOKI never waived the attorney-client privilege as to the Attorney Memorandum.
5. I find the Attorney Memorandum is exempt from public disclosure under FOIA pursuant to S.C. Code Ann. § 30-4-40(a)(7).
6. I find that the Plaintiff's ability to further contest this matter is protected by Plaintiff's ability to file a Motion for Reconsideration of this Order pursuant to South Carolina Rules of Civil Procedure Rule 59(e).

**ORDER**

Having applied the facts of this case to the law, it is hereby ORDERED that that relief sought by Plaintiff is hereby denied.

**AND IT IS SO ORDERED.**

***[JUDGE'S SIGNATURE PAGE FOLLOWS]***