

Aug 17 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Wendy Brawley,)
)
Plaintiff,)
)
v.)
)
Richland County, South Carolina,)
)
Defendant.)
_____)

**IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT**

Civil Action No. 2015-CP-40-1805

FINAL ORDER ON THE MERITS

THIS MATTER CAME BEFORE THE COURT on September 5, 2019 for a hearing on the merits pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq.*¹ Present at the Trial and appearing on behalf of Plaintiff Wendy Brawley (“Ms. Brawley”) were Shaun C. Blake, Esq. and Jenkins M. Mann, Esq. Present at the bench trial and appearing on behalf of Defendant Richland County was Andrew F. Lindemann, Esq.

On March 27, 2016, the Plaintiff filed a Complaint seeking declaratory and injunctive relief. The Defendant Richland County filed a Motion to Dismiss which was heard by Judge Clifton Newman. By Form Order filed August 14, 2015, Judge Newman granted that motion and dismissed the Plaintiff claim for injunctive relief. Later, with respect to the remaining claim for declaratory relief, the Defendant County filed a motion for summary judgment. By Order filed October 24, 2016, that motion was granted in part and denied in part by Judge Clifton Newman. Judge Newman resolved three of the four FOIA requests. The fourth FOIA request sought the production of "a copy of the application and supporting documentation Richland County submitted to the USDA Rural

¹ This case is controlled by the Freedom of Information Act as it was codified in 2014, which was prior to the significant amendments to FOIA as adopted as part of 2017 Act No. 67, which became effective on May 19, 2017.

Development for grant and loan funding for the Lower Richland Sewer Project." In his Order filed October 24, 2016, Judge Newman determined that "there appears to be a genuine issue of material fact in dispute that precludes the resolution of this claim at the summary judgment stage." That is the remaining claim for declaratory relief that proceeded to trial before this Court.

FACTS

After careful consideration of the testimony and exhibits presented at trial as well as the legal arguments of counsel both during the trial and in proposed orders, the Court makes the following findings of fact.

Prior to February 2013, Richland County applied for a loan and grant from the USDA Rural Development office to fund the majority of what is known as "Phase I" of the Lower Richland Sewer Project (hereinafter, the "Grant"), which includes planning, acquiring easements, and installing the infrastructure to provide Richland County sewer service to Lower Richland. (Transcript at 97, Salley Testimony). Richland County's utilities department, grants coordinator, and general administration had roles in applying for the Grant. (Transcript at 97, Salley Testimony; Transcript at 114, Metts Testimony).

On September 9, 2014, at a Richland County Council Meeting, Ms. Brawley submitted four (4) separate written South Carolina Freedom of Information Act ("FOIA") requests to the Defendant Richland County. (Transcript at 23-27 and 81, Brawley Testimony). Of the four requests, only one remains at issue; the one in which Ms. Brawley sought "a copy of the application and supporting documentation Richland County submitted to the United States Department of Agriculture (USDA) Rural Development for grant and loan funding for the Lower Richland Sewer Project" (hereinafter "Loan Documentation FOIA Request"). (Transcript at 28-29, Brawley Testimony; Exhibit 1).

The Defendant informed Ms. Brawley by letter dated October 1, 2014 that they were researching her Loan Documentation FOIA Request and expected to have data available within the next few weeks. (Transcript at 29-31, Brawley Testimony; Exhibit 2). The October 1, 2014 letter provided, in part, “The information requested will be released.” (Transcript at 83, Brawley Testimony; Exhibit 2).

a) The County’s Response to Ms. Brawley’s Loan Documentation FOIA Request

By letter dated October 8, 2014, Defendant informed Ms. Brawley that her request was forwarded to the Richland County Clerk of Council, Procurement Department, Utility Department, and Finance Department for review and that she would be provided documents as a response to the Loan Documentation FOIA Request. (Transcript at 32, Brawley Testimony; Exhibit 3). The October 8, 2014 letter also informed Ms. Brawley that “Richland County has no further information regarding this matter”. (Exhibit 3). The October 8, 2014 letter included six (6) pages of documents consisting of the following:

- a) A one (1) page Application for Federal Assistance on Form 424, as signed by County Administrator J. Milton Pope;
 - b) Two (2) pages of instructions for the SF-424 and SF-424c;
 - c) Two (2) pages of “assurances” dated March 16, 2010; and
 - d) A one (1) page budget.
- (Hereinafter “Original Response Documents”). (Transcript at 33-34, Brawley Testimony; Exhibit 4).

