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**Oct 10 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
DeAndrea Gist Benjamin, Circuit Court Judge

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Appellate Case No. 2020-001135  
Case No. 2015-CP-40-1805

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Wendy Brawley,..... Respondent-Appellant,

v.

Richland County, South Carolina ..... Appellant-Respondent.

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**PETITION FOR REHEARING**

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The Appellant-Respondent Richland County petitions the South Carolina Court of Appeals for a rehearing of the Court’s recent decision in *Brawley v. Richland County*, Op. No. 6090 (S.C. Ct. App. filed September 25, 2024)

The grounds for the Appellant-Respondent’s petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellant Appellant-Respondent's petition for rehearing is based on the Court's decision in *Brawley v. Richland County*, Op. No. 6090 (S.C. Ct. App. filed September 25, 2024); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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**MEMORANDUM IN SUPPORT OF  
PETITION FOR REHEARING**

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The Appellant-Respondent Richland County has petitioned this Court for a rehearing of the recent decision in *Brawley v. Richland County*, Op. No. 6090 (S.C. Ct. App. filed September 25, 2024). The Appellant-Respondent respectfully submits that the following points were overlooked or misapprehended by this Court:

In its Statement of Issues on Appeal, the Appellant-Respondent Richland County raised four specific issues, all of which presented legal questions and not

factual questions. Of those four legal issues, the Court, however, overlooked or did not address three of those, and on the fourth, the Court ruled in the County's favor although the ultimate ruling of a FOIA violation was nonetheless affirmed.

Literally, Richland County raised the following issues on appeal: (1) Did the trial court err in its application of the burden of proof in a FOIA case? (2) Did the trial court err in refusing to consider and evaluate the scope of the FOIA request itself and whether the request was reasonably described such that the responding public body could understand what was requested? (3) Did the trial court err in adjudicating a "failure to conduct a reasonable investigation" claim that was never pled? (4) Did the trial court err in failing to recognize that a public body has no duty under FOIA to retain documents, re-create documents that were not retained, produce documents not in its possession, or obtain documents from a third-party source? The first three of those issues are not addressed in any respect – not even tangentially -- in the Court's decision. As to the fourth issue, the Court "agree[d] with the County that FOIA does not require public bodies to seek documents from third parties or recreate documents in order to respond to FOIA requests." (Slip Op. at 5). Thus, the Court actually reversed the trial court and ruled in the County's favor on that fourth issue of law.

With respect to the first issue, the burden of proof is not addressed by this Court. The words "burden of proof" do not appear in the opinion. As the County argued, the trial court failed to recognize that the burden of proof rests with a plaintiff to prove a FOIA violation. In this case, the burden of proof lay with Wendy

Brawley, as the requester, to prove the reasonable scope of the request and that any reasonably responsive documents were actually in the County's possession at the time the FOIA request was made but were not then disclosed in response. In response to a Rule 52(b) motion, the trial court ultimately shifted the burden of proof to the County to prove that a document need not be produced. In fact, the trial court confused a prima facie claim under FOIA on which a plaintiff has the burden of proof on the elements of the claim with an exemption on which the governmental entity has the burden of proof. FOIA requires disclosure of records held by a public body unless the documents fall within enumerated exemptions set forth in S.C. Code Ann. § 30-4-40(a). *See, Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888, 892 (Ct. App. 2004). The exemptions from disclosure under FOIA “simply allow public agencies the discretion to withhold exempted materials from public disclosure,” and the justification for the exemption lies with the entity withholding the document. 594 S.E.2d at 893. This case, however, does not involve the assertion by the County of any exemptions from disclosure. The County did not plead that it withheld disclosure of any public records based upon a statutory exemption, nor did the County argue any exemption at trial. Thus, the trial court shifted the burden of proof to the County to prove that a document need not be produced, which is an error of law. The Court is respectfully requested to address this issue on rehearing.

As to the second issue, this Court, like the trial court, never addresses whether the FOIA request was ambiguous or how it could be reasonably interpreted by the County in responding to it. As the County argued, Brawley had the burden of showing that a reasonable governmental agency would understand that the contested documents were within the scope of the search.

