IN THE SUPREME COURT
OF SOUTH CAROLINA

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Apr 11 2024

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Erin D. Dean, Special Referee

COURT OF APPEALS OPINION NO.: 2024-UP-018
CASE NO.: 2019-CP-07-00818
APPELLATE TRACKING NO.: 2021-00321

Mare Baracco, ……Petitioner,

v.

County of Beaufort,…….. Respondent.

PETITION FOR A WRIT OF CERTIORARI

April 11, 2024

/s/Thomas R. Goldstein
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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that he filed a Petition for Rehearing (and a Petition for Rehearing *en banc*), and the Court of Appeals denied both petitions on March 18, 2024.

QUESTIONS PRESENTED

DID THE COURT OF APPEALS FAIL TO APPLY THE SOUTH CAROLINA *FREEDOM OF INFORMATION ACT* TO THE COUNTY'S DEMAND FOR UNLAWFUL FEES, TO INCLUDE "REVIEW" OF REQUESTED DOCUMENTS, ALLOW THE COUNTY TO REDACT PUBLIC INFORMATION IMPROPERLY, EXTEND THE ATTORNEY-CLIENT PRIVLEGE TO MATTERS AND PERSONS NOT PROTECTED BY IT, AND WHICH THE COUNTY WAIVED BY CONDUCTING GOVERNMENT BUSINESS THROUGH PRIVATE E-MAIL ACCOUNTS WITH VARIOUS THIRD PARTIES UNDER THE ALLEGED PRIVILEGE, AND IN THEIR WITHHOLDING OF DOCUMENTS RELATED TO THE ACQUISITION OF REAL ESTATE AFTER THE TRANSACTIONS HAD CLOSED?

DID THE COURT OF APPEALS ABUSE THE DISCRETIONARY STANDARD BY NOT FINDING THE PETITIONER A PREVAILING PARTY AND FAILING TO AWARD FEES AND COSTS AS PROVIDED BY THE *ACT*?

STATEMENT OF THE CASE

This matter is before the Court under the *South Carolina Freedom of Information Act*, §§ 30-4-10, *et. seq*. On June 29, 2019, the Appellant filed an amended complaint, Appendix/R.O.A. Vol. 1, page 62, alleging that she made four requests for government documents under § 30-4-40, S. C. Code, ann. The Appellant's amended complaint sets out how she requested to inspect County documents relating to the County's purchase of two parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River. In addition to the sales documents, the Appellant also asked for e-mail communications of County officials connected with these and other transactions. For the Court's convenience, the four requests—and the dates for each—are summarized as follows (Appendix/R.O.A. Vol 1, page 69 [Exhibit 1 to Amended Complaint]):

February 10, 2019	Case Number 2019-000231 (request for documents related to real estate purchases)	[Exhibit 2]
March 10, 2019	Case Number 2019-000385 (request for county officials' correspondence)	[Exhibit 3]

March 18, 2019	Case Number 2019-000459 (revised request for a county official's correspondence from four specified addresses)	[Exhibit 4]
March 31, 2019	Case Number 2019-00575 (request for private emails from Councilmember Alice Howard to County)	[Exhibit 5] (R.O.A. Vol. 1 page 37)

The County acknowledged each request, assigning each an individual case number set forth in the preceding summary table on February 11th, March 11th , March 18th and April 1st (App./R.O.A. Vol. 1, pages 345-354 [Exhibits 2, 3, 4, and 5 to amended complaint]) After acknowledging receipt of the requests, the County informed plaintiff that it required a 25% deposit, $3,019.75, to cover the $12,079.00 cost prior to supplying the documents. (App./R.O.A. page 351) The parties exchanged a series of e-mail letters on the subject of fees (App./R.O.A. Vol. 1, pages 351-359 Exhibits 5-7), and ultimately Petitioner wrote checks to the County for $124.66 and $144.66. (App./R.O.A. Vol. 1, page 41 [Order page 3]); however, when the County furnished its responses, it had redacted most of the limited documents it produced, including the identity of the correspondents, plus multiple copies of the same documents for which it charged the Petitioner. When the Petitioner inquired as to the reason for the excessive charges, the extensive redactions, and the absence of certain specified documents, the County refused to communicate with her in good faith. Instead, it responded in bad faith by avoiding her questions, directing her to contact the legal department, and provided non-answers as follows:

April 30, 2019

. . . The emails from [request] #2 and #3 were all redacted (it was about 76 pages). Also, I requested the emails between Gruber and Regecz, and they were not included.
/s/ Mare Baracco

[May 1, 2019]

Beaufort County has responded to your FOIA request in full and in accordance with South Carolina's Freedom of Information Act. If no documents were produced in response to a portion of your request,

either no documents exist, or, if documents do exist and/or they were redacted, they are exempted form production pursuant to the act.

/s/ Bill Lisbon, FOIA Specialist

Not satisfied with the County's response, the appellant followed up with an e-mail on May 2, 2019 as follows:

. . . In an effort to amicably resolve my concern, what is the County claiming as their rationale under FOIA and the SC Records and retention act for the redactions?

/s/ Mare Baracco

May 2, 2019

Good afternoon. I just forwarded your correspondence to our Legal Department . . . for follow up. My office was not involved in the redactions.

/s/ Monica N. Spells, ICMA-CM

May 2, 2019

. . . Ms. Spells, are you the County's FOIA Officer? If not, please tell me who is—

/s/ Mare Baracco

May 3, 2019

Good morning. No, ma'am and we do not have an employee with that title.

