

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**May 23 2024**

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Erin D. Dean, Special Referee

Case No.: 2019-CP-07-00818  
Appellate Case No. 2021-00321

Court of Appeals Opinion No. 2024-UP-018

Mare Baracco..... Petitioner,

v.

Beaufort County..... Respondent.

**RETURN OF BEAUFORT COUNTY TO  
PETITION FOR WRIT OF CERTIORARI**

May 23, 2024

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## **COUNTER-STATEMENT OF QUESTIONS PRESENTED**

- ISSUE I. THE PETITION PRESENTS NO SPECIAL AND IMPORTANT REASONS JUSTIFYING A DISCRETIONARY WRIT OF CERTIORARI.
- ISSUE II. THE COURT OF APPEALS CORRECTLY FOUND THE COUNTY'S CALCULATION OF THE REASONABLY ESTIMATED COSTS OF PRODUCTION DID NOT VIOLATE FOIA.
- A. The Court of Appeals Correctly Found That There Was No Justiciable Controversy.
  - B. The Court of Appeals Correctly Found that the County Could Include the Costs of Redaction in Estimating the Direct Costs of Production.
- ISSUE III. THE COURT OF APPEALS WAS CORRECT AS A MATTER OF LAW IN FINDING THE COUNTY ACTED PROPERLY IN REDACTING VARIOUS PUBLIC RECORDS PRIOR TO PRODUCTION.
- A. The Court of Appeals Correctly Found That the Use of Private Email Accounts by Public Officials Neither Violates the Freedom of Information Act Nor Waives the Attorney-Client Privilege.
  - B. The Court of Appeals Correctly Found That Communications Between County Officials and the County Attorney Were Exempt from Disclosure Under FOIA as Privileged Communications.
  - C. The Court of Appeals Correctly Found That the Consummation of a Real Estate Transaction Does Not Eliminate the Attorney-Client Privilege.
- ISSUES IV. THE COURT OF APPEALS CORRECTLY FOUND THAT THE SPECIAL REFEREE DID NOT ABUSE HER DISCRETION IN DECLINING TO AWARD ATTORNEYS' FEES.

## **COUNTER-STATEMENT OF THE CASE**

On February 10, 2019, Mare Baracco (the “*Petitioner*”) submitted a Freedom of Information Act (“*FOIA*”) request to Beaufort County for communications related to the purchase of two parcels of real estate by the County for the potential development of special needs housing (“*FOIA Request No. 1*”). (R. p. 313-15). On February 20, 2019, the County responded and requested an initial deposit of \$124.66 as a condition of fulfilling the request, which the *Petitioner* later tendered. On March 21, 2019, the County turned over the responsive documents to the

Petitioner and refunded \$53.66 to the Petitioner due to the County's overestimating the initial costs of production. Portions of the production were redacted by the County prior to delivery.

On March 10, 2019, the Petitioner submitted another FOIA request to Beaufort County in which she requested all emails to/from/between two County Councilmembers with various County department heads, the County Administrator, the County Attorney, the County Sheriff, members of County Council, and/or other public and private individuals over an approximately six (6) year's period ("*FOIA Request No. 2*"). (R. pp. 317-318). There was no limit as to subject matter. Given its expansive scope, the request involved thousands of documents.

On March 18, 2019, the County responded to FOIA Request No. 2 by requesting a deposit of \$3,019.75, which represented approximately 25% of the reasonably anticipated costs to be incurred by the County in responding to FOIA Request No. 2. (R. pp. 319-20). The County estimated that searching, retrieving, and redacting the numerous records requested by FOIA Request No. 2 would take approximately 167 hours, based on an estimated time of one minute per document. (*Id.*). On that same day, the Petitioner amended FOIA Request No. 2, reducing its scope to all e-mails over the same 6-year period but only between the County Council Chairman, the former County Administrator, the former County Attorney/former Deputy County Administrator, and the County Attorney ("*FOIA Request No. 3*"). (R. pp 321-322). On March 25, 2019, the County responded that an initial deposit of \$152.82 – once again, 25% of the estimated cost of fulfillment - would be required prior to record compilation. (R. pp 323-325). No deposit was ever paid by the Petitioner for FOIA Request No. 3.

Thereafter, on March 31, 2019, the Petitioner submitted a fourth FOIA request to the County, this time for all emails from January 1, 2015, to/from/between multiple individuals and County Council member Alice Howard's using her personal e-mail address ("*FOIA Request No.*

4”). (R. p. 326). On April 2, 2019, the County responded that an initial deposit of \$404.29 – once again, 25% of the estimated cost of fulfillment - would be required prior to document production. (R. p. 327). No deposit was ever paid by the Petitioner for FOIA Request No. 4.

