

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2008-CP-10-03308

Stephen George Brock,
Appellant,

v.

Town of Mount Pleasant,
Respondent.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN HOLDING THAT APPELLANT FAILED TO ESTABLISH BY A PREPONDERANCE OF EVIDENCE THAT THE TOWN VIOLATED THE FOIA BY AMENDING THE AGENDA OF EXECUTIVE SESSIONS, AND VOTING ON THOSE MATTERS UPON RETURNING TO OPEN SESSION?
2. DID THE CIRCUIT COURT ERR IN HOLDING THAT THE APPELLANT FAILED TO ESTABLISH BY A PREPONDERANCE OF EVIDENCE THAT THE TOWN'S ANNOUNCED PURPOSES FOR EXECUTIVE SESSION VIOLATED FOIA?
3. IN LIGHT OF THE RECORD, DID THE CIRCUIT COURT ERR IN REFRAINING TO ENTER A DECLARATORY JUDGMENT AS TO PAST ACTIONS REGARDING EMAIL RETENTION AMONGST COUNCIL MEMBERS?
4. DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN ITS AWARD TO APPELLANT OF \$42,000.00 DOLLARS IN ATTORNEY FEES AND COSTS?

RESPONDENT'S STATEMENT OF THE CASE

This matter arises from the circuit court's Order dismissing several of the Appellant's claims, (Order at 14-15; Record on Appeal [R.] pp. 14-15; Brock v. Town of Mount Pleasant, (No. 2008-CP-10-3308) (2011)), the circuit court's Supplemental Order for Reasonableness of Attorney's Fees, (Supplemental Order for Reasonableness of Attorneys' Fees at 1-3; R. pp. 16-18; Brock v. Town of Mount Pleasant, (No. 2008-CP-10-3308) (2011)), and the circuit court's Second Supplemental Order, (Second Supplemental Order at 1-2, R. pp. 19-20; Brock v. Town of Mount Pleasant, (No. 2008-CP-10-3308) (2011)), denying Appellant's Second Supplemental Motion for Attorneys' Fees and Litigation Costs and denying Appellant's Motion to Amend Findings of Fact and to Alter or Amend the Judgment.

This action came before the circuit court by way of a Complaint filed by Stephen Brock (herein "Appellant" or "Brock") whereby Appellant alleged various violations of S.C. Code Ann. § 30-4-10 et seq. (2007), the Freedom of Information Act (herein "FOIA" or "Act") by the Town of Mount Pleasant (herein "Respondent" or "Town"). (Am. Compl. at 1-11; R. pp. 23-33; Brock v. Town of Mount Pleasant, (No. 2008-CP-10-3308) (2011)). Appellant also made a claim under S.C. Code § 30-1-10 et seq. (2007), the Public Records Retention Act (herein "Records Retention Act" or "RRA") alleging the Town failed to adhere to the RRA. Id. at 9; R. p. 31.

RESPONDENT'S STATEMENT OF THE FACTS

At issue in this case are actions of the Town Council of Mount Pleasant in amending agendas pertaining to executive sessions. Appellant contests the amendments, the announced purposes and the actions authorized. A review of the proceedings of the contested meetings is in order.

The Freedom of Information Act and Executive Sessions

The FOIA does not require an agenda for an executive session. See S.C. Code Ann. § 30-4-10 et. seq. (2007) and Herald Publishing Company, Inc. v. City of Barnwell, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986). This circumstance notwithstanding, the Town's practice is to list the topics it anticipates discussing in executive session on its posted agendas, when such topics are known at the time the agenda is published. See Pl. Ex. 2, 7, 8, 16, 22; R. 539, 613, 614, 629, 634. On those occasions where important matters after an executive session agenda has been published that warrant discussion in executive session, the Council, albeit superfluously, amends the agenda to include the item for discussion in executive session. (Transcript of Hearing [Tr.] at 261-262; R. pp. 328-329; Brock vs. Town of Mt. Pleasant, (No. 2008-CP-10-3308) (2011)).

The Record reveals that it is not unusual for Council meetings to last to as late as 11:00 p.m. (Tr. 272; R. p. 339, lines 13-15). Though the Town's rules of order include a standing place for executive sessions at regularly scheduled meetings, the Town, at times pertinent to this matter and so as not to inconvenience the public by interrupting business at regular meetings with executive sessions, from time to time held special meetings in advance of regular meetings where executive session matters were attended to. (Tr. 271- 272; R. p. 338, line 1 – p. 339, line

22). The Record reveals each of these special meetings was noticed in accordance with law. (See Pl. Ex. 2, 7, 8, 16, 22; R. pp. 539, 613, 614, 629, and 634; S.C. Code Ann § 30-4-80(a)).

For quite some time, the Town held forth an interest in acquiring property in its picturesque Shem Creek area to solidify “public access to one of the most important bodies of water in the community.”(Tr. 266-267; R. p. 334, lines 1-6). The property consisted of highland that was once the site of an OK Tire Store and adjoining marshes and docks that provided access to Shem Creek. The property was commonly referred to as the Shem Creek or O.K. Tire Store property. (Tr. 266; R. p. 333, lines 18-25). The Town’s interest in the property was well known, having been publicized by television reports and articles in the Post & Courier, and openly discussed at both committee and Council meetings. (Tr. 267; R. p. 334, lines 19-25).