/s/ Monica N. Spells, ICMA-CM[1]

After a month passed without further response, the appellant followed up on June 4, 2019:

June 4, 2019

Re your reply of May 2, I have still not heard from the legal department as to their reason for the redaction of FOIA 2019-000231. May I have a response please? Thank you.

/s/ Mare Baracco

June 4, 2019

I have submitted your follow up inquiry to the Legal Department. Generally speaking, my understanding is that the Legal Department redacts those portions of documents which contain information which the public records act exempts from production. . . . I recommend contacting either of those offices directly with any further inquiries about this item.

/s/ Monica Spells

App./R.O.A. Vol. 1, pgs. 348 [Exhibits 3, 6], Vol. 2, pgs. 416-438, and Vol. 3, pgs. 658-659

[1] "ICMA-CM" is an acronym for "International City Managers Association—City Manager."

When the County made demands for unlawful fees and provided only blacked-out documents, Petitioner tried and failed to get anyone at the County to respond to her, as demonstrated by the unsatisfactory explanations from the County quoted above, she filed her initial summons and complaint on April 10, 2019, and an amended complaint on June 29, 2019, seeking a court order to enjoin the County from violating the *Freedom of Information Act*, for an Order compelling the County to make the records available, and to stop charging excessive fees as prohibited by the *Act*, for attorney's fees for the prosecution of the action, and for such other and further relief as the Court found proper. The County timely answered on August 14, 2019, setting up four defenses: general denial, immunity, a motion to dismiss, and reserving all defenses (Appendix/R.O.A. Vol. 1, page 70)

On May 28, 2020, the Chief administrative Judge for Beaufort County *sua sponte* assigned the case to the Honorable Perry Buckner to conduct a hearing in accordance with § 30-4-100, S. C. Code, Ann. (App./R.O.A. Vol 1, page 33 [Order])[2] Thereafter, the matter came before Judge Buckner on June 2, 2020, and the Court, again *sua sponte*, assigned the case to Erin Dean as Special Referee by Order filed that same day, June 2, 2020. (App./R.O.A. Vol. 1, page 36 [Order]) After Erin Dean set a briefing schedule, the parties appeared before her for a hearing on the merits by video conference on September 25, 2020. After taking testimony, considering written briefing and arguments of counsel, the Special Referee issued an Order on November 13, 2020. (App./R.O.A. Vol. 1, page 39 On November 19, 2020, the Petitioner moved for reconsideration (App./R.O.A. Vol. 1, page 184), and on November 23, 2020, the County filed its motion for reconsideration. (App./R.O.A. Vol. 1, page 194) By Order dated March 2, 2021, the Special Referee denied both motions (App./R.O.A. Vol. 1, page 55, and Petitioner appealed on March 22, 2021. The County filed its cross appeal on March 23, 2021. (R.O.A. Vol. 1, pages 231 and 233) On May 18, 2021, the

[2] This delay occurred in part because Petitioner's counsel suffered a heart attack on April 20, 2019, which led to open heart surgery on August 20, 2019, which required a lengthy rehabilitative period.

Special Referee billed $7,280.00 for her service in the case, and each party paid the sum of $3,640.00 for the Special Referee's time. On November 9, 2023, the Court of Appeals held oral argument on the case and issued the Opinion under review on January 10, 2024 and denied Petitioner's application for rehearing on March 18, 2024.

INTRODUCTION
WHY THIS COURT SHOULD GRANT A WRIT OF CERTIORARI

Rule 242, *Appellate Court Rules* lists five factors the Court considers in whether to grant a review of a Court of Appeals' decision. The first factor applies to cases "where there are novel questions of law." While there is nothing novel about either the purpose or the scope of the *Freedom of Information Act*, the Opinion under review departs from controlling precedent, reaching novel conclusions never considered by the appellate courts about government officials conducting government business on private e-mail: "The County's public use of private email accounts is neither a violation of FOIA nor does it eliminate the attorney-client privilege." (Opinion at ¶ 2). In addition, the Court of Appeals held in a first-of-its-kind conclusion that the *Freedom of Information Act* requires damages to present a "justiciable controversy." The Court of Appeals sidestepped the illegality of the County's demand for $12,079.00 in fees, which the Petitioner ultimately did not pay in part because the quoted fees were so far beyond the County's published fee schedule and because the *F.O.I.A.* does not authorize charging requestors $72.00 an hour to "review" documents. Even the records the County produced were entirely blacked out, including the identity of correspondents. The Opinion under review ignored the "irreparable harm" standard, which does not require damages to state a cause of action. The General Assembly declared that "violations of this chapter must be considered to be an irreparable injury for which no adequate remedy of law exists." S. C. Code, ann. § 30-4-100).

Moreover, the procedure in the case is extremely novel—the Chief Administrative Judge assigned the case *sua sponte*, the judge who received the assignment then, again *sua sponte*,

assigned the case to a Special Referee, who in turn, required the Petitioner to pay over $3,000.00 in fees just to have her case heard.

Finally, the Opinion under review ignored the legal requirements governing "discretionary standard." While the Opinion identifies the correct legal standard, it never addresses, let alone evaluates, that Petitioner materially prevailed. Likewise, the Court never applies the factors to the minimum standards governing discretionary review, rendering it to unbridled and unreviewable.

These conclusions place the Opinion under review in conflict with settled and controlling precedent. As the General Assembly makes clear, the purpose and the scope of the *Freedom of Information Act* is settled:

> § 30-4-15 Findings and purpose
> 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.