The Petitioner filed this lawsuit on April 10, 2019, against Beaufort County. On June 29, 2019, before service of a responsive pleading by the County, the Petitioner served and filed an Amended Complaint seeking an injunction against the County and attorneys’ fees for the County’s alleged violation of the Freedom of Information Act. (R. pp. 31-37). In particular, the Petitioner challenged the County’s estimate of the reasonably anticipated costs of production in response to FOIA Requests Nos. 2 through 4, and the propriety of the redactions completed by the County in response to FOIA Request No. 1. *Id.*

Although the relevant portion of the Freedom of Information Act does not require responsive pleadings, on August 14, 2019, the County answered the Amended Complaint and raised four defenses, including a general denial and Rule 12, SCRCF. (R. pp. 38-41). On May 28, 2020, the Chief Administrative Judge *sua sponte* assigned the case to the Honorable Perry Buckner to conduct a hearing in accordance with S.C. Code Ann. § 30-4-100(A). (R. p. 1).

On June 2, 2020, the matter came before Judge Buckner via WebEx hearing. On June 3, 2020, Judge Buckner (i) ordered Petitioner to identify which documents she was requesting under FOIA, which documents remained in dispute, and to provide a list of the same within fifteen days to the County; (ii) ordered the County, within thirty days of receipt of document identification from the Petitioner, to provide the basis for any objections to the requested documents as well as the exact fee that County intended to charge for the production of the same; and, (iii) appointed Erin Dean as special referee to “determine the reasonableness of the fee, and whether or not any of the exceptions under the applicable FOIA statute apply.” (R. p. 5).

On June 19, 2020, the Petitioner provided the County and the Special Referee with her list of requested documents and the reduced scope of the outstanding requests. (R. p. 81). On June 29, 2020, the County responded. (R. pp. 84-86). On July 6, 2020, and July 7, 2020, the County produced (i) redacted versions of the requested documents along with a privilege log asserting the basis of the FOIA exemption to the Petitioner and the Special Referee, and (ii) “clean” versions of the documents to the Special Referee for *in camera* review. (R. pp. 87-96). Given the sheer volume of documents, the parties agreed to accept receipt of the same via electronic transfer over Citrix ShareFile, an encrypted document sharing software program. Prior to the final hearing on the matter, the Special Referee received all of the documents pertaining to FOIA Request No. 1, both redacted and un-redacted, as well as all of the documents implicated by the Petitioner’s reduced FOIA Request No. 3, both redacted and un-redacted.

The Parties appeared before the Special Referee on September 25, 2020, for a final hearing conducted via Lifesize streaming program supplied by the court reporter. After taking testimony and considering the briefing and arguments of counsel, the Special Referee issued an Order on November 13, 2020. (R. pp. 7-22).

In regard to FOIA Request No. 1, the Special Referee determined that all of the redactions completed by the County fell within a recognized FOIA exemption except for those redactions on communication in which Debra Regecz, a third-party real estate agent retained by the County to assist with the location and acquisition of real property, was copied. (R. pp. 16-20). In regard to revised FOIA Request No. 3, “[a] thorough review by this Court of the 167 pages of documents produced ... revealed that the majority of redactions did pertain to legal advice received from Keaveny.” (R. p. 16). Three exceptions were found and the Special Referee

ordered that those three documents be provided to the Appellant-Respondent. On December 15, 2020, those three documents were provided to Appellant-Respondent through her counsel.

Both parties later moved for reconsideration, which the Special Referee denied on March 2, 2021. (R. pp. 23-30). On March 22, 2021, the Petitioner filed her Notice of Appeal. (R. p. 199). On March 23, 2021, the County filed its Notice of Appeal. (R. p. 201). On May 18, 2021, the Special Referee billed \$7,280.00 for her services in this case. In accordance with the Order from Judge Buckner, each party paid one-half of the Special Referee's costs.

On November 9, 2023, the Court of Appeals held oral argument and issued the Opinion under review on January 10, 2024. The Petitioner's application for rehearing was denied on March 18, 2024.

## **ARGUMENT**

Respondent, pursuant to Rule 242(f), SCACR, submits this Return in opposition to the Petition for Writ of Certiorari. For the reasons set forth below, the Petition should be denied.

### **ISSUE I. THE PETITION PRESENTS NO SPECIAL AND IMPORTANT REASONS JUSTIFYING A DISCRETIONARY WRIT OF CERTIORARI**

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” *Ellison v. State*, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009). In determining whether a petition presents “special and important reasons” for review, the Court should consider the following five factors: (1) the novelty of the legal questions presented; (2) whether there was a dissent in the decision of the Court of Appeals; (3) whether a prior decision of the Supreme Court conflicts with the Court of Appeal's decision; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the

United States Supreme Court. *Id.*; *Haggins v. State*, 377 S.C. 135, 659 S.E.2d 170 (2008); *State v. Lyles*, 381 SC 442, 445, 673 S.E.2d 811, 813 (2009); Rule 242(b), SCACR.

The Petition fails to demonstrate the special and important circumstances that must be present in this case to justify this Court’s review. The reason: They do not exist.

*First*, the decision of the three-judge panel in the Court of Appeals was unanimous.

*Second*, this case does not involve a constitutional issue.

*Third*, there is no federal question included and the Court of Appeals’ opinion does not conflict with any decision of the United States Supreme Court.