The Application included with the Original Response Documents specifies the type of submission is “Non-Construction,” the type of application is marked as a “Continuation,” and the estimated federal funding requested was \$20,961,360. (Exhibit 4). Further, the documents provide that “Continuation” is defined as “an extension for an additional funding/budget period for a project with a projected completion date.” (Transcript at 93, Brawley Testimony; Exhibit 4).

On March 25, 2015, Ms. Brawley filed the instant lawsuit pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq* seeking the production of

all responsive documents to the Loan Documentation FOIA Request. On June 3, 2015, the Defendant produced 55 pages of additional documents. The documents provided were:

- a) Application for Assistance dated July 18, 2012;
- b) Instructions for the SF-424
- c) Budget Information – Construction Programs;
- d) Instructions for HUD-424C;
- e) Richland County Utilities Department - Lower Richland Sewer System - Preliminary Engineering Report - July 2012 – Cost Estimate – Phase I;
- f) SC WEP Guide 1 – Processing the Initial Application;
- g) Certification of Outstanding Debts dated July 18, 2012;
 - o Richland County – Ratios of Outstanding Debt by Type – Last Ten Fiscal Years;
 - o Richland County – Direct and Overlapping Governmental Activities Debt– As of June 30, 2011;
 - o Richland County – Legal Debt Margin – Last Ten Fiscal Years;
 - o Richland County – Ratios of General Bonded Debt Outstanding – Last Ten Fiscal Years;
- h) Lower Richland Sewer Revenue/Expenditure Projections;
- i) Balance Sheet (Governmental Funds; Capital Projects Fund; Water/Sewer Enterprise Fund) and related documents;
- j) Lower Richland Water/Sewer – Statement of Net Assets;
- k) Hopkins Utility System Enterprise Fund – Statement of Net Assets;
- l) Letter dated October 20, 2010 to the United States Department of Agriculture Rural Development from Richland County;
- m) Memorandum entitled “Richland County for Richland County/Utilities Department” dated February 23, 2007;
- n) Memorandum entitled “Information Needed for Organizational Review”
- o) Minutes of a Meeting Hopkins Community Water Project – Hopkins Park – Monday 28 August 2006;
- p) Letter dated April 12, 2010 to the United States Department of Agriculture Rural Development from South Carolina Budget and Control Board;
- q) Memorandum entitled “Lower Richland Community Sewer System Project”;
- r) Memorandum entitled “Development of a Richland County Owned and Operated Sewer System to Serve Lower Richland County”;
- s) Lower Richland Sewer – Monthly User Fee and New Customer Connection Rate Comparison;
- t) Three (3) USDA Memoranda with Subject referring to “Richland County Utilities Department – Lower Richland County Sewer Project”;

(Transcript at 42-57, Brawley Testimony; Exhibit 5) (Hereinafter “June 2015 Discovery Documents”).

In February 2016, Ms. Brawley was allowed inspection of Richland County's Lower Richland Sewer Project file at Mr. Lindemann's office as part of discovery process for this action. (Transcript at 57-58, 88, Brawley Testimony). In reviewing the County's files, Ms. Brawley identified roughly 120 pages of additional, relevant documents which were not produced during the original Loan Documentation FOIA Request, or as part of the June 2015 Discovery Documents. (Transcript at 57-58, Brawley Testimony).

The newly discovered documents found by Ms. Brawley included:

- a) "New" Application for Federal Assistance SF-424 for Sewer System Improvements, Hopkins Service Area (Exhibit 7);
- b) "New" Application for Federal Assistance for Sewer System Improvements, Hopkins Service Area dated July 18, 2012 (Exhibit 17);
- c) "Continuation" Application for Federal Assistance SF-424 for project affecting "Hopkins Community, Lower Richland Community, Town of Eastover" (Exhibit 8);
- d) "New" Construction Application for Federal Assistance for Lower Richland County Sewer System, that included (i) Budget Information – Construction Programs, (ii) Certification Regarding Debarment, Suspension, and Other Responsibility Matters, and (iii) Certification of Outstanding Debts (Exhibit 9);
- e) "Continuation" Non-Construction Application for Federal Assistance for Sewer System Improvements for Hopkins Community, that included Budget Information – Construction Programs dated March 16, 2010 (Exhibit 10);
- f) Letter of Transmittal dated June 7, 2010 from Wilbur Smith indicating sending (i) Environmental Assessment for USDA (client copy); (ii) HUD Modified Environmental Assessment (client copy), among other items (Exhibit 11);
- g) South Carolina Rural Infrastructure Authority Grant Checklist (Exhibit 18);
- h) Letter from the USDA to Richland County dated January 5, 2011 providing comments to the revised "PER dated July 2012" (Exhibit 19);
- i) Letter from the USDA to Richland County dated August 2, 2012 providing comments to the revised "PER dated July 10" (Exhibit 13);
- j) Letter from the USDA to Richland County dated January 30, 2013, 21 pages in total, providing conditions which Richland County "must understand and agree to before further consideration may be given to [Richland County's] application." (Exhibit 21);
- k) Letter from Richland County to the USDA dated February 4, 2014 confirming Richland County is moving forward with the sewer project and is working to meet all "items contained in the Letter of Conditions dated January 30, 2013" (Exhibit 23);

(Transcript at 59-81, Brawley Testimony) (Hereinafter "February 2016 Located Documents").

b) Richland County's Efforts in Responding to Loan Application FOIA

At trial, Sara Salley, the former grants coordinator for Richland County, testified that she accumulated and provided the documents that were given to Ms. Brawley in the Original Response Documents provided on October 8, 2014. (Transcript at 101, Salley Testimony). Ms. Salley testified that the documents she provided were from a collection of what was in her office, but her office did not have the "full application file". (Transcript at 101 and 98, Salley Testimony). Ms. Salley's office was not in the same building as the Utilities Department and Salley did not search files in the Utilities Department or Finance Department. (Transcript at 99-100, Salley Testimony).

The Plaintiff also presented the testimony of Andy H. Metts. Mr. Metts is the former Director of Richland County Utilities and was involved in locating the documents responsive to the Plaintiff's FOIA request at issue. Mr. Metts testified that files on the Grant "could have been" in the finance department office, procurement department office, and administration. (Transcript at 108, Metts Testimony). Mr. Metts is listed on both applications as point of contact for Richland County. (Transcript at 177-178, Metts Testimony; Exhibit 8; Exhibit 4). Mr. Metts testified that he was aware of the following:

- a) A Grant application and supporting documentation were given to the USDA prior to August 18, 2010. (Transcript at 133, Metts Testimony).
- b) The County submitted a USDA Application in July 2012 related to the Grant. (Transcript at 142-145, Metts Testimony; Exhibit 17).
- c) In August 2012, USDA requested additional information and explanations, which were likely provided by Richland County. (Transcript at 152-155, Metts Testimony).
- d) Richland County obtained and submitted preliminary engineering reports and revised preliminary engineering reports as part of the Grant. (Transcript at 150-152, Metts Testimony).
- e) In July 2012, Richland County received and Metts reviewed a 21-page letter from the USDA with requirements and conditions that must be met prior to the USDA further considering the Grant request. (Transcript at 158-162, Metts Testimony; Exhibit 21).
- f) Likely correspondence between Richland County and the USDA regarding the USDA's need for proof that Richland County held public meetings about the project. (Transcript

at 175, Metts Testimony).

- g) The County's full application included numerous documents provided as part of the June 2015 Discovery Documents. (Transcript at 197, Metts Testimony).

In regards to Richland County record keeping practices, Mr. Metts further testified as follows:

- a) Documents and correspondence created as early as June 7, 2010 as part of the Grant were likely kept as part of Richland County's file. (Transcript at 129, Metts Testimony).
- b) Metts general mode of operation involved printing off important emails and keeping them in his files. (Transcript at 141, Metts Testimony).
- c) Metts likely did not destroy preliminary engineering reports obtained by Richland County for the Grant and submitted to the USDA, and such is "sure" to be somewhere in the Utilities Department's files. (Transcript at 150-151, Metts Testimony).
- d) Mr. Metts further admitted that he possessed miscellaneous documents associated with the Grant and submitted to the USDA as part of the application on his computer that he never deleted, which were not part of the Original Response Documents. (Transcript at 211-212, Metts Testimony).