The County presented supporting authority for its position, none of which this Court acknowledged or addressed. Certainly, the Court did not reject or distinguish such authority; the entire issue was disregarded despite being a legal argument that should have been a threshold determination.

To recap, the federal courts, using the mandatory language “must,” states that “[b]efore addressing the adequacy of the search under FOIA, a court must first ascertain the scope of the request itself.” *Judicial Watch v. United States Department of State*, 681 Fed. Appx. 2, 3-4 (D.C. Cir, 2017). “A requester bears the burden of reasonably describing the records its seeks such that the agency is able to determine precisely what records are being requested.” 681 Fed. Appx. at 4. “A FOIA request must reasonably describe the records requested.” *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F.Supp.2d 59, 64 (D.D.C. 2003). “The agency's obligation to search is limited to the four corners of the request.” *Id.* “Where a FOIA request is unclear, an agency processing a FOIA request is not required to divine a requester’s intent.” *Id.* That should be the law in South Carolina as well.

As the County argued, the trial court was required *as a threshold issue* to assess the reasonable meaning and scope of the FOIA request for "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project." (R. 572). The trial court failed to engage in such analysis and made no findings of fact or conclusions of law in that regard. This Court has similarly erred in failing to even consider or address that threshold issue.

If this Court had addressed that threshold issue, this Court would recognize that in the remaining FOIA request at issue Brawley sought an application submitted to the USDA Rural Development and "supporting documentation," with the latter being the term that on its face is unclear and is subject to varying interpretations. Had the trial court and this Court examined the plain and ordinary meaning of that request, it would be immediately apparent that there is no temporal aspect to Brawley's FOIA request. In other words, Brawley did not make it clear whether she was requesting solely documents that accompanied the application or whether she was seeking all documentation that was ultimately submitted to the USDA over time, regardless of whether the materials accompanied the application or were submitted at different times, separate and apart from the application itself. The trial court and this Court should have recognized that the lack of clarity in the request has given rise to the controversy between the parties.

As the record indisputably reflects, Andy Metts is the only witness who was questioned about his interpretation and understanding of the request. Metts explained that he understood the request as seeking the Application for Federal Assistance as submitted to the USDA and the documents that accompanied that submission. (R. 521). He did not conclude that the request required the production of the following exhibits placed into evidence by Brawley from her February 2016 review of the project file:

- \* A timeline that Andy Metts did not prepare and was never submitted to the USDA  
(Pl. Ex. 6). (R. 502-503, 628-631).
- \* Unsigned, incomplete and draft copies of applications that were never submitted to the USDA  
(Pl. Ex. 7-9). (R. 507-510, 632-649).
- \* Letter of Transmittal not directed or sent to the USDA  
(Pl. Ex. 11). (R. 510, 653).
- \* Emails from USDA personnel and between USDA personnel which were not submitted by the County to the USDA  
(Pl. Ex. 12-15, 19-20). (R. 510-513, 654-659, 669-677).
- \* USDA internal checklist  
(Pl. Ex. 18). (R. 389-392, 666-668).
- \* Letter of Conditions dated January 30, 2013 from USDA to Richland County  
(Pl. Ex. 21). (R. 514, 678-698).
- \* Loan Resolution  
(Pl. Ex. 22). (R. 514, 699-706).
- \* February 4, 2014 letter  
(Pl. Ex. 23). (R. 514-515, 707-709).

As a result, the trial court and this Court have erred in failing to find that an objectively reasonable person attempting to respond to the FOIA request as it was articulated would not conclude that the foregoing documents were responsive to the request for “supporting documentation.” Accordingly, Brawley did not sustain her burden of proving that the County personnel should have properly determined that the documents at issue were responsive to her request and were withheld by the County in violation of FOIA. Moreover, based on a review of the documents themselves and the testimony explaining what they are (see above list), no reasonable fact finder could find that the "February 2016 Located Document," as identified by the trial court, would meet a reasonable person's interpretation of "supporting documentation" provided to the USDA with an Application for Federal Assistance.