*Fourth*, the Petition concedes that there are no novel questions of law presented: “While there is nothing novel about either the purpose or the scope of the *Freedom of Information Act*...” (Petition, p. 6). This is not the first time that the Petitioner has flatly rejected the idea that novel issues are presented by this case. In the Petitioner’s Response Brief to the Court of Appeals, the Petitioner claimed that “government secrecy is as inevitable as nature’s decay” and “the issues here will be depressingly and frequently repetitive, but far from novel.” (Resp. Brief, pp. 6-7). A novel legal issue, however, does not exist due to speculation regarding whether a similar fact pattern could occur, nor from the purported nobility of the Petitioner’s cause.

*Fifth*, the Court of Appeals’ decision does not conflict with any prior decision of this Court. The unambiguous language of FOIA empowers the Special Referee with the discretion to award or deny any attorneys’ fees. *See* S.C. Code Ann. § 30-4-100(B). Contrary to the argument of the Petitioner, FOIA is not a punitive statute designed to punish public bodies for all manner of transgressions, no matter how slight, provided that the prosecuting party is capable of prevailing on just one of many different claims. *See Litchfield Plantation Co., Inc. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 443 S.E.2d 574 (1994) (finding that

Special Referee did not err in refusing to award attorneys' fees to prevailing party). The explicit and codified purpose of FOIA is public disclosure, not discipline. *See* S.C. Code Ann. § 30-4-15. Interpreting the Act to *mandate* the award of attorneys' fees not only runs counter to the purpose of FOIA and its explicit statutory language, it also depends on the rejection of established South Carolina case law.

The Petition fails to meet the standards imposed by this Court for granting certiorari; instead, it simply echoes the same arguments made before the Court of Appeals. The Court of Appeals made a proper ruling in this case, based on supported evidence and grounded in established law, and the Court of Appeals' opinion should be left undisturbed.

**ISSUE II. THE COURT OF APPEALS CORRECTLY FOUND THE COUNTY'S CALCULATION OF THE REASONABLY ESTIMATED COSTS OF PRODUCTION DID NOT VIOLATE FOIA.**

The Petitioner argues the County violated FOIA by including the estimated costs of redaction in its calculation of the reasonably anticipated costs of production. As concluded by both the Special Referee and the Court of Appeals, since the Petitioner never paid the deposits and later amended its requests, there was no justiciable controversy. (R. p. 13-14); (Opinion, pp. 4). Further, even if there was a justiciable controversy, the Court of Appeals clarified that there was no FOIA violation by the County given that “[in] the context of attorney-client privilege, redaction and determining whether documents are subject to disclosure are separate and distinct processes.” (Opinion, pp. 2, 4). As detailed herein, the Court of Appeals opinion was correct.

**ISSUE II(A). THE COURT OF APPEALS CORRECTLY FOUND THAT THERE WAS NO JUSTICIABLE CONTROVERSY.**

Both the trial court and the Court of Appeals determined that there was no cognizable violation of the Freedom of Information Act relative to the County's estimated deposits because the Petitioner never paid the deposits. Since no deposits were paid, the Petitioner's questions

were merely academic. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474, 478 (2006)(finding that even in FOIA cases appellate courts will not decide academic questions). “Generally, this Court only considers cases presenting a justiciable controversy.” *Id.* (citing *Byrd v. Irmo High School*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996)). “A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract.” *Id.*

Further, even to the extent a justiciable controversy may have existed, the Petitioner mooted any claims related thereto by **voluntarily** amending FOIA Request No. 2 and reducing the scope of FOIA Request No. 3 and FOIA Request No. 4, to which amended FOIA requests the County provided revised estimated deposits.<sup>1</sup> (R. pp. 81, 87-88). The Petitioner has never challenged the revised estimated deposits.

**ISSUE II(B). THE COURT OF APPEALS CORRECTLY FOUND THAT THE COUNTY COULD INCLUDE THE COSTS OF REDACTION IN ESTIMATING THE DIRECT COSTS OF PRODUCTION.**

The Petitioner largely ignores the Court of Appeals’ conclusion that the County could include the estimated costs of redaction in calculating the reasonably anticipated costs of production. In fact, other than referring to the County’s *statutorily-authorized estimates* as “illegal fees” throughout the Petition and accusing the Court of Appeals of “duck[ing] the issue,” the totality of the Petitioner’s argument appears to be found within two consecutive sentences: (i) “Both the Special Referee and the Court of Appeals conflated ‘review’ with ‘redaction’”; and, (ii) “‘Redaction’ is the physical act of blacking out **privileged** information....” (Petition, pp. 8, 11-12)(emphasis in original).

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<sup>1</sup> The Petitioner’s voluntary amendment of FOIA Request No. 2 effectively eliminated the County’s statutory right to challenge the breadth and burdensomeness of the request as originally framed.