The appellate courts make clear that the remedies provided under the *Act* are remedial and the courts uniformly hold that application of the *Act* must be liberally construed: "The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166." *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) Here, the Opinion under review not only cavalierly decides novel issues—government officials can transact government business privately including receiving legal advice from the County Attorney; petitioners must prove damages to avail themselves of the *F.O.I.A.* remedies—but also construes the *Act* both narrowly and against the Petitioner. These erroneous conclusions stand against the controlling precedent of this Court. In short, the Opinion under review is an astonishing departure from both the statutory purpose and the settled body of law construing the

Act, and this departure from settled precedent puts the Opinion under review in direct "conflict with a prior decision of the Supreme Court." The salient conflict is not lessened by the Court of Appeals releasing its decision as an unpublished, *per curiam* decision because in the digital age, a decision eroding the rights of citizens to monitor government activities circulates at the speed of light. The issues raised in this case touch every citizen in the State and affect every government body and are too important to allow lower courts to dismantle the *Freedom of Information Act* gradually in one unpublished opinion after another.

1.

THE COURT OF APPEALS FAILED TO APPLY THE STATUTORY STANDARD THAT EVERY CITIZEN HAS STANDING TO ENFORCE THE *ACT*, AND SUCH CLAIMS ALWAYS PRESENTS A "JUSTICIABLE CONTROVERSY," AND THAT SUCH VIOLATIONS MUST "BE CONSIDERED TO BE AN IRREPARABLE INJURY FOR WHICH NO ADEQUATE REMEDY AT LAW EXISTS." S. C. CODE, ANN. § 30-4-100

The error surrounding "justiciable controversy" permeates the Opinion under review, an error foreshadowed by the colloquy at oral argument. During Appellant's reply argument, at approximately the 26-minute mark, a member of the panel asked: "What caused her to try to get *F.O.I.A.* information . . . Was there a reason?" To be fair, the Court of Appeals qualified the question and conceded an explanation is not required to invoke the remedies provided by the *Act*, but the question adumbrated the fundamental error about the remedial nature of the *Act* and that every violation is an irreparable harm and every citizen has standing. The error hinted in the oral argument reappears in the written decision under the rubric of "justiciable controversy" when the Court of Appeals erroneously held that because Petitioner did not pay the unlawful fees demanded by the County, she could not assert a claim under the *Act* after the County demanded she pay $12,079.00 to cover the County's legal department's "review" of the requested documents. Both the Special Referee and the Court of Appeals conflated "review" with "redaction." "Redaction" is the physical act of blacking out **privileged** information, which the County erroneously believed—until Petitioner demonstrated otherwise—included even the identity of the

correspondents in the blacked out correspondence. Moreover, as pointed out in footnote 3 on page 14, the rationale for a legal department's $72.00 per hour "review" preventing disclosure of public documents is infinite when the standard is anything that **might** be exempt from disclosure, an infinitely unbridled standard. The Opinion under review errs because it elevated Petitioner's refusal to pay illegal, excessive fees to preclude standing: "Moreover, because Baracco paid no deposit for the disputed requests, there was no justiciable controversy as to the County's fee estimations." (Opinion page 1) The Record demonstrates the County demanded an illegal fee of $12,079.00 with a prepayment of $3,019.75 as a condition of fulfilling the request. (App./R.O.A. at pages 41, 65, and 351 [Opinion, Complaint, Exhibit 5]), and the County met Petitioner's request for explanation with shockingly illegal explanations such as: "167 hours estimated for I.T. to search and compile emails @ $72.00/hour." March 18, 2019 Whitney Snyder, FOIA specialist, App./R.O.A. Vol. 3, page 426 or "22 hours for Legal /Admin to sort emails @ $72.00/hour." /s/ Whitney Snyder, FOIA specialist April 2, 2019, App./R.O.A. Vol. 3, page 434 The *Act* is clear that "Fees may not be charged for examination and review to determine if the documents are subject to disclosure." § 30-4-30(B), S. C. Code, ann. The Court of Appeals erroneously found that because the Petitioner never paid the full amount, she failed to present a "justiciable controversy"—a conclusion refuted by the enabling statute of the *Act*, § 30-4-100, where the General Assembly declares that "violations of this chapter must be considered to be an irreparable injury for which no adequate remedy of law exists," and the violation occurred when the County demanded unlawful fees. Even though Petitioner did not capitulate to the County's unlawful monetary demand, it does not negate the illegality of the County's attempt. Thus, the Court of Appeals deviated from both the requirement of the *Act* as well as this Court's consistent line of cases construing the remedial purpose of the *Freedom of Information Act*.