In 2007, Town Council initiated negotiations to purchase the property. (Tr. 267; R. p. 334, lines 15-18). The negotiations started to intensify in the summer and fall of 2007. (Tr. 267; R. p. 334, lines 15-18). In October 2007, Town Attorney Allen Young (herein “Young”) was directed by Council to make a final offer, and, if rejected, to initiate legal action. (Pl. Ex. 7; R. R. p. 613). A final offer to purchase the Shem Creek property was made and rejected. (Tr. 268; R. p. 335, lines 4-6). Thereafter, Young filed a condemnation action on the Town’s behalf to acquire a portion of the property. Id. In response, the owner, attorney Mark Mason, brought a lawsuit against the Town and the Town Council, and sued the Council in both their individual and official capacities. (Tr. 223-224; R. p. 290, line 1 – p. 291, line 23). Mason contested the taking and asserted several causes of action, including, but not limited to actions for fraud, deceit, FOIA violations, and actions arising from alleged violations of the condemnation statute. (Tr. 224; R. p. 291). At trial, Mason confirmed serving “rafts of discovery ... on the Town and also on the Council, individually and in their official capacities....” Id. The case ultimately

settled. Most of Appellant's issues in this case deal with executive sessions leading up to that settlement and the purchase of the property.

August 14, 2007 Special Town Council Meeting

On August 14, 2007, the Town held a special meeting prior to its regularly scheduled meeting. (Pl. Ex. 8; R. pp. 614-616). The items noticed on the posted agenda read as follows:

I. EXECUTIVE SESSION

A. Legal and Contractual Matters

1. Property Acquisition
2. SCE&G Right-of-Way

B. Legal Advice regarding pending cases

C. Personnel Matters

1. Duties of Town Administrator, Legal Counsel and Board & Commissions
2. Appointments to Boards & Commissions
 - (a) Commercial Development Design Review Board
 - (b) Open Space Foundation

Id.

The Record shows that, during the meeting, the Town Administrator, Marc Burdette ("Burdette"), indicated that the agenda called for an executive session. Id. Burdette then announced the first purpose for executive session. Id. He stated that, "Council would be discussing legal and contractual matters associated with property acquisition which is related to recreation leisure services associated with Shem Creek and other areas, as well as [an] SCE&G right of way." Id. He also stated that Council would "receive legal advice regarding pending cases." Id. Young announced the cases, which included: Save Snee Farm vs. JKM Holdings and Save Hungryneck Corridor vs. Town of Mount Pleasant. Id. Young then announced the remaining legal matters for discussion: "possible litigation regarding [the] Old Park drainage issue and Dunes West Boulevard repair issues." Id. Burdette then announced the personnel

matters to be discussed, and stated that Council wished to add to the executive session agenda “discussion with legal counsel in reference to legal representation regarding possible pending legal cases.” Id. A motion was made and all present were in favor. Id. Upon reconvening in open session the following actions were taken:

Mr. Gawrych made a motion to direct legal counsel to move forward with negotiation a piece of property as discussed in executive session; seconded by Ms. Stokes-Marshall. All present were in favor.

Ms. Stokes-Marshall made a motion to direct legal counsel to proceed with legal and contractual matters in reference to property acquisition and right of way as discussed in executive session; seconded by Mr. Gawrych. All present were in favor.

Mr. Bustos made a motion to authorize legal counsel to proceed as discussed in executive session pertaining to Dunes West Boulevard and Olde Park and to proceed with litigation if necessary; seconded by Mr. Gawrych. All present were in favor.

Id.

October 9, 2007 Special Town Council Meeting

On October 9, 2007, the Town held a special meeting immediately prior to its regularly scheduled meeting. (Pl. Ex. 7; R. p. 610). The items noticed on the posted agenda read as follows:

- I. Approval of TIF Priorities
- II. Presentation by Charleston County School District and Glick-Boehm regarding the new Moultrie Middle School and Farmers Market Pavilion
- III. **EXECUTIVE SESSION**
 - A. Legal and Contractual Matters
 - (1) Shem Creek
 - (2) Proposed project near Six Mile Road and US 17
 - B. Economic Development Prospect pertaining to property in the vicinity of Wando Business Park
 - C. Personnel Matters pertaining to:

- (1) Town Employee Grievance Hearing
- (2) Appointments to Boards & Commissions:
 - (a) Planning Commission
 - (b) Open Space Foundation
 - (c) Workforce Housing Advisory Committee

Id. (emphasis in original).

During the meeting Burdette requested that Council add two items to the agenda under executive session. Id. He stated the first item is for “legal consideration regarding the Buist Lawsuit settlement and the second would be contractual matters regarding property acquisition for property in the vicinity of town hall.” Id. A motion was made to amend the agenda and all present were in favor. Id. Later in the meeting, Burdette announced that a few items needed to be discussed in executive session, including:

Legal matters pertaining to the Buist lawsuit, contractual matters pertaining to property acquisition in the vicinity of Town Hall, legal and contractual matters concerning Shem Creek property, a proposed project near Six Mile Road and US 17, an economic development prospect and some personnel matters pertaining to a employee grievance and appointments to the Boards and Commissions.