Notably, the Petitioner’s argument on this issue has evolved at each stage of litigation. Before the Court of Appeals, the Petitioner rebuked the County for having “the temerity to argue that a requestor is responsible for the County’s fees in redacting documents,” concluding that “the statute says exactly the opposite.” (Resp. Brief, p. 12). This argument fell flat as FOIA is explicit in permitting local governments to charge the costs of redaction to a requestor: “The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records.” S.C. Code Ann. § 30-4-30(B) (emphasis added). While before the Special Referee, the Petitioner argued the public body could only charge for “the type of redactions routinely expurgated from public documents, such as the names of minors, social security numbers, financial account numbers, etc.” (R. pp. 618-620). In other words, public bodies could only charge for redactions when the law *requires* it but not when merely permitted. FOIA, however, explicitly ties redactions to the exemptions enumerated in Section 30-4-40, including but not limited to the attorney-client privilege. *See* S.C. Code Ann. § 30-4-30(C).

As to the Petitioner’s current position, the Opinion does not conflate redaction with review; rather, it correctly recognizes that FOIA places two distinct and separate review obligations upon public bodies. *See* S.C. Code Ann. § 30-4-30(C). A FOIA request is not a subpoena, nor is it a simple consumer transaction. Instead, as recognized by the Court of Appeals, it is a multi-step process that begins with the public body’s receipt of a FOIA request.

Upon receipt of a FOIA request, the public body has between ten and twenty days to make a “determination...as to the public availability of the requested public record.” S.C. Code Ann. § 30-4-30(C). In accordance with FOIA, many “public records” are not publicly available and are not subject to disclosure. *See* S.C. Code Ann. § 30-4-20(c).<sup>2</sup> Further, FOIA requests

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<sup>2</sup> The definition of “public record” in the Act identifies well over a dozen different subsets of

often demand the production of documents that either do not exist or are not within the possession of the public body. As such, this “examination and review to determine if the documents are subject to disclosure” is the mandatory first step in all FOIA requests. S.C. Code Ann. § 30–4–30(B).

The Court of Appeals correctly interpreted FOIA’s prohibition on charging for “examination and review” to apply *exclusively* to the review of the records during the initial 10 (or 20) day acknowledgement period required by FOIA. A public body cannot charge for the time it takes to determine whether it will or can comply with a FOIA request. If there are no documents subject to disclosure, there is no need to move to the second stage of this process. If, however, the public body believes there are responsive public records, a second question must be answered: What is the reasonably anticipated actual cost to the public body of reproduction of these records?

FOIA grants public bodies the right to require a “deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records...*prior to the public body searching for or making copies of records.*” S.C. Code Ann. § 30-4-30(B)(emphasis added). In determining the amount of a proposed deposit, a public body must first estimate the total permissible fee that could be levied under FOIA. FOIA permits public bodies to recover a reasonable fee for the cost of having an employee of the public body search, retrieve, *and redact* public records in response to a valid FOIA request. *See* S.C. Code Ann. § 30–4–30(B).

Previously, South Carolina limited local governments to recovering fees only for the cost of the “search and retrieval” of public records in response to a FOIA request, with such costs

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public records (*e.g.*, “income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records,” etc.) that the General Assembly determined should never be disclosed as part of a FOIA production. *Id.*

“not to exceed the actual cost of searching for or making copies of records.” *See* S.C. Code Ann. § 30-4-30(B)(2016). In 2017, the Freedom of Information Act was amended to add the costs associated with “redaction” and to permit recovery based on “the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform [the search, retrieval, and redaction of records].” *Id.*; (R. pp. 62-67).<sup>3</sup> Thus, the time spent redacting public records in response to a FOIA request is expressly compensable on an hourly rate and should be included within any calculation of the estimated costs of reproduction. *Id.*; (R. pp. 162-166).

The County responded to the Petitioner within the statutorily required timeframe, notifying the Petitioner of the existence of responsive records. At the same time, the County provided its estimated deposits, as permitted by FOIA, and informed the Petitioner that upon her payment of the deposit, the County would begin searching, retrieving, and redacting the responsive records. The Petitioner chose not to pay. Only upon the payment of the deposit is the public body obligated to produce any responsive records, “specific portions of [which] may be subject to redaction according to the exemptions provided for by Section 30-4-40 or other state or federal laws.” S.C. Code Ann. § 30-4-30(C). This would be the next step in the process.

In redacting material in accordance with S.C. Code Ann. § 30-4-40, the public body is not making a determination as to whether the documents are subject to disclosure; rather, it is analyzing whether portions of documents already determined to be subject to disclosure *may be* otherwise exempt per Section 30-4-40 of the Act. By its very nature, the process by which

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<sup>3</sup> The Court of Appeals’ conclusion that the County Attorney “was best suited for the identification of privileged information” is not a “wholly irrelevant conclusion” as alleged by Petitioner. (Petition, p. 11). It is far from irrelevant. It is an essential element of determining a reasonable fee for almost every FOIA request. The Petitioner continues to offer no alternative individual who would have the skill and training to perform such a request.

exempt material is separated from non-exempt material must be subsequent to the determination of whether the underlying public records are even subject to the disclosure requirement of Section 30-4-30(A)(1) of the Act.