This Court also overlooked or otherwise did not address the inconsistencies in the trial court's findings which the court refused to correct in response to the County's Rule 52(b) motion. As the County demonstrated, the "February 2016 Located Documents" were identified by the trial court in the "Findings of Fact" as Plaintiff's Exhibits 7, 8, 9, 10, 11, 13, 17, 18, 19, 21, and 23. (R. 16). However, the trial court then refers to “Exhibits 5-15, 17, and 19-23” in the “Legal Analysis” section of its order as “all responsive FOIA documents which were not provided to Ms. Brawley in the Original Response Documents.” (R. 20). On reconsideration, the trial court refused to address this inconsistency on the following basis: "Since

the injunctive relief requiring Richland County to provide the documents to the Plaintiff is no longer requisite, this Court finds no need to make specific findings regarding the documents that were to be provided to the Plaintiff per the injunctive relief order." (R. 33). The trial court, however, failed to recognize that those findings are a critical part of its declaratory relief as well. This Court, likewise, did not acknowledge or address those inconsistencies.

This Court also disregarded and made no mention of the most blatant legal error committed by the trial court – a mistake that truly encapsulates the erroneous legal analysis that permeates the trial court’s rulings of a FOIA violation. To recap, the court impermissibly shifted the burden to the County by ruling as follows: "No question concerning vagueness was made, nor did the Defendant file a request to the circuit court seeking relief from an overly broad request. Rather, the Defendant responded to the request with 6 pages of responsive information." (R. 32). The trial court thus relied on a newly-enacted provision of FOIA. There were significant amendments to FOIA that were adopted as part of 2017 Act No. 67. Those amendments, however, did not become effective *until May 19, 2017*. S.C. Code Ann. § 30-4-110(A) now provides:

A public body may file a request for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure.

*See*, S.C. Code Ann. § 30-4-110(A) (Supp. 2017). Accordingly, the trial court committed an error of law in impermissibly and unfairly finding that the County failed to utilize the new provisions of S.C. Code Ann. § 30-4-110(A), *which were not even in existence in 2014*. In its opinion, this Court did not even mention this clear error of law, although the Court did state that “[t]hroughout this opinion, we rely on the 2014 version of the act, which controls this litigation.” (Slip Op. at 5). The trial court, however, did not rely on the 2014 version of the Act, and that clear error should not be overlooked on rehearing.

Most importantly, with respect to the third issue raised, this Court did not address that this case was adjudicated as a "failure to conduct a reasonable investigation" claim when that claim was never pled and was not raised as a theory *until the trial court issued its order*. This theory of liability is not in Brawley's Complaint, and at no time after discovery was completed did Brawley move to amend to bring such a claim. Moreover, the case was not tried as a "failure to conduct a reasonable investigation" claim. In fact, as the County pointed out in its brief, the term "reasonable investigation" does not appear in the trial transcript. Instead, the claim first appeared in Brawley's proposed order submitted to the trial court *after the trial*. (R. 815). That is not commensurate with fundamental fairness and due process.

In effect, this Court affirms “the circuit court’s finding that the County did not diligently investigate Brawley’s FOIA request.” (Slip Op. at 7). Yet, the Court

did not address whether such a claim was even pled or tried. With all due respect, this is a critical issue, and not one this Court should just disregard. Basic notions of fundamental fairness demand otherwise.

Ultimately, to avoid deciding what are threshold and critical legal issues, the Court re-phrased the “County’s main argument” to characterize it as a factual question and then to decide the appeal in Brawley’s favor under the more deferential standard of review. This Court writes: “The County’s main argument against the circuit court’s finding of FOIA violation is that the County supposedly requested and received certain documents from the USDA after this case commenced.” (Slip Op. at 5). With all due respect, that is not the “main argument.” The County’s main arguments are clearly and concisely articulated in the Statement of Issues on Appeal as required by Rule 208(b)(1)(B), SCACR, and those arguments all present legal issues, not factual ones, to which a *de novo* standard of review applies. As discussed above, the Court then refused to acknowledge, let alone address, three of the four legal issues actually raised by the County.