Id.

Upon reconvening to open session, a motion relating to the executive session discussion pertaining to the legal and contractual matters concerning the Shem Creek property was passed. Id. Specifically, the motion authorized “the Town Attorney [Young] to make a final offer and if not accepted to pursue formal legal action as discussed in executive session.” Id. The offer made by Young was rejected, and he pursued formal legal action to acquire the property. (Tr. 268; R. p. 335, lines 7-17). The owner then brought suit against the Town and its Council in their individual and official capacities. (Tr. 223-224; R. p. 290, line 22 – p. 291, line 9).

November 13, 2007 Special Town Council Meeting

On November 13, 2007, Town Council held a special meeting prior to its regularly scheduled meeting. (Pl. Ex. 22; R. pp. 633-634). The posted agenda included an executive session, which listed as an item for discussion:

- A. Legal and Contractual Matters pertaining to properties near Shem Creek
- B. Personnel Matters – Appointments to Boards & Commissions
 - 1. Workforce Housing Advisory Committee
 - 2. Pride Committee
 - 3. Accommodations Tax Advisory Committee

Id.

During the meeting, Burdette stated “staff would like to ask Council to go into executive session to discuss legal and contractual matters pertaining to properties near Shem Creek and to also discuss personnel matters pertaining to appointments to Boards and Commissions.” Id. Thereafter, “Mr. Gawrych made a motion to amend the agenda to add as item C legal advice pertaining to Ordinance 07060 pertaining to the comprehensive plan and as item D would [sic] be [sic] legal advice pertaining to an opinion from the Attorney General Concerning the Planning Commission.” Id. All present were in favor of adding the amendments. Id. A motion to adjourn into executive session was passed. Id. Upon reconvening to open session, Town Council took the following actions:

Mr. Gawrych made a motion to direct the Town Attorney to move forward with the discussions as discussed in executive session pertaining to a piece of property on Shem Creek; seconded by Ms. Stokes-Marshall. All present were in favor.

Mr. Bustos made a motion to authorize the Mayor and members of Council to obtain their individual attorneys for all lawsuits now and in the future with all fee statements to be reviewed by the Town Attorney; seconded by Mr. Gawrych.¹

Id.

¹ Burdette confirmed that the action authorizing the Mayor and individual members of Council to obtain their own individual attorneys was related to the Shem Creek litigation where the Council was being sued in their individual capacities. (Tr. 271; R. p. 337, line 19 – p. 338, line 10).

November 16, 2007 Special Town Council Meeting

On November 16, 2007, Town Council held another special meeting. (Pl. Ex. 16; R. pp. 629-630). The posted agenda included an executive session, which listed for discussion: "Legal Advice pertaining to OK Tire property litigation." Id. During open session, two separate motions were made to amend the executive session agenda. Id. The first motion was "to amend the agenda to include personnel matters pertaining to the Clerk of Council."² Id. The second motion was "to add personnel matters relating to the Boards and Commissions."³ Id. Mayor Hallman stated that a motion was needed for Council to enter executive session to discuss "legal advice pertaining to the OK Tire property litigation and to discuss other personnel matters as mentioned." Id. To clarify, Young stated that the executive session would involve all three items mentioned. Id. Council voted to adjourn into executive session, and upon reconvening took the following actions:

Mr. Glasson made a motion to adjust the position requirements and compensation for the Clerk of Council as discussed in executive session; seconded by Mr. Gawrych. All present were in favor.

Mr. Bustos made a motion to reject the offer that was tendered in reference to the Shem Creek property and OK Tire Store property litigation; seconded by Mr. Swails. All present were in favor.

Mr. Bustos made a motion to authorize the attorney to prepare a letter as discussed in executive session in reference to the personnel actions regarding boards and commissions; seconded by Mr. Gawrych. All present were in favor.

Id.

² Burdette testified that this matter related to the Clerk of Council's resignation, which took place earlier on the day of the meeting. (Tr. 297; R. p. 364, lines 10-20).

³ The Record indicates that the second personnel matter related to the Appellant, who, at the time, was serving as chairman of the planning commission. (Tr. 302; R. p. 369, lines 5-13). Burdette testified that Council needed to discuss actions taken by the chairman that "some members of Council felt were insubordinate, inappropriate, [and] disloyal." (Tr. 302; R. p. 369, lines 5-8).

At trial, Burdette was asked to explain why the agenda did not include notice that action would be taken. (Tr. 302; R. p. 369, lines 18-25). He responded that, oftentimes, Council goes into executive session without knowing that an action will need to be taken; but, from time to time, information received in executive session warranted that action be taken for the good of the public. (Tr. 302-303; R. p. 369, line 18 – p. 370, line 19). He added that when any action is taken following an executive session, it is always related to the purpose for which Council went into executive session. (Tr. 327; R. p. 394, lines 6-10).