The Court of Appeals correctly recognized that FOIA places two distinct and separate review obligations upon public bodies. *See* S.C. Code Ann. § 30-4-30(C). Any other interpretation of these provisions would render the Act hopelessly contradictory as analyzing records for disclosure determinations is an essential part of the redaction process. By recognizing the multi-step process created by FOIA and the impact of the 2016 legislative amendments, the Court of Appeals correctly found that there was no irreconcilable conflict within the law. This interpretation clarifies that the public body has no right to charge a requestor in providing its initial response regarding the public availability of such documents and the public body's reasonably anticipated costs of production. *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). By removing the possibility of such an expense, the General Assembly reaffirmed the right of the public to inquire about publicly available documents without risk of financial penalty, while simultaneously acknowledging the admirable goal of limiting taxpayer burden due to the *actual production of records*.

Further, even if the Court of Appeals had found that an irreconcilable conflict exists within FOIA, the last legislative expression rule would hold that the time spent reviewing documents *as part of the redaction process* is compensable under FOIA. "Under the 'last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails." *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991); *Whiteside v. Cherokee Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (finding that "later legislation supersedes earlier laws addressing the identical issue").

As to the Petitioner’s second argument – that redaction is limited to the time necessary to physically obscure the exempt material – it is similarly without support and an interpretation that strains logic and reason. The process of analyzing potentially sensitive documents for exempt material is a necessary and substantial component of redaction and requires extensive training. To separate the two would effectively nullify the General Assembly’s decision to permit public bodies to recover the cost of redaction. For these reasons, the Court of Appeals correctly determined that the County did not violate FOIA as to the estimated deposits.

**ISSUE III. THE COURT OF APPEALS WAS CORRECT AS A MATTER OF LAW IN FINDING THE COUNTY ACTED PROPERLY IN REDACTING VARIOUS PUBLIC RECORDS PRIOR TO PRODUCTION.**

The weight of the Petitioner’s issue on appeal is whether the Court of Appeals *and the trial court* erred in determining that the majority of documents produced by the County in response to FOIA Request No. 1 and FOIA Request No. 3 were properly redacted as exempt material under the Freedom of Information Act. As discussed herein, the Court of Appeals and the Special Referee’s conclusions were based on a complete and exhaustive review of each redaction, grounded in established law, and the result of a proper analysis of the facts.

While the Petitioner continues to offer a litany of ever-shifting positions as to why the County’s redactions were allegedly improper, a single theme has existed throughout this action: The Petitioner’s unfounded belief that “there is no such thing as ‘privileged information’ when government officials communicate with third parties or one another.” (R. p. 45). Or, as more bluntly claimed by the Petitioner, “[t]he assertion that the email communications of government officials are ‘privileged’ is nonsense....” (R. p. 47). This argument, however, fails once examined in the light of the Freedom of Information Act and established case law.

FOIA’s judicially enforceable right to access public records is subject to certain well-

recognized exceptions, including the right of the public body to exempt from disclosure “[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.” See S.C. Code Ann. § 30–4–40(a)(7). See S.C. Code Ann. § 30–4–40(a)(7). The South Carolina Supreme Court has already dismissed the notion that the status of the attorney can eliminate the protections provided by the attorney-client privilege. *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745 (2011)(recognizing the existence of the attorney-client privilege for governmental clients but questioning whether inclusion of outside counsel on employee questionnaires was done solely to avoid disclosure); see also, *In re Grand Jury Investigation (John Doe)*, 399 F.3d 527 (2<sup>nd</sup> Cir. 2005) (finding, “if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context”); *Ross v. City of Memphis*, 423 F.3d 596, 601-603 (6<sup>th</sup> Cir. 2005)(noting that the privilege in the civil context for government employees should be even more robust so that the government can investigate wrongdoing more thoroughly and pursue remedial options). For these reasons, both the trial court and the Court of Appeals correctly rejected the contention that our State’s thousands of public servants are not afforded the same legal protections offered to private citizens by the attorney-client privilege.

At its core, the attorney-client privilege protects communications between attorneys and clients in which legal advice was sought or rendered, and which was intended to be and was in fact kept confidential, unless otherwise waived. “In order to establish the privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature.” *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44, 46-47 (S.C. Ct. App. 1984). Attorneys’ communications should be protected by the attorney-client privilege so long as they relate to some legal strategy, or to the meaning, requirements,

allowances, or prohibitions of the law.

As to FOIA Request No. 1, the County's attorneys were brought into these communications due to their legal knowledge and the existence of potential legal issues regarding the acquisition of real estate and the potential development of a Department of Special Needs home in a residential subdivision. (R. pp. 71-72). The communications were predominantly centered on the process by which a local government could acquire this real estate and the various title issues revealed by the title work, in particular various restrictive covenants. *See Matrix Financial Services Corporation v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011)(recognizing certain aspects of real estate acquisition constitute the practice of law). The Special Referee agreed. "After careful review of the un-redacted documents produced to the Court...with the exception of the documents that include Debra Regecz [the County's real estate agent] ... I find the remaining redactions appropriate and subject to exemption pursuant to S.C. Code Ann. § 30-4-40(a)(7)." (R. p. 17).