Nonetheless, even the “main argument” as articulated by the Court is deserving of a rehearing. With respect to the different Application for Federal Assistance dated July 18, 2012, there was no evidence presented that a copy of that application was retained and existed in the County’s files in September 2014, when the FOIA request was made. Andy Metts testified that, based upon the search

conducted of the files, a copy of this application had not been retained and was not in the County's possession at that time. (R. 517, 522). Brawley, however, presented no evidence to contradict this.

During the discovery process in this litigation, the County made a request to the USDA Rural Development Office to learn what was in their file. The County provided that information received from the USDA to Brawley as part of the discovery process after the lawsuit was filed. (R. 712). The origin of those documents are clearly stated in discovery responses (R. 712), but the trial court erroneously ruled that there was no evidence "supporting the origin for June 2015 Discovery Documents." (R. 21). The court improperly shifted the burden of proof and required the County -- not Brawley -- to prove (or rather disprove) whether those documents were in the County's possession in September 2014, when the FOIA request was made. The burden of proof, however, lies with a plaintiff, and Brawley did not show that the July 2012 application was in the County's possession in September 2014, such that a diligent search would have revealed its existence and the need for production.

As the County argued, the trial court did not need to decide whether the County's representations made in discovery responses is evidence or not. That is because the trial court erred in shifting the burden of proof -- particularly to the extent that the court was critical that defense counsel did not testify about the

origin of documents produced in discovery. As discussed above, this Court never addresses issues related to burden of proof.

Nevertheless, instead of addressing the burden of proof in any respect, the Court writes: “There was no admissible evidence presented to the circuit court to show the responsive documents Brawley procured in litigation came solely from the USDA.” (Slip Op. at 7). In making that ruling, the Court disregarded and failed to consider that, as a matter of law, the County was precluded by Federal law – specifically the USDA’s *Touhy* regulations -- from being able to call an employee of the USDA as a witness. That limitation was well documented in the record. (R. 217-219). Moreover, the Court did not explain why the County’s discovery responses which explained the source of USDA documents is not considered evidence – particularly in light of the fact that the USDA refused to provide a witness under *Touhy*. Discovery responses are routinely included in the trial record as a form of evidence.

Finally, this Court erred in concluding that the February 4, 2014 letter from Metts to the USDA (Plaintiff’s Exhibit 23) is responsive to the FOIA request. That letter from 2014 was not “supporting documentation” sent to the USDA with an Application for Federal Assistance dated July 18, 2012. That is illogical from a purely temporal standpoint. Likewise, the Court erred in concluding that the documents referenced on pages 6 and 7 of the opinion that came from the USDA

were in the County's possession when the FOIA request was made. There is no evidence to support that conclusion.

### **CONCLUSION**

Based on the foregoing discussion, the Appellant-Respondent Richland County respectfully requests that the Court rehear its decision in this case and reverse the Orders issued by Circuit Court Judge DeAndrea Benjamin finding a FOIA violation and awarding declaratory relief to the Respondent-Appellant and declaring the Respondent-Appellant to be a prevailing party.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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Pursuant to Section (d)(1) of the Supreme Court’s Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellant-Respondent Richland County, does hereby certify that service of the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 10th day of October 2024 as follows:

Jenkins M. Mann, Esquire  
Shaun C. Blake, Esquire  
Rogers, Lewis, Jackson, Mann & Quinn, LLC  
Email: [jmann@rogerslewis.com](mailto:jmann@rogerslewis.com)  
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October 10, 2024

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*\*Also Admitted in North Carolina*

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**Via Email Only**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Email: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

RE: Wendy Brawley v. Richland County, South Carolina  
Appellate Case Number: 2020-001135  
Civil Action Number: 2015-CP-40-1805  
Our File Number: 314.9670

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as Amended April 24, 2024), please find enclosed for filing the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above referenced matter. In accordance with Section (d)(1) of this same Order, I am hereby serving copies on all counsel of record. The \$50.00 filing fee will be sent to the Court via U.S. Mail.

If you have any questions, please advise.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb  
Enclosure

cc: Jenkins M. Mann, Esquire (*w/ Enclosures, Via Email Only*)  
Shaun C. Blake, Esquire (*w/ Enclosures, Via Email Only*)