December 5, 2007 Special Town Council Meeting

The next Town Council meeting took place on December 5, 2007. (Pl. Ex. 2; R. p. 539). The meeting was a special meeting held in lieu of Town Council's regularly scheduled monthly meeting. (Tr. 142; R. p. 209, lines 17-25). The posted agenda included an item for executive session. (Pl. Ex. 2; R. p. 539). Under the item for executive session, Council included a list of anticipated discussion topics. Id.

After the close of business on that day, a proposed settlement agreement of the OK Tire litigation was delivered to the Town Attorney at his home. (Tr. 225-226; R. p. 292, line 19 - p. 293, line 6). The settlement detailed the demands for settling, set a date by which the settlement had to be accepted (24 hours after delivery to the Town Attorney) and made clear that time was of the essence. (Pl. Ex. 1; R. p. 535; Tr. 226; R. p. 293, lines 20-24). At the beginning of the meeting of December 5, Burdette asked that an item be added to the executive session scheduled later in the meeting. (Pl. Ex. 3; R. p. 543). Burdette described the item as "to receive legal advice pertaining to the OK Tire Store Litigation". Id.; R. p. 544 When Council reached the place on the agenda for the executive session, its purposes were announced as follows:

- **Legal Advice** pertaining to Mathis Ferry Road (DEPAUL) relative PS&J

- **Legal Advice** pertaining to EEOC complaint relative to firefighter applicant (Personnel matter)
- **Personnel matters** pertaining to appointments to Board & Commissions
- **Legal Advice** regarding the settlement of legal issues and purchase of property known as the OK Tire Store and other properties.

Id.; R. p. 565 (emphasis in original).

Young clarified that the legal advice pertained to the OK Tire litigation. Id.; R. p. 566. Upon reconvening to public session, a motion was made to accept the settlement agreement and to transfer money from an account to effectuate the settlement. Id. Specifically:

Mr. Bustos made a motion to approve the settlement agreement discussed in executive session pertaining to the OK Tire Store property condemnation lawsuits and authorize Mayor Hallman to execute the agreement; seconded by Mr. Gawrych. All present were in favor.

Mr. Swails made a motion to authorize the Town Administrator to transfer an additional \$3 million into the water access property acquisition project for a total project budget of \$6 million; transferred funds would come from the various TIF projects as described on page 29 of the mid-year budget book; seconded by Mr. Gawrych. All present were in favor.

Id.

On December 6, 2007, prior to the 5:00 pm deadline, the Mayor executed the settlement agreement, and the purchase was publicized in a local newspaper the following day. (Tr. 55; R. p. 122, lines 20-23; Tr. 218; R. p. 285, lines 14-18).

Appellant was at the meeting when the agenda for the executive session was publicly amended. (Tr. 144; R. p. 211, lines 7-10). He had the opportunity to make his displeasure known at the citizens' comment period, but did not do so. For reasons of his own, he decided to leave the meeting early and thus was not present to hear the outcome of the executive session discussion. Id.

December 17, 2007 Special Town Council Meeting

On December 17, 2007, Town Council held a special meeting. (Def. Ex. 3; R. p. 728).

The posted agenda listed the following items for discussion:

Authorization and/or confirmation of the Settlement Agreement pertaining to the OK Tire property lawsuits, specifically including the purchase of the Shem Creek property for \$6,000,000.00 (OK Tire and the Bailey Docks)

Amendment to FY 2007/2008 Budget regarding purchase of property on Shem Creek

Id.

At the meeting Council reaffirmed the actions taken to settle the Shem Creek litigation. (Tr. 240; R. p. 306, line 25 – p. 307, line 3).

In accordance with S.C. Code Ann. § 5-7-250(b), the Town has adopted standing rules of procedure. These rules are codified and specify how agendas may be amended. (Pl. Ex. 39; R. p. 656; Tr. 132-134; R. pp. 199-201).

The circuit court held that the Town's amendments to the executive session agendas did not violate the FOIA. (Order 5; R. p. 5). Specifically, the circuit court held that "exigent circumstances sometimes require the late addition of one or more items to a meeting agenda for the proper and expeditious conduct of public business." Id. As to the December 5th meeting, the circuit court also held that Town Council later "endorsed its prior actions by taking the same action on the same subject matter at a later meeting where the added agenda item had been timely included on the posted agenda." Id.

No language in the FOIA prohibits a last minute decision to add an item for discussion in executive session, so long as the specific purpose is publicly announced. See S.C. Code Ann. § 30-4-70. The circuit court held that Town Council's purposes for entering each executive session were specifically announced as required by the FOIA. (Order 6; R. p. 6).