As to FOIA Request No. 3, following a "thorough" *in camera* review of the "167 pages" of redacted and un-redacted documents produced by Beaufort County, the Special Referee similarly found "that the majority of the redactions did pertain to legal advice received from Keaveny [the County Attorney]." (R. p. 16). The Special Referee ultimately found that there were three (3) documents improperly redacted as to FOIA Request No. 3, at least one of which she inferred was an "oversight." (R. pp. 16-17).

While the County recognizes that whether a particular communication is privileged can be a challenging question given the recognized public benefit of transparency in government actions and the complex and varied roles expected of a county attorney on a daily basis, the redactions made by the County in this case were proper, legal, and necessary to avoid an

inadvertent waiver of privileged material through disclosure to a third party. Upon a thorough review of all the public records produced by the County in this action, the Special Referee and Court of Appeals agreed, finding that the vast majority of them – with the aforementioned exceptions – were privileged and properly redacted in accordance with FOIA.

**ISSUE III(A). THE COURT OF APPEALS CORRECTLY FOUND THAT THE USE OF PRIVATE EMAIL ACCOUNTS BY PUBLIC OFFICIALS NEITHER VIOLATES THE FREEDOM OF INFORMATION ACT NOR WAIVES ATTORNEY-CLIENT PRIVILEGE.**

Given that the attorney-client privilege is recognized in the governmental client context, the Petitioner argues a modified version of the same elimination theory espoused earlier, namely whether the use of *personal* email by a public official constitutes an automatic waiver of the attorney-client privilege. The law does not support this contention. Private email accounts of public officials are not summarily subject to public disclosure; rather, courts across the country have determined that context is key. South Carolina is no exception.

The Freedom of Information Act’s deliberately broad definition of “public record” reinforces that the content of the communication will generally control over the medium. *See* S.C. Code Ann. § 30-4-20(c). As codified, FOIA’s definition of “public record” is designed to encompass all records that relate to public business, not just those records that are created and/or stored on publicly owned communication systems. At no point relevant to this action has Beaufort County challenged the proposition that a public official’s private emails are subject to the Freedom of Information Act when such emails are used to conduct public business. Similarly, the exemptions set forth in S.C. Code Ann. § 30-4-40 are not limited to a particular narrow subset of public records (*e.g.*, email from official government accounts); rather, much like the disclosure obligations of FOIA, the exemptions’ applicability is based on the content of the communication, not the medium used. If the public record contains attorney-client privileged

material, the privileged information may be exempt from disclosure.

**ISSUE III(B). THE COURT OF APPEALS CORRECTLY FOUND THAT COMMUNICATIONS BETWEEN COUNTY OFFICIALS AND THE COUNTY ATTORNEY WERE EXEMPT FROM DISCLOSURE UNDER FOIA AS PRIVILEGED COMMUNICATIONS.**

As an alternative path to reach the Petitioner's desired result, the Petitioner offers a non-exhaustive anthology of raised, rejected, abandoned, and then resurrected arguments spanning the (i) crime-fraud exception to privilege, (ii) the impact of the County Attorney briefly serving as Interim County Administrator, (iii) the purported use of electronic communications to evade transparency in defiance of S.C. Code Ann. § 30-4-70(c), to (iv) alleged violations of the Public Records Act. The Petitioner does not provide any legal authority or existing case law that conflicts with the Court of Appeals' opinion or supports her position. Instead, the Petitioner simply consolidates multiple unrelated arguments under a single heading in an effort to obscure their individual deficiencies through volume.

(1) THE CRIME-FRAUD EXCEPTION

The crime-fraud exception eliminates privilege for communications made for the *specific purpose* of furthering a fraudulent or criminal act. It does not work retroactively to eliminate privilege whole cloth as suggested by the Petitioner. Further, no evidence has been offered to suggest any County communications were made for such a *specific purpose*. Even viewing the Petitioner's briefing in the most charitable light possible reveals, at worst, a lawyer offering inaccurate legal advice regarding the statutory authority of a County administrator. To accept the Petitioner's argument would effectively penalize the County for doing what the attorney-client privilege is designed to encourage - consulting with counsel to ensure legal compliance.

(2) DUAL CAPACITY OF COUNTY ATTORNEY

While chastising the Court of Appeals in Issue I(A) for "follow[ing] a tortuous path to an

irrelevant analysis,” the Petitioner asserts that an in-house attorney cannot assume a secondary role – even in an interim or secondary capacity – within the same organization and retain the protections of the attorney-client privilege. (Petition, p. 11.). The irony in referring to the Court of Appeals’ analysis as “irrelevant” should not be lost on this Court given that (i) *only one record* was produced by the County to the Petitioner with redactions during this short period in which the County Attorney was serving as Interim County Administrator; and, (ii) the Special Referee determined that the County Attorney waived privilege as to this record when he copied the County’s realtor on the communication. As a practical matter, this argument is entirely irrelevant to the issues before this Court. As a legal matter, it similarly lacks substance.