Despite citing correct precedent, the Court of Appeals neglects to apply it, erroneously concluding Petitioner is unable to present a "justiciable controversy." There is nothing remotely "contingent, hypothetical, or abstract" about the County (1) demanding Petitioner pay outrageously inflated and unlawful fees as a precondition to fulfilling her public records request, and (2) writing to other local governments to entice them to get on board with the same illegal scheme: "For anyone that is not familiar with this matter or the requestor, feel free to call me or send questions my direction." (App./R.O.A. page 375 [Ex. 17]) There is not a case in South Carolina jurisprudence that requires a citizen to submit to an unlawful act as a prerequisite to filing suit, and even if there were, the General Assembly grants standing on every citizen to maintain an action under the *F.O.I.A.* for violations. Petitioner was not required to pay unlawful fees to maintain her action, and the Court's erroneous reliance on such a principle not only overrules the General Assembly's declaration of standing conferred by § 30-4-100, but also violates the Supreme Court's precedent as set forth in such cases as *Sloan v. Friends of the Hunley (Hunley II*), 393 S.C. 152, 711 S.E.2d 895 (2011) (Defendants providing documents prior to Answer being due did not preempt claim.) Against this fundamental underpinning of standing and "irreparable injury," the Court of Appeals improperly relied on *Wallace v. City of York*, 276 S.C. 693, 281 S.E.2d 487 (1981), which is a surprising choice. In *Wallace*, the City of York's City Council voted to discontinue a suit, seeking to enjoin the City from holding a public meeting to remove the Mayor from office. When the Council decided not to appeal, a citizen sought to intervene and maintain the appeal in the place of the City Council. It is neither surprising nor controversial that the Supreme Court said a citizen cannot stand in the shoes of the City Council, so the *Wallace* case is not relevant to the issue before the Court. In short, the Opinion under review errs in holding Petitioner could not maintain her action under the *F.O.I.A.* without paying unlawful fees, and Petitioner presents an obvious "justiciable controversy."

1(A)

THE COURT OF APPEALS FAILED TO ADDRESS THE COUNTY'S ATTEMPT TO IMPOSE EXCESSIVE AND UNLAWFUL FEES ON PETITIONER IS A VIOLATION OF THE *FREEDOM OF INFORMATION ACT* EVEN THOUGH PETITIONER DID NOT PAY THEM IN THEIR ENTIRETY.

This issue is discussed in the preceding section, but Petitioner makes two additional points.

First, the Court of Appeals' discussion follows a tortuous path to an irrelevant analysis. Despite stating the correct legal standard: "Fees may not be charged for examination and review to determine if the documents are subject to disclosure." (Opinion at ¶ 4, citing § 30-4-30(B)), the Court of Appeals ducked the issue because Petitioner did not pay them. The same paragraph holds that: "Here, Keaveny was best suited for the identification of privileged information in his correspondence with county council members," a wholly irrelevant conclusion. Whether Mr. Keaveny was "best suited" to "review" documents is not an issue in the case—the issue is that the County tried to impose a $72.00 an hour charge on Petitioner. Moreover, the Court of Appeals ignored that from July to October 2018, Mr. Keaveny was acting in a dual capacity as County Administrator and County Attorney, and this conflict of interest eviscerates the Court of Appeals' conclusion that he was best suited to make evaluations since he was protecting himself. Whether he was best suited or not, the *F.O.I.A.* violations were demanding Petitioner pay for him to "review" his own work and then "redacting" every single word in every single document, including the identity of correspondents and the unprivileged communications with third parties who cannot possibly be clients of the County Attorney. The Respondent double-punched the Petitioner, trying to charge her for illegal review and simultaneously claiming attorney-client privilege on every e-mail, including those sent to third parties and e-mails dealing with the public acquisition of real estate, and allowing council members to conduct County business through private discussions.

Second, this Court has already analyzed these issues in numerous cases such as *Sloan v. Friends of the Hunley (Hunley II*), 393 S.C. 152, 711 S.E.2d 895 (2011) In the second *Sloan* case, this

Court certified the case pursuant to Rule 204 of the *South Carolina Appellate Court Rules*. As the Court explained:

> Sloan filed a complaint on July 18, 2001, seeking production of the documents based on Friends' status either as a public body under FOIA or as an alter ego of the Hunley Commission. On August 16, 2001, approximately one month later, Friends fully complied with Sloan's document request, but state that it was not tendering the documents "due to any concession that [Friends] is subject to the Freedom of Information Act," but "in the spirit of cooperation." *Sloan*, page 155.

The Friends of the Hunley's argument—arguments that this Court rejected—are the same arguments advanced by the County here, at least with regard to the County's attempt to extort illegal fees from Petitioner. It is not a defense to an illegal act to say, "I didn't pull it off." In Constitutional law, for example, governments frequently deny standing to litigants who challenge statutes or ordinances on the ground that the litigant is not adversely affected and thus lacks standing or fails to present a justiciable controversy. However, common law evolved the "facial" challenge to supplement the "as applied" challenge. Likewise, in criminal courts, the Government frequently prosecutes crimes despite defendants failing to carry them out to completion, for example in criminal conspiracy cases. The Government can prosecute assault or pointing a firearm even when not accompanied by a battery or the discharge of a weapon. Thus, the Court of Appeals erred in holding that Petitioner was required to pay illegal fees as a condition of bringing her case because the gravamen of the violation is in the demand.

1(B)

THE COURT OF APPEALS FAILED TO FIND THAT GOVERNMENT OFFICIALS UTILIZING PRIVATE E-MAIL COMMUNICATIONS TO CONDUCT GOVERNMENT BUSINESS IS A VIOLATION OF § 30-4-70(c) AND WAIVES ATTORNEY CLIENT PRIVILEGE

In the first paragraph (following a summary of the procedural history of the case), the Opinion under review holds: "The County's public use of private email accounts is neither a violation of FOIA nor does it eliminate the attorney-client privilege." (Opinion under Review ¶ 2) This over-generalization is a novel reinterpretation, essentially abrogating the General