Records Retention Act and Email Retention

The South Carolina Records Retention Act (“RRA”) sets forth requirements for public bodies, including municipalities, to retain certain records. S.C. Code Ann. § 30-1-10 *et. seq.* (2007). The South Carolina Department of Archives and History is responsible for establishing the standards, procedures, techniques and schedules for effective records management.⁴ See S.C. Code Ann. § 30-1-90. The RRA imposes a duty on the legal custodian of records to protect records from destruction, mutilation, deterioration, theft or loss. See S.C. Code Ann. § 30-1-70. The willful failure of the legal custodian to attend to the duties imposed by the RRA is a misdemeanor, punishable by a fine of not less than two hundred nor more than one thousand dollars. See S.C. Code Ann. § 30-1-160. Violations are tried in magistrates or municipal courts. See S.C. Code Ann. § 30-1-30. Similarly, the failure of the custodian of a public record to turn it over to his successor is a misdemeanor, punishable by a fine of up to five hundred dollars. See S.C. Code Ann. § 30-1-50. The return of the public record may also be pursued by the Department of Archives and History by way of a verified petition presented to the court of common pleas. Id. The statutory scheme for enforcing the RRA creates no private cause of action. See S.C. Code Ann. § 30-1-10, *et. seq.*

The Record reveals the Town has now, and had at the time of trial, a records retention policy. (Tr. 253-254; R. p. 321, line 11 – p. 321, line 20; D. Ex. 7). Under the policy, all emails sent to or from Town computers are retained and managed according to the laws of South Carolina. (Tr. 314; R. p. 381, lines 9-23).

⁴ The South Carolina Department of Archives and History created email management guidelines. (Tr. 201; R. p. 264, lines 11-19; Ex. 35; R. p. 646). The guidelines differentiate between emails with information of permanent value, which must be protected, and those of transitory value, which can be deleted when no longer needed. (Tr. 202; R. p. 269, lines 6-8; Ex. 35; R. p. 646). The guidelines also recognize emails that only have temporary value, which can be deleted at any time without authorization. (Tr. 203; R. p. 270, lines 4-12; Ex. 35; R. p. 646). These emails are called “convenience copies,” duplicates of a record copy. Id.

In 2010, the Town budgeted for and issued laptop computers to members of Council, with each member receiving an assigned Town email account. (Tr. 257; R. p. 324, lines 4-8). Prior to that time, council members used personal computers to communicate with staff and constituents. Id. In March of that year, Town Council passed a Resolution, adopting guidelines for the use of the computers and specifically addressed the retention of emails. (Pl. Ex. 40; R. p. 723; Tr. 257-258; R. p. 325, lines 4-24). The effect of the Resolution was to require that all Town business be conducted on Town computers and that retention or deletion of emails be conducted as per the directives of the Clerk of Council. (Pl. Ex. 40; R. p. 723; Tr. 257-258; R. p. 325, line 25 – p. 326, line 20).

ARGUMENT

- I. THE CIRCUIT COURT DID NOT ERR IN HOLDING THAT APPELLANT FAILED TO ESTABLISH BY A PREPONDERANCE OF EVIDENCE THAT THE TOWN VIOLATED THE FOIA BY AMENDING THE AGENDA OF EXECUTIVE SESSIONS, AND VOTING ON THOSE MATTERS UPON RETURNING TO OPEN SESSION.

Appellant contends the actions of the Town in adding matters to executive session agendas and acting on those matters in public session violate the FOIA. (Brief of Appellant at 13-18, Brock v. Town of Mt. Pleasant, No. 2008-CP-10-3308, (9th Cir. June 7, 2013)). The circuit court correctly concluded that such actions by the Town Council did not violate the FOIA.

Appellant contends that an amendment of any agenda, even one for an executive session, is improper. Id. He contends that S.C. Code Ann. §30-4- 80 precludes an amendment to an agenda for an executive session. Id. On this basis, he asks this Court to reverse the circuit court's decision that Town Council did not violate S.C. Code Ann. § 30-4-80 by adding items to executive sessions agendas at the meetings held on November 13, 2007, November 16, 2007, and December 5, 2007. This Court should refuse that request.

Executive sessions are governed by S.C. Code Ann. § 30-4-70. The statute is

straightforward: an executive session can only be convened for certain purposes; prior to convening an executive session, the purpose for the session must be announced; and no action may be taken in executive session. See S.C. Code Ann. § 30-4-70. The Record reveals the Town conformed to this procedure at each of the contested meetings. (Pl. Ex. 2, 7, 22). The reason for each session was announced, each such purpose fell within the statutory categories listed in S.C. Code Ann. § 30-4-70(a)⁵ and no action was taken in the session. Id. All actions taken were only by way of a vote occurring in public session. Id. These facts are undeniable, and wholly comport with the procedure required by S. C. Code Ann. § 30-4-70.

Appellant's reliance on S. C. Code Ann. § 30-4-80 is misplaced. This statute governs the time when an agenda must be posted in advance of a meeting, if there is an agenda. See S.C. Code Ann. § 30-4-80. It does not require an agenda for an executive session or preclude any additions to that agenda if there is one. Id. Precedent established by this Court in Herald lays this issue to rest. In Herald, as here, proper notice of a special meeting was given, the agenda of which included an executive session. 291 S.C. at 6. In Herald, as here, during the meeting Council added items to be discussed in executive session and announced each purpose. Id. at 6, 11. In Herald, as here it was contended that the Council violated the FOIA in not adhering to the notice requirements set forth in the Act. Id. at 11. This Court properly and flatly rejected that contention, finding:

The Act [FOIA] does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session. Instead, the Act requires that the presiding officer of a public body which has voted to go into executive session shall announce the purpose of the executive session. Section 30-4-70(5). Practically speaking, it is easily foreseeable that public bodies might not know what will be taken up in executive session until they are meeting in an open session. The Act recognizes this by providing that an executive session can only follow an open session, where the public body must vote in public to meet in executive session.