Although perhaps a novel question in the public body context, this argument has been regularly rejected in the corporate context. In particular, the South Carolina Rules of Professional Conduct accept that attorneys may serve organizational clients in more than one role. *See* SCRPC 1.7, cmt. 33 (“A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict.”). While there is no dispute that serving an organization in more than a single capacity can create complications - in particular for attorneys - the broad proposition presented by the Petitioner lacks any legal foundation for further consideration by this Court.

### (3) USE OF ELECTRONIC COMMUNICATIONS TO EVADE TRANSPARENCY

While previously rebuking the County for advancing “a straw man argument that the Petitioner was attempting to bring an action under § 30-4-70(c)” and “sow[ing] confusion where there is none,” the Petitioner again raises S.C. Code Ann. § 30-4-70(c) as a basis for error. (App. Final Brief, pp. 23-25), (Petition, p. 16); S.C. Code Ann. § 30-4-70(c) (“No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirits of this

chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” S.C. Code Ann. § 30-4-70(c).

This section of FOIA addresses *meetings* of public bodies. Meeting is defined as “the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.” S.C. Code Ann. § 30-4-20(d). In order for a meeting to occur, there must be a quorum. *Id.* For there to be a quorum, “a simple majority of the constituent membership of a public body” must be present. S.C. Code Ann. § 30-4-20(e). Without a majority of councilmembers present, there could be no quorum. Without a quorum, there can be no meeting. Without a meeting, there can be no violation of S.C. Code Ann. § 30-4-70(c). The Petitioner has failed to provide a *single example* of a quorum of councilmembers convening electronically because no such example exists. The Petitioner continues to argue this position without a legitimate legal or factual foundation.

#### (4) PUBLIC RECORDS ACT

Finally, the Petitioner briefly resurrects a previously discarded claim in support of certiorari: the South Carolina Public Records Act. At trial, a substantial portion of the Petitioner’s claims alleged violations of the South Carolina Public Records Act, S.C. Code Ann. § 30-1-10, *et seq.*, as an additional basis for challenging the privileged nature of certain email communications and asserting various FOIA violations. The Public Records Act does not create any explicit private right of action in the event of a violation, nor does it remotely apply to eliminate privilege as suggested by the Plaintiff. *See Doe v. Marion*, 373 S.C. 390, 396-97, 645 S.E.2d 245, 248 (2007) (finding that when language regarding civil liability is missing from a statute that contains administrative penalties, it indicates the legislative intent that a violation

thereof does not give rise to a private cause of action). Based on clear case law contradicting the Petitioner's position, it was rightly abandoned on appeal yet it resurfaces in the Petition without any new legal or factual support. (Petition, p. 16).

**ISSUE III(C). THE COURT OF APPEALS CORRECTLY FOUND THAT THE CONSUMMATION OF A REAL ESTATE TRANSACTION DOES NOT ELIMINATE THE ATTORNEY-CLIENT PRIVILEGE.**

The Petitioner argues that S.C. Code Ann. § 30-4-40(a)(5) means “documents related to the acquisition of real estate are always open to the public once the transaction is complete.” *See* S.C. Code Ann. § 30-4-40(a)(5). FOIA generally permits public bodies to categorically exempt from disclosure certain documents incidental to prospective or pending contractual arrangements and/or the sale or purchase of property. *Id.* The basis for this exemption is clear and apparent: Not permitting certain information to remain confidential is likely to harm the public body's bargaining position in contractual negotiations. Once the transaction is consummated, however, the purpose behind this wholesale exemption is eliminated. *Id.* The Petitioner takes it a step further and argues that all exemptions are eliminated upon completion of the transaction.

In making this argument, the Petitioner focuses on a small portion of the applicable exemption while adroitly avoiding the more problematic language: “these documents are not exempt from disclosure once a contract is entered into or the property is sold or purchased **except as otherwise provided in this section.**” S.C. Code Ann. § 30-4-40(a)(5)(b) (double emphasis added). Contrary to the Petitioner's assertion, attorney-client privileged documents pertaining to a real estate transaction nonetheless retain their privilege and remain exempt from disclosure after the consummation of the underlying real estate transaction.

The Petitioner does not identify any case law or secondary sources in support of this argument, nor does the Petitioner offer any method by which our state's established rules of

statutory interpretation would allow for such a reading of FOIA's exemptions. Instead, the Petitioner simply reargues the same broad generalizations and unsupported allegations that appear throughout this case.

The attorney-client privilege exemption - like the confidential informant exemption and the others set forth within FOIA – operate as separate and independent exemptions within the Freedom of Information Act. To hold that the conclusion of a real estate transaction eliminates these separate exemptions would expose routinely protected information to public scrutiny and disclosure (*e.g.*, social security numbers and other personal identifying information on mandatory tax forms, wire instructions, attorney-client privileged information, etc.). As a result, the Court of Appeals appropriately determined that the exemptions for privileged and confidential documents granted to public bodies by S.C. Code Ann. § 30-4-40(7) are not limited, much less extinguished, by S.C. Code Ann. § 30-4-40(a)(5).

**ISSUE IV. THE COURT OF APPEALS CORRECTLY FOUND THAT THE SPECIAL REFEREE DID NOT ABUSE HER DISCRETION IN DECLINING TO AWARD ATTORNEYS' FEES.**

The South Carolina Freedom of Information Act provides for a discretionary, not mandatory and automatic, award of attorney's fees: "If the person or entity prevails in part, the court *may in its discretion* award him reasonable attorney's fees or an appropriate portion of those attorney's fees." S.C. Code Ann. § 30-4-100(B)(double emphasis added). The Court of Appeals correctly determined that the Special Referee did not abuse her statutory discretion to decline to award any attorneys' fees to the Petitioner. The Special Referee recognized that these redactions were the result of the extremely difficult and unique challenges posed by the interplay between the Freedom of Information Act and the attorney-client privilege, and that any compliance errors by the County impacted only a small subset of documents.

The Petitioner's reliance on *Sloan v. Friends of the Hunley* ("*Hunley II*"), 393 S.C. 152, 711 S.E.2d 895 (2011) is misplaced as inapplicable to the present case. For one, the holding therein was dependent upon the requestor prevailing on the main issue. *Id.* The Special Referee clearly and unmistakably found that the Petitioner did not prevail on the main issue in this matter. (R. pp. 25-26). The Court of Appeals concurred, correctly concluding that Petitioner had only prevailed in part, specifically on the narrow issue of whether the County's copying of a contractually retained real estate agent on privileged legal communications constituted a waiver of the attorney-client privilege. (R. pp. 21-22). Contrary to the Petitioner's claims, the *substantial* majority of the Petitioner's arguments throughout this action were outright rejected. These refuted arguments include the Petitioner's original position at trial on privilege (*i.e.*, "there is no such thing as 'privileged information' when government officials communicate with third parties or one another" (R. p. 45)) and the Petitioner's original position on redaction (*i.e.*, the public body could only recover the costs for mandatory redactions, not discretionary ones). They also include the multitude of tangential arguments that followed, ranging from the crime fraud exception to the South Carolina Public Records Act.

Additionally, in *Hunley II*, the Supreme Court determined that while the public body's voluntary production of records after the initiation of litigation may moot the case, the individual litigant may still be considered the prevailing party for the purposes of attorneys' fees. *Hunley II*, 393 S.C. at 156, 711 S.E.2d at 897. In this case, however, the claims were not mooted by act of the public body; rather, it was the Petitioner's own voluntary actions that mooted the claims. The estimate provided in response to FOIA Request No. 1 was never challenged and FOIA Request No. 2 was abandoned by the Petitioner's voluntary amendment thereof prior to the initiation of litigation. (R. p. 11). Similarly, after the initiation of litigation, FOIA Request No. 3 and FOIA

Request No. 4 were dramatically reduced by voluntary action of the Petitioner. (R. p. 11). Unlike the facts set forth in *Hunley II*, the public body's actions were not responsible for mootng the case. Instead, the intervening act that mooted the case was the voluntary action of the party claiming it should be entitled to prevailing party status. For these reasons, there was no abuse of discretion in declining to award any attorneys' fees.

The Special Referee and the Court of Appeals analyzed all of the evidence and facts available to them and recognized that the redactions made in this case were not made with animus, but rather, in a diligent effort by County attorneys attempting to comply with their legal responsibilities. The unambiguous language of FOIA empowered the Special Referee with the discretion to award or deny any attorneys' fees to a prevailing party, and the Court of Appeals properly defended her exercise thereof. *See* S.C. Code Ann. § 30-4-100(B). FOIA cannot be interpreted as a punitive statute designed to punish public bodies for all manner of transgressions, no matter how slight, provided that the prosecuting party is capable of prevailing on just one of many different claims.

### **CONCLUSION**

The County recognizes the crucial role that both accountability and transparency play in local government. Transparent governance fosters trust through collective oversight. While it is indisputable that the South Carolina Freedom of Information Act serves as one of the strongest guarantors of public transparency, it does not guarantee the public unfettered access to any and all public records. The General Assembly crafted limitations to FOIA to ensure that the delicate balance between efficient governance and disclosure could be maintained. One of those limitations is the broad exemption granted to public bodies to redact legal correspondence and to protect inviolate the concept of privileged communications between attorneys and clients.

The General Assembly also recognized the excessive costs and constraints that open disclosure requirements can impose on municipalities and counties. Public money pays for the creation of the public records, the maintenance of them, the storage of them, and, ultimately, their production pursuant to a FOIA request. Each step in the process is a cost to the taxpayer. Requiring extensive retrieval, review and production of tens of thousands of documents annually in response to FOIA requests conflicts with this goal if local governments cannot recover the actual direct and indirect cost of numerous and expensive FOIA requests. By amending the South Carolina Freedom of Information Act to grant public bodies the right to recover the actual costs of redaction, the General Assembly reasonably reduced the fiscal demands on taxpayers. Moreover, the byproduct of not allowing the full costs of redaction to be recovered by the public body is the financial incentive to delegate the review of potentially sensitive material to those not in a position of trust and/or expertise.

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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