Assembly's prohibition against using electronic media to escape scrutiny. See the *Freedom of Information Act*, § 30-4-70(c): "No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirt of requirements of this chapter to act upon a matter, over which the public body has supervision, control, jurisdiction, or advisory power." The Court of Appeals' blanket statement is not only a repudiation of this section, but also an invitation to government officials to mischief, especially where the Court of Appeals places its imprimatur on County Council members allegedly receiving County Attorney legal advice through their private e-mail accounts. According to the County's bogus privilege log, every time the County Council Chairman communicated with the County Attorney (and others) via private e-mail, the discussion is covered by attorney-client privilege, a principle rejected by this Court in *Evening Post Publ. Co. v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011). This unbounded privilege reappears in footnote 3 on page 14. See also Maura I. Strassberg, "Privilege Can Be Abused: Exploring the Ethical Obligations to Avoid Frivolous Claims of Attorney-Client Privilege," *Seton Hall Law Review* (vol. 37, 2007) pages 413-495. Here, the Court of Appeals ignored the evidence of the County's mendacity, evidence which only became known through disclosure in a separate case. See County Councilman Stu Rodman's July 18, 2018, e-mail to four other Council members—and the County Attorney—privately scripting out the decisions to be reached in an upcoming County Council meeting. App./ROA. at page 360 [Ex. 9 to June 2, 2020, hearing before Special Referee] This evidence paints an exclamation point on the Court of Appeals' holding in *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 44 that copying the County Attorney on every e-mail does not invoke privilege, especially where, as demonstrated here, councilmembers are engaging in demonstrably illegal conduct. It is impossible to square this flagrant illicit and unethical conduct with either the County's privilege log or with the Court of Appeals' question about why Petitioner sought public information to which

she is entitled as a matter of law. It is depressingly common to observe government officials having so little regard for their legal and ethical duties that they include the County Attorney in their shenanigans or that the Court of Appeals would be cavalier about the Court's responsibility to stand as a bulwark against this kind of government misconduct. This misconduct is a perfect segue into the Court of Appeals' error relating to the claim of attorney-client privilege whether through private e-mail communication or otherwise proper channels.

1(C)

THE COURT OF APPEALS FAILED TO FIND THE COUNTY'S CLAIM OF ATTORNEY-CLIENT PRIVILEGE IS PRETEXT WHEN THE MEMBERS OF COUNCIL ARE VIOLATING THE *F.O.I.A.* AND INCLUDING NUMEROUS CORRESPONDENTS AND THIRD PARTY CORRESPONDENTS.

The Court of Appeals reached its novel conclusion that all Councilmembers are universally clients of the County Attorney and free to use their private e-mail accounts to obtain legal advice or conduct County business out of public view. As stated the previous page, it is settled law that including the County Attorney on communications does not automatically, necessarily, and immutably invoke attorney-client privilege. *Evening Post Publ. Co. v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011).[3] The Opinion under review concludes that every blacked out e-mail is protected by attorney-client privilege, but never discusses how the privilege applies (1) from communications from Councilmembers as private citizens, (2) to communications that involve numerous correspondents (whom the County refused to identify until the Special Referee ordered it), (3) to illegal conduct, which Petitioner identified, or (4) to communications about real estate acquisition once the transaction is complete. § 30-4-40(5)(a), S. C. Code, ann.: "These documents are not exempt from disclosure once a contract is entered into or the property

[3] While not a part of this record, the County puts the Court of Appeals' expansion of the privilege to work. In a subsequent *F.O.I.A.* request, Beaufort County is refusing to turn over material because **it might demonstrate illegal conduct,** or as it says: "until the appropriate law enforcement agencies have notified the County that the records are not relevant to their investigations or the aforementioned exemptions cease to apply." "Might" is the modal auxiliary verb meaning unbounded. So, in other words, never.

is sold or purchased except as otherwise provided in this section." Thus, whatever privilege existed regarding the acquisition of 1 Bostick Circle and 429 Broad River Rd. evaporated once the transaction closed. As Exhibit 9 demonstrates (App. page 350), Councilmembers are not free to claim attorney-client privilege while they violate the law. Moreover, the alleged attorney-client privilege cannot apply to numerous correspondents, whose identities the County tried to hide, some of whom are County employees and some of whom are not. The inclusion of third parties waives any attorney-client privilege.

Finally, the Court of Appeals fundamentally misapplies the attorney-client privilege, which this Court summarized in *Ross v. Medical University of South Carolina*, 317 S.C. 377, 453 S.E.2d 880 (1994):

> Attorney-client privilege protects **a client** and any other person from disclosing confidential communications made to counsel relative to a legal matter. See generally *McCormick on Evidence* § 87 (E. Cleary, 3rd Ed.1984). However, this privilege is not absolute:
>
> Not every communication within the attorney and client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice. This is exemplified by the widely recognized rule that the privilege does not extend to communications in furtherance of criminal tortious or fraudulent conduct. *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (internal citations omitted).
>
> The determination of whether the privilege applies is within the sound discretion of the trial judge and his decision will not be reversed absent an abuse of that discretion. *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980) (emphasis added)

The Court of Appeals' analysis overlooks that Mr. Keaveny served as County Administrator from July – October 2018, (which makes him the attorney and the client!) and also ignores the ethical conflict in asking a lawyer to make a privilege determination about his or her own correspondence as both the attorney and the client. Such an assignment is like asking a student to assign herself a grade. The attorney-client privilege belongs to the client, not the lawyer. *Ross v. Medical University of South Carolina, ibid*, casts doubt on whether Mr. Keaveney is or is not "best suited" to evaluate the advice he gave himself, and his dual capacity does not abrogate the

Freedom of Information Act. As set forth above, the County not only attempted to charge Petitioner $72.00 an hour for Mr. Keaveney's review, but also the Court of Appeals ignored the several ways the County waived privilege if it ever existed. As pointed out in *Ross* (and discussed extensively in Petitioner's briefs to the Court of Appeals), attorney-client privilege cannot be asserted "in furtherance of criminal, tortious, or fraudulent conduct," and even Beaufort County independently determined that it improperly acquired 1 Bostick Circle but could not take corrective action because the person responsible previously left employment with the County. See App./R.O.A. Vol. 1, page 372 [Exhibit 14]: "First, the unauthorized purchase by the former Interim County Administrator. . . . There is no available disciplinary action available against the former Interim County Administrator because he is no longer employed by the County." Thus the Court of Appeals materially contracted the remedial core of the *Freedom of Information Act*, essentially gutting it especially in light of the mandatory disclosures required by § 30-4-40(a). In short, the Opinion under review invites governmental mischief.

There are few citizens who are willing to invest the time or the money to challenge government misconduct, and the Opinion under review erodes confidence in government transparency and prejudices the few who are willing to run the litigation gauntlet to seek justice to vindicate the rights of others. The Court's erroneous conclusion that government officials can conduct public business privately (especially in the acquisition of real estate or while acting illegally) and claim the protection of attorney-client privilege is not supported by any discernable legal authority. Moreover, the Court's novel interpretation violates both the announced purpose of the *Act* in § 30-4-15, quoted above on page 7, and the specific prohibition of the *Act* in § 30-4-70(c) to prevent government officials from using electronic communication to evade transparency. It is also counter to the County's obligation to preserve public records under § 30-1-20, S. C. Code, ann., *et. seq*. The *Freedom of Information Act* prohibits governmental secrecy, and elected officials

cannot solicit the County Attorney for legal advice as private citizens communicating on private email.

Opinion No. 2024-UP-018 ignores this point by carving out a universal exception that swallows the rule by declaring that government officials are free to conduct business in private: "The County's public use of private email accounts is neither a violation of FOIA nor does it eliminate the attorney-client privilege." (Opinion under review at ¶ 2.) This conclusion is both erroneous and a study in contradiction, holding on one hand that "the Special Referee did not err in failing to require the County to turn over the real estate documents," while on the other hand, ignoring that the County refused to produce them, forcing Petitioner to file suit to gain access to documents the County wrongly claimed are covered by attorney-client privilege. While the Court of Appeals correctly concludes that "the determination of whether documents or portions thereof are exempt from FOIA must be made on a case by case basis," citing *Evening Post Publ'g Co. v. City of North Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005), the Court of Appeals completely overlooks that the documents related to the acquisition of real estate are always open to the public once the transaction is complete. See § 30-4-40(a)(5)(b), S. C. Code Ann.: "a contract for the sale or purchase of real estate shall remain exempt from disclosure until the deed is executed, but this exemption applies **only** to those contracts of sale or purchase where the execution of the deed occurs within twelve months from the date of sale or purchase." (emphasis added) The Opinion under review acknowledges this statutory requirement, but then concludes the documents related to real estate are protected by attorney-client privilege. In other words, the Opinion under review rewrites the General Assembly's statute. Thus, the Court of Appeals violates its own conclusion that privilege must be evaluated on a case-by-case basis.

1(D)

THE COURT OF APPEALS FAILED TO HOLD THAT RECORDS RELATED TO THE ACQUISITION OF REAL ESTATE ARE ALWAYS OPEN TO THE PUBLIC ONCE THE TRANSACTION IS COMPLETE.

As discussed above, § 30-4-40(5)(a), S. C. Code, ann. specifically requires local governments to release information surrounding the sale or acquisition of real estate once the transaction is complete. Because all of the correspondence surrounding the purchase of these two parcels is blacked out, Petitioner has no idea why the County is withholding public information about the purchase of real estate with taxpayers' money. The County also fought hard to maintain a demonstrably frivolous legal position that their communications with the real estate agent were protected under attorney-client privilege! (The Petitioner also prevailed on this issue.) The County's intransigence on this point is both ironic and startling since it ultimately decided the acquisition of 1 Bostick Circle was improper! (See footnote 3 above on page 14.) In providing its determination of impropriety, the County did not claim its Attorney's December 12, 2018, Opinion letter provided to County officials is privileged. See Appendix/R.O.A. at page 360 [Ex. 14] Because all the other communications are blacked out, Petitioner has nothing to rely on but the County's deliberately vague and legally insufficient privilege log to rely on for conclusions. However, the County Attorney's December 12, 2018, report on the same subject matter is disclosed to the world, and certainly this publication waives attorney-client privilege, at least as to the real estate acquisition. See *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984). See also Maura I. Strassberg, "Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney-Client Privilege," *Seton Hall Law Review* (Vol. 37, 2007) The Court of Appeals gave this issue short shrift and decided the issue solely on the basis that it found Thomas Keaveny "was best suited for the identification of privileged information in his correspondence with county council members." (Opinion under review, page 4, ¶ 3) Assuming this is a correct conclusion, the Opinion under review never addresses why the County redacted every correspondent in the e-mail chain until Petitioner judicially forced them to disclose the identity of correspondents. Neither the County nor the Court of Appeals explains how every word

in every e-mail is a "privileged" communication or how to square its conclusion with the obvious waiver by Assistant County Attorney, Christopher Inglese in his December 12, 2018 Opinion letter. (App./R.O.A. Vol. 1, page 370 [Ex. 14])

These deficiencies are too important to be overlooked and are proper legal issues for this Court to grant a writ of certiorari to review the Opinion.

2.
THE COURT OF APPEALS FAILED TO FIND THE PETITIONER IS A PREVAILING PARTY AND ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS.

Section 2 of the Opinion under review holds that an award of attorney's fees is discretionary with the trial court, a correct statement of law. However, the Opinion under review never articulates its identification of discretionary standards or its application of the "discretionary" standards and thus elevates a discretionary power to an unknown, unbridled and unreviewable power because it never identifies the discretionary standard it is applying to the case. For example, even though the Petitioner prevailed on several important legal issues such as backing the County down from charging her exorbitant, unlawful fees, forced the County to turn over real estate documents, and required the County to disclose the identities of the correspondents in the private e-mail communications.[4] The Court of Appeals never mentions the Petitioner's success. The Record demonstrates that Petitioner identified 13 correspondents from a sample of e-mails—after the Special Referee order the County to reveal them—whose inclusion refutes the County's putative claim of attorney-client privilege. See App./R.O.A. Vol.3, pages 660-662 [Bate Stamped production 220, 221, and 255]. The Opinion under review fails to identify a single fact or apply any discussion or any analysis as to who is the prevailing party, even though this Court makes clear in *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011), a prevailing

[4] The County never provided its privilege log until July 6, 2020, 15 months after Petitioner filed suit.

party does not necessarily have to prevail on each and every point to be eligible for fees and costs. More importantly, the Court of Appeals ignored the indisputable fact that Petitioner prevailed on several important issues:

- Compelling the County to disclose documents related to its acquisition of two parcels of real estate;
- Prevailed on demonstrating that a real estate agent is not a client of the County Attorney;
- Requiring the County to disclose information related to communications with third persons who cannot be covered by an attorney/client privilege;
- Requiring the County to disclose the identity of participants in discussion of County business;
- Compelling the County to cease charging requestors with unlawful fees for legal "review" of documents sought under the *Freedom of Information Act*.
- Requiring the County to provide a privilege log in order to see what the County alleged as justification for withholding public documents.
- Prevailing on the right to obtain the email correspondence from Councilmembers Alice Howard and Stewart "Stu" Rodman, **which have never been turned over**—the County's Privilege Log only lists Paul Sommerville, who was Chairman, as exempt. (See App./R.O.A. Vol. 1, pages 121-128.) The record is clear the County would have supplied Rodman and Howard's emails to the Petitioner if only she paid the exorbitant, unlawful fees the County demanded. Interestingly, the Sommerville Privilege Log claims that every communication to every County employee is covered by "attorney-client" privilege! See for example, entry no. 133, page 127: "Email from County Attorney to County employees **and retained agent**." (emphasis added) Even a casual inspection of the County's

Privilege Log reveals that ordinary County business is universally cloaked in alleged "attorney-client privilege."

"An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions. *Id.*, 675 S.E.2d at 445 (quoting *Layman*, 376 S.C. at 444, 658 S.E.2d at 325)." *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 711 S.E.2d 895 (2011). The facts here are stronger than *Sloan* because, for example, here the County resisted disclosing even the identities of correspondents until the Special Referee compelled it. Thus appellant achieved more than Sloan: "Here, Sloan's complaint prompted Friends to do what a series of FOIA letter requests could not accomplish—produce the requested documents. Accordingly, Sloan prevailed and is entitled to an award of attorney's fees." In *Sloan*, the Friends of the Hunley produced the requested documents one month after Sloan filed his suit. They then asserted there was no "justiciable controversy" because they turned over the documents Sloan requested. According to the Friends, this meant Sloan could not be a "prevailing party" because they complied early and without a court order. This Court disagreed. Here, Beaufort County pushed Petitioner much harder, first demanding she pay exorbitant and unlawful fees in direct violation of the *Act* and the County's published fee schedule, then by entirely blacking out the documents she sought, including even the identities of the participants in the communications, and also refusing to turn over public documents related to the acquisition of real estate, which the County is obligated to provide and which the Court ordered, and by adopting a facile legal position that a private, third party, real estate agent is by extension a County employee and therefore, the County Attorney's client. In short, the County took a highly aggressive—and illegal—position against Petitioner far worse than the 30-day stonewalling that this Court analyzed in *Sloan*. As Footnote 3 on page 14 above demonstrates, the County's disobedience of the *Freedom of Information Act* is not a one off episode. Affirming the Special Referee's "discretion" to not award

fees after Petitioner prevailed on several important issues is a decision at variance with both the facts and the law, and the very definition of an abuse of discretion. In affirming the decision to withhold fees or costs from Petitioner, the Court of Appeals ignored the factors defining the discretionary standard and thus reached an erroneous conclusion.

Thus there is no "evidentiary support" for either the County's decisions to withhold the identities of participants in communications or the suppression of public information related to the acquisition of real estate, cloaking a third-party real estate agent as a client of the County Attorney, or in attempting to demand Petitioner pay outrageously expensive and unlawful fees, and she prevailed on all of these legal issues both at both trial and on appeal. Because the Court of Appeals overlooked this success in violation of *Sloan II,* and failed **to apply** the discretionary standard, the Opinion under review failed to measure or apply Petitioner's success. Even if this Court affirmed the Court of Appeals on the substantive law, there is no denying Petitioner was at least a partial prevailing party, and thus Opinion under review errs in citing the abuse of discretion standard without applying it to the facts of the case.

Finally, as discussed fully above starting on page 6, the Opinion under review inserts a parenthetical comment that appellate courts only analyze cases presenting a "justiciable controversy" without explaining why the present case presents only "moot" or "academic" issues. The Court of Appeals cites *Wallace v. City of York,* 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981) for this proposition, a case wholly inapposite as discussed above. Inasmuch as the *Freedom of Information Act* bestows statutory standing on the Petitioner to maintain this action (§ 30-4-100, S. C. Code, ann.) and declares all "violations of this chapter must be considered to be an irreparable injury for which no adequate remedy of law exists." S. C. Code, ann. § 30-4-100, it is indisputable that Petitioner presents a "justiciable controversy," which the Court of Appeals ignored. Thus the

Petitioner's success as described above makes her a prevailing party entitled to fees and costs as provided by statute.

CONCLUSION

This Court should grant a writ of certiorari to review Opinion No. 2024-UP-018 because it adopts several novel and alarming interpretations of the *Freedom of Information Act* and rejects settled precedent. Outside analysis may shed some light on this: In a March 16, 2024, editorial, the *Post & Courier* noted how frequently local governments defy the *Act's* requirements for open meetings and full document production. The editorial staff also noted how rare it is for a citizen to invest her time and money to compel a local government to act lawfully and ethically, especially when local governments face no deterrent to bad behavior other than to reimburse fees to successful plaintiffs with taxpayer money. Case law demonstrates the lack of consequences for government officials who act unethically and how the lack of meaningful penalties does nothing to inhibit future violations. In short, the editors of the *Post & Courier* openly discuss an issue glossed over by the courts—the lack of governmental incentive to adhere to the *Act*—and while this Court has cited frequently the preamble to the *Freedom of Information Act* (quoted above on page 7), the case law avoids the lack of a meaningful deterrent. The Opinion under review ignores Beaufort County's demonstrably bad acts and its willingness to deploy every dilatory and deceptive practice in its arsenal to avoid being held accountable to the very constituency it is meant to serve. Because a single, private citizen bears the entire risk of loss alone in attempting to influence local government to obey the law, and because local governments do not personally or individually fear a deterrent, they violate the *Act* with impunity, and the *Freedom of Information Act* is the only check available to an individual citizen. The Opinion under review brings highlights these dynamics and brings them into sharp focus because even though Beaufort County tried to charge Petitioner unlawful and unconsciously expensive fees, refused to provide the identity of

correspondents—even private, third-party correspondents, on documents, claimed bogus attorney-client privilege for every document that included the County Attorney in the chain, and it improperly withheld obviously public documents, the Opinion under review winks at these transgressions and weakens the state's commitment to the *Freedom of Information Act*. The fact that it is an unpublished *per curiam* Opinion is another reason this Court should grant Petitioner a writ of certiorari because every municipal and county attorney in the State will read the Opinion as a green light for mischief.

The Court of Appeals gave this case a cursory review, even denying the Petitioner reimbursement for her costs and fees despite the fact she materially prevailed, and it is important for the Supreme Court to put this right by addressing directly the governmental misconduct demonstrated by this Record. The appellate courts of this State cannot condone government misconduct without promoting this type of injury, an injury only experienced by the private citizens and taxpayers of this State. Without adherence to standard rules, a local government can morph into the kind of anarchy lampooned by Shakespeare in *Henry IV*: When Jack Cade pronounced his new order of lawlessness, all he needed was to dismantle the rules, which obviously required eliminating the yeomen of justice:

> DICK THE BUTCHER. The first thing we do, let's kill all the lawyers.
>
> JACK CADE. Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment, that parchment, being scribbl'd o'er, should undo a man? Some say the bee stings; but I say 'tis the bee's wax, for I did but seal once to a thing, and I was never mine own man since.
>
> *2 Henry VI*, Act IV, Sc. 2, lines 76-83

The Opinion under review dissolves the safety seal and opens the door for bad conduct, for what private individual will dare accept the personal and financial challenge to the government under the *Act* if the courts embolden the noncompliant? For the *Freedom of Information Act* to be

something more than a toothless tiger, a parchment easily unsealed by any plausible scoundrel, Courts must enforce it as it is intended, faithfully and consistently. Here, the Court of Appeals summarily disregarded the important policy implications raised by Petitioner's suit, best illustrated by the query posed at minute 26 during the Court's November 9, 2023, oral argument: "What caused her to try to get FOIA information. . . was there a reason?" The Court of Appeals answered its own question 20 years earlier in *Campbell v. Marion County Hosp. Dist*., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003): "The essential purpose of the FOIA is to protect the public from secret government activity." *Quality Towing v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001): the F.O.I.A. was enacted to prevent the government from acting in secret."

The amount of secret government conduct in this case is shocking. Some of it was directed unprofessionally at Petitioner—see App./R.O.A. pages 374-381—with the rest garden variety unethical conduct that mushrooms in the dark, out of public view—see Appendix/R.O.A. page 370: "The controversy surrounding the property has two elements. First, the unauthorized purchase by the former Interim County Administrator. . . ." The purpose of the *Act* is to inhibit secret government conduct, and the Court of Appeals not only ignored the well-developed body of law of controlling precedent, but also set loose into the world an Opinion that will encourage government misconduct. For these reasons, the Court should grant a writ of certiorari to review Opinion No. 2024-UP-018.

Respectfully submitted,

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