⁵ The sufficiency of the announcement will be addressed in Part II of this brief.

Id. at 11-12.

Note must be taken that Appellant is not contending that meetings were improperly noticed or that general agendas were amended. His sole contention is that an agenda of an executive session cannot be amended. (Tr. 142; R. p. 209, lines 4-16). Appellant's argument that Town Council violated the FOIA's notice provision thus fails for the same reason that the claimant in Herald failed: the Act simply does not require that an agenda for executive session be posted or that the news media be notified of the agenda for executive session. As a result, the circuit court properly concluded that Appellant failed to meet his burden of proof with respect to his claim regarding the improper amendment of agenda items.

Appellant also argues on Appeal that Town Council violated S.C. Code Ann. § 3-4-80 by taking formal action following executive sessions without having published notice on the agenda that formal action was contemplated. (Br. of Appellant at 15-18). In finding the FOIA does not require agendas for executive session items, this Court in Herald reasoned that, as a practical matter, public bodies may not know what they are going to discuss in executive session until reconvening in open session. 291 S.C. at 12. It logically follows that public bodies cannot know whether a formal action will be necessary until after meeting in executive session. Consistent with this Court's reasoning in Herald, the circuit court dismissed Appellant's claims regarding improper notice and action. (Order 5; R. p. 5).⁶

⁶ This finding was supported by Councilman Burdette's testimony that certain situations, for example, employee matters, occur between the issuance of the agenda and the meeting, but require that action be taken by Council. (Tr. 265; R. p. 332, lines 1-20). If there was a complete bar on Council's ability to amend agenda items, such as its ability to amend an agenda to discuss pressing personnel matters, Burdette testified there could be serious effects and legal ramifications. (Tr. 264-265; R. p. 331, line 21 – p. 332, line 9). Additionally, Mark Mason's testimony confirmed that the Town did not receive the Shem Creek/O.K. Tire Store Settlement Agreement until after Mason signed at some point during the day on December 5, 2007, the same day as the Town Council Meeting. (Tr. 226; R. p. 293, lines 13-19). Mason's testimony confirms that the first page of the agreement included a time is of the essence clause. (Tr. 227; R. p. 295, lines 1-4). Specifically the agreement stated "This Settlement Agreement has been executed by Landowners and if not executed by the Mayor on behalf of the Town and delivered to

Appellant contests this holding and takes issue with this Court's precedent recognizing that exigent circumstances may require an addition to an agenda in order to promote the expeditious conduct of public business. See Herald, 291 S.C. at 11-12 ("Practically speaking, it is easily foreseeable that public bodies might not know what will be taken up in executive session until they are meeting in open session."). Appellant's objection to this premise aside, the circuit court did not err in adhering to the principles of Herald. Indeed, the circuit court went the extra mile and substantiated his reasoning and the circumstances giving rise to his holding. (See Order, fn 16).

The Appellant misconstrues the circuit court's application of Herald. The court did not rely on Herald to establish "substantial compliance" as the measuring stick of actions taken under the FOIA. The circuit court relied on Herald, and rightfully so, for the premise that agendas for executive sessions may, at times, require amendment. See Herald, 291 S.C. at 11-12.

It is wrong to extend the holding in Lambries v. Saluda County Council, 398 S.C. 501, 728 S.E.2 488 (Ct. App. 2012), to executive sessions so as to overrule Herald. Lambries dealt with an amendment that added a substantive matter to a published agenda. Id. The agenda amended was not an executive session agenda. Id. The amendments with which Appellant takes issue in this case were all amendments to executive session discussion items – not general meeting agenda items. The facts of Lambries differ from the facts of Herald and of this case. Lambries did not purport to alter Herald. And indeed, the two can be squared: agendas of executive sessions, not being required, and often arising due to a matter that arises during a meeting, may be altered during a session, so long as the purpose for the session is announced and comports with the statute; an agenda addition pertaining to non-executive session matters may

Landowners' counsel by Thursday, December 6, 2007 at 5:00 p.m. it shall be of no force and effect." (Pl. Ex. 1; R. pp. 535-538).

not be made, except in compliance with the notice requirements of S.C. Code Ann. § 30-4-80.

While the Court of Appeals in Lambries interpreted the FOIA to restrict a public body's ability to amend agenda items during meetings, the Court did not overrule its own opinion in Herald, which still controls the addition of agenda amendment's involving executive session items. The evidence presented to the circuit court only included amendments to facilitate executive session matters. As a result, Appellant's reliance on Lambries is misplaced.

Despite Appellant's displeasure with the circuit court's holding regarding exigent circumstances, the holding is consistent with precedent and S. C. Code Ann. § 30-4-70. The Record reveals the Town adhered to both the procedural and substantive requirements of S. C. Code Ann. § 30-4-70. And contrary to the contention otherwise, § 30-4-70 does not preclude a public body from acting on a matter discussed in executive session. It only precludes such action while behind closed doors, and there is nothing in the Record that suggests that occurred.

The General Assembly has recognized that, in certain limited, if not sensitive areas, a public body may require a closed session to accommodate a vetting of issues without embarrassment or to receive legal advice and litigation strategy or to address matters pertaining to the public fiscus. At the same time, the General Assembly has recognized the overarching need for public business to occur in the open. Hence, the adoption of S.C. Code Ann. §30-4-70. With this statute, the General Assembly balanced the need for public bodies to act expeditiously regarding sensitive matters, with the public's need for transparency.

A Public Body may Ratify Potential FOIA Violations by Taking Subsequent Actions

The circuit court properly held that, even if there was a violation of the FOIA at the meeting of December 5, 2007, such was cured at Town Council's subsequent meeting on December 17, 2007 where the acts taken at December 5th meeting were affirmed. In Multimedia,

Inc. v. Greenville Airport Commission, 287 S.C. 521, 524-525, 339 S.E. 2d 884, 886-887 (Ct. App. 1986), this Court held that no cause of action is stated under the FOIA where the complaint reveals the prior action was subsequently ratified at a meeting in compliance with the law. This Court in Multimedia also held that substantial compliance with the FOIA will satisfy the requirements where a technical violation has demonstrated no effect on a complaining party. Id.

Appellant challenges the circuit court holding, contending its reliance on Multimedia was an error. (Br. of Appellant 19). In support of this contention, Appellant relies on post-Multimedia amendments to S. C. Code Ann. § 30-4-70. Contrary to his assertion, the 1987 amendments to § 30-4-70 have no relation to, and in no way undermine, the Multimedia ruling.

Prior to 1987, a public body could formally act on matters while in executive session. See S.C. Code Ann. § 30-4-70(a)(5) (1976). Such action could only be effectuated, however, by a public vote ratifying that action. Id. The former statute read: "...[a]ny formal action taken in executive session shall thereafter be ratified in public session prior to such action becoming effective." Id. The 1987 amendments withdrew from public bodies the ability to take any action in executive session, and required that an action could only be taken in public session. See S.C. Code Ann. § 30-4-70 (1987). Appellant argues that Multimedia only held that where a formal action was taken in executive session, such action was valid if subsequently ratified in open session. (Br. of App. 19). Because the ratification provisions have been amended, he contends Multimedia is no longer efficacious. Id. Such is not the case.

At issue in Multimedia was the hiring of an airport director at a meeting that was not publicly noticed. 339 S.E.2d at 885. At a subsequent, properly noticed meeting, the Airport Commission affirmed its decision to hire the director. Id. Multimedia contested the hiring as a violation of the FOIA. Id. at 885-886. This Court upheld the actions of the Airport Commission,

finding that affirming the prior action at a subsequent, lawfully noticed meeting cured the prior notice defects, when no harm in the interim had occurred. Id. at 886. As applied here, assuming a FOIA violation occurred at the December 5, 2007 meeting of Council, the acts of Council revisiting the issue at a subsequent, properly noticed meeting, including placing the item on the agenda, cured the defect. In addition, the fact that Appellant showed absolutely no prejudice as a result of the action is further reason to sustain the holding of the circuit court.

Essentially, Appellant is claiming that absent the FOIA statute specifically providing for a ratification procedure, a FOIA violation cannot be cured. In other words, a public body is powerless to correct mistakes. This premise is not just without legal precedent, but it would also frustrate the ability of public bodies to attend to the efficient and effective conduct of the public's business. Appellant's proposed result is anathema to sound public policy.

II. THE CIRCUIT COURT DID NOT ERR IN HOLDING THAT THE APPELLANT FAILED TO ESTABLISH BY A PREPONDERANCE OF EVIDENCE THAT THE TOWN'S ANNOUNCED PURPOSES FOR EXECUTIVE SESSION VIOLATED FOIA.

Appellant asserts that the circuit court erred by analyzing the announced purpose requirement of § 30-4-70 under Multimedia and Herald, because these cases predate the 1987 "specific purpose" amendment to the FOIA, and more recent case of Quality Towing v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001). (Br. of Appellant 26).

As an initial matter, the circuit court did not rely on Multimedia with respect to the claims of whether the purposes of the executive sessions were properly announced. An accurate reading of the circuit court's opinion reveals it cited Multimedia on the issue of ratification. (Order, fn 21).

Nor did the circuit court err in referencing Herald with respect to the claim of the announced purposes of the sessions. In Herald, the court reasoned that because the purpose stated for entering executive session specifically disclosed what was going to be discussed, no violation

of the Act occurred. 291 S.C. at 11. The definition of “specific purpose” set forth in the 1987 amendment provides, “[a]s used in this subsection, “specific purpose” means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section”. SC Code Ann. § 30-4-70(6)(b). The definition of specific purpose in the 1987 amendment is in accord with the Herald court’s language. Thus, even if the circuit court somehow erred in referencing the language in Herald as opposed to the FOIA’s language in determining whether Town Council met the announced purpose requirement, the end result is the same.

Appellant argues that Council’s stated reasons for going into executive session were too general, equating the Town’s actions with those of the council in Quality Towing. Appellant states, “In Quality [sic] the purpose for the executive session was: ‘C. Towing – Contractual Recommendation’.” (Br. of Appellant 27). Appellant then asserts:

With very little discussion this Court in Quality held that the above language clearly failed to meet the requirements of FIOA [sic]:

“FOIA is clear in its mandate that the ‘specific purpose’ of the session ‘shall be announced.’ Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private.”

Id. (quoting Quality Towing, 345 S.C. at 164).

Appellant’s analysis of Quality Towing is incomplete. In Quality Towing, Myrtle Beach City Council was taken to task, not because the purpose of the executive session was not specific enough, but because the purpose was not announced. 345 S.C. at 164. The Court made note that there was no indication that the agenda item was read, or announced, so as to advise the public of what was to be discussed. Id. According to the minutes from the Myrtle Beach City Council meeting, upon arriving at the agenda item, the mayor simply “advised this matter would be discussed in Executive Session”. Id.

That the issue in Quality Towing was the failure to announce the purpose, as opposed to the specificity of the purpose, is substantiated by the Court placing its discussion of this issue under the heading, “**Announcement**”. Id. (emphasis in original). The facts here are far different. Unlike Quality Towing, each purpose of the contested executive sessions was announced and the announcement was specific. The circuit court Order is detailed in this regard, as are the minutes of Council proceedings. (Order 6-7; R. pp. 6-7; Pl. Ex. 2, 16, 22; R. pp. 539, 629-630, and 631-632). Appellant’s real issue is his desire for detail and precision, if not perfection. But that is not what the FOIA requires, nor should it. To require a public body to disclose in detail the specifics of the topic to be discussed defeats the authorized purpose for convening an executive session, and as noted by the circuit court, could have the effect of compromising legal strategy, unnecessarily causing embarrassment to personnel and undermine contractual negotiations. (See Order fn 21 ¶ 4; R. pp. 6-7, fn 21 ¶ 4).

III. IN LIGHT OF THE RECORD, THE CIRCUIT COURT DID NOT ERR IN REFRAINING TO ENTER A DECLARATORY JUDGMENT AS TO PAST ACTIONS REGARDING EMAIL RETENTION AMONGST COUNCIL MEMBERS.

A threshold matter for consideration on this issue is whether Appellant has standing to bring a claim under the Records Retention Act. The statutory scheme for enforcing the RRA creates no private cause of action. The main factor in determining whether a statute creates a private cause of action is legislative intent:

The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of a statute ... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes a provision to secure the safety or welfare of the public entity is not subject to a construction establishing a civil liability.

Dorman v. Aiken Communications, Inc., 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990) (quoting Whitworth v. Fast Fare Markets of South Carolina Inc., 289 S.C. 418, 420 338 S.E.2d 155, 156

(1985)).

When a statute does not specifically create a private cause of action, one can only be implied if the legislation was enacted for the special benefit of a private party. Citizens of Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992).

Nowhere in the RRA is a specific party or class identified as the beneficiary of its requirements. The RRA is designed to benefit the public generally, not any particular member of it. The RRA specifically empowers the Director of Archives to pursue civil remedies. See S.C. Code Ann § 30-1-50 (2007). If the legislature intended for the Chapter to be enforced by a private party, it would have done so as it did for the enforcement of the FOIA. See S.C. Code Ann § 30-4-100 (2007).

Appellant is correct that § 30-1-10(a) of the RRA refers to the FOIA for the definition of public records. Appellant is also correct that § 30-1-100(D) of the RRA references the relief procedures outlined in § 30-4-100 of the FOIA. Appellant, however, is incorrect to extrapolate from these references that the RRA creates a private right of action. Reference to the FOIA's definition for public records is completely irrelevant to the issue of whether the RRA may be privately enforced; and reference in Section 30-1-100(D) to the FOIA's relief provision is only applicable to the appeal process related to the Director of Archivist's decision to withhold public records from inspection.

Because Appellant has no standing to pursue a claim under the RRA, he should not be heard to maintain on appeal that the circuit court erred in refusing to rule on whether "past actions" of Town Council violated the RRA.

Moreover, even if Appellant could pursue a cause of action under the RRA, the Record supports the circuit court's decision to decline to enter declaratory judgment. The decision to

enter a declaratory judgment is discretionary. E.g., Corbin v. Carlin, 366 S.C. 187, 192, 360 S.E.2d 745, 748 (Ct. App. 2005) (“...the decision to grant a declaratory judgment is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.”). Even if one could take issue with whether or not the interplay of law and technology is ever evolving, the circuit court made note that the Town, did, contrary to the allegations of Count VI of the Amended Complaint, have a records retention policy, and had adopted a policy, specific to the Council’s use of computers, public or private, to conduct Town business and the retention of e-mails resulting therefrom. (Tr. 258-259; R. p. 325, line 9 – p. 326, line 20; Pl. Ex. 40; R. p. 723). To assure compliance, the circuit court dutifully restrained the Town from engaging in future conduct relating to the deletion of e-mails pertaining to Town business from computers, both public and private. (Order 12; R. p. 12). In short, at the time of trial, the matters about which Appellant complained were either without foundation or had been addressed by the Town. In light of these facts and the court’s restraint of future conduct not in accordance with Town policy, its decision to refrain from issuing a declaratory judgment hardly rises to an abuse of discretion.

Additionally, the evidence Appellant presented on the email deletion issue was that two Councilmembers deleted e-mails