Mr. Metts further testified that he interpreted the Loan Documentation FOIA Request made by the plaintiff on September 9, 2014 to be seeking just "the USDA application that was signed and submitted". (Transcript at 256, Metts Testimony). Accordingly, in response to the Loan Documentation FOIA Request, after Mr. Metts and his staff could not locate a USDA application in records within the Utilities Department, Mr. Metts contacted Ms. Salley. (Transcript at 112, 166, Metts Testimony). After obtaining the aforementioned pages from Ms. Salley, Mr. Metts and Richland County provided the Original Response Documents to Ms. Brawley as their complete and final response. (Transcript at 222, Metts Testimony). Mr. Metts did testify that in his search for the grant application within the records of the Utilities Department, that he found documents related to the application which were not produced to Ms. Brawley as part of the Original Response Documents. (Transcript at 206-208, 211-215, 226-227, 231-234, 266, and 272 Metts Testimony).

As such, Ms. Brawley seeks a declaration that FOIA requests are deemed approved, that Richland County failed to fully provide the Loan Documentation FOIA, immediate FOIA responses for the Plaintiff, and that the Plaintiff is entitled to recover costs and reasonable attorney fees.

LEGAL ANALYSIS

In the present case, the central question is whether Richland County's response to Ms. Brawley's Loan Documentation FOIA Request violated the South Carolina Freedom of Information Act (FOIA). The South Carolina Freedom of Information Act 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). "FOIA was designed to guarantee the public reasonable access to certain activities of the government" with the purpose of "protect[ing] the public by providing for the disclosure of information." 594 S.E.2d at 893. S.C. Code Ann. § 30-4-15 (2014) provides as follows:

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.

Our supreme court has found that the clear legislative intent is for FOIA to be liberally construed to carry out its purpose. *Pope v. Wilson*, 427 S.C. 377, 384-385, 831 S.E.2d 442, 446 (Ct. App. 2019) (quoting *Evening Post Publ'g. Co. v. Berkeley Cty. Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011)).

Pursuant to S.C. Code Ann. § 30-4-30(a) (2014), "Any person has a right to inspect or copy any public record of a public body . . . in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(c) (2014) further provides:

Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the

receipt of any such request notify the person making such request of its determination and the reasons therefor. Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

As such, the clear language of the "FOIA creates an affirmative duty on the part of public bodies to disclose information." *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).

1. Defendant Failed to Provide All Responsive Documentation.

a) Richland County Failed to Produce all Documents in its Possession in Response to the Loan Documentation FOIA

The record demonstrates Richland County failed to provide the application and supporting documents in their possession in response to the Loan Documentation FOIA Request. In replying to the Loan Documentation FOIA Request, Richland County informed Ms. Brawley that, "The information requested will be released." (Transcript at 83, Brawley Testimony; Exhibit 2). Per S.C. Code Ann. § 30-4-30(c) (2014), the County's response constitutes the final opinion of the public body. As such, Ms. Brawley was entitled to receive or have access to "a copy of the application and supporting documentation" related to the Lower Richland Sewer Project per her request.

Richland County provided a total of 6 pages in response to the request and informed Ms. Brawley "Richland County has no further information regarding this matter". (Exhibit 3). Exhibits 5-15, 17, and 19-23, are all responsive FOIA documents which were not provided to Ms. Brawley in the Original Response Documents. S.C. Code Ann. § 30-4-20(c) (2014), defines a "Public record" to include "all . . . documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." Accordingly, this Court finds the Defendant failed to provide all of the documentation that was contained in its files at the

time of the Loan Documentation FOIA Request. In addition, during discovery Richland County also provided Ms. Brawley a June 2015 Discovery Documents that included the July 18, 2012 Application for Federal Assistance, that was not part of the Original Response Documents.

b) The Defendant's Contention that its FOIA Response was Sufficient is without merit.

Richland County contends that it did not violate FOIA, arguing that it is only required to produce those documents it created or retained, and is not required to obtain documents from a third-party or to duplicate or to re-create documents. In support of this argument, Defendant cites *Trask v. South Carolina Dept. of Public Safety*, 2012 WL 10864175 (S. C. Ct. App. 2012) (unpublished), which references, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980) (indicating FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained"). Defendant's reliance on *Trask* and *Kissinger* concerning the recreation of documents is inapplicable to the facts before this Court.

First, the Defendant has asserted that the June 2015 Discovery Documents were obtained from the USDA after the instant suit was brought. There is no testimony or evidence before this Court supporting the origin for June 2015 Discovery Documents. Defendant's reliance on its own counsel's transmittal letter for the June 2015 Discovery Documents is not evidence establishing the origin of these documents. Furthermore, neither Defendant's counsel, nor any witness, testified that the June 2015 Discovery Documents originated from the USDA.

Second, the February 2016 Located Documents which were not produced to Ms. Brawley prior to filing suit, but are unique from the June 2015 Discovery Documents, and are responsive to the Loan Documentation FOIA Request. The Defendant contends that the Plaintiff cannot establish

that the February 2016 Located Documents were in the Defendant's possession at the exact moment that it responded to her FOIA request. However, the law places no such burden on the Plaintiff.

In a civil case, proof of circumstances warranting a given inference is sufficient to prove a fact. *See generally, Eickhoff v. Beard-Laney*, 20 S.E.2d 153, 155 (S.C. 1942) (*citing Leek v. New South Exp. Lines*, 192 S.C. 527, 7 S.E.2d 459). "In the absence of a statute or a valid contractual provision to the contrary, circumstantial evidence is regarded by law as competent to prove any given fact in issue in a civil case *and is sometimes as cogent and irresistible as direct and positive testimony.*" *Id.* (quoting Am. Jur, Volume 20 at 259-260) (emphasis included in original) (*see also, Graves v. CAS Med. Sys., Inc.*, 401 S.C.63, 80, 735 S.E.2d 650, 658 (2012) (providing "the general rule is any fact can be shown through circumstantial evidence, and it is up to the trier of fact to determine whether it alone is worth as much merit as direct evidence.") The testimony in the present case provides that the loan application documentation involved numerous submittals and documents, that Richland County Utilities Department generally kept copies of important documents, that supporting documentation was likely within Richland County's files and that these very same documents were present in the Defendant's file when Ms. Brawley was allowed to search it in February 2016. No evidence or testimony was presented by Richland County to the contrary.

Finally, the legislative intent is that FOIA "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" (S.C. Code Ann. § 30-4-15 (2014)). FOIA is to be liberally construed to carry out its purpose (*Pope*, 427 S.C. at 384-38). As such, under FOIA, a public body should make reasonable and diligent efforts to locate and/or identify the location of public records requested.

Accordingly, based on the foregoing, I find that in failing to conduct a reasonable investigation to obtain and/or locate all relevant documents, the Defendant committed a violation of the South Carolina Freedom of Information Act (FOIA). Federal law supports this analysis. In *Ethyl Corp. v. U.S. Env'tl. Prot. Agency*, 25 F.3d 1241, 1246 (4th Cir.1994), the Court held that “in judging the adequacy of an agency search for documents the relevant question is . . . whether the agency has demonstrated that it has conducted a search reasonably calculated to uncover all relevant documents.” (citations and quotations omitted). In *Ethyl Corp.*, the Court found that to comply with FOIA the agency must demonstrate that the search conducted include a search of all files likely to contain responsive materials; the agency cannot merely aver that the search was consistent with customary practices and procedures. *Id.* at 1246-47. Accordingly, based on the foregoing, I find that FOIA in South Carolina requires that a public body take, at a minimum, must undertake reasonable investigative measures to provide requested public records.

2. Richland County is ordered to provide all applicable documents.

Per section 30-4-100(a) (2014) of the South Carolina Code, A violation of FOIA is “considered to be an irreparable injury for which no adequate remedy at law exists.” “The court may order equitable relief as it considers appropriate.” *Id.* I hereby order that the Defendant conduct a reasonable examination of its records for any heretofore unidentified, responsive documents and produce those to Ms. Brawley within **15 days** of the date of this order.

3. The Plaintiff is entitled to Attorney’s Fees.

Per section 30-4-100(b) (2014) of the South Carolina Code, Ms. Brawley is entitled to reasonably attorney’s fees incurred herein. *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 157-158, 711 S.E.2d 895, 897-898 (2011). Accordingly, the Plaintiff is to submit a schedule of fees and a motion to support the amount of fees and costs incurred herein. The Defendant will have **15**

days to respond to the Plaintiff's motion.

IT IS SO ORDERED!

The Honorable DeAndrea Gist Benjamin
Presiding Circuit Court Judge
Fifth Judicial Circuit

February 13, 2020
Columbia, South Carolina



Richland Common Pleas

Case Caption: Hopkins And Lower Richland Citizens United Inc , plaintiff, et al vs Richland County

Case Number: 2015CP4001805

Type: Order/Other

So Ordered

s/DeAndrea Gist Benjamin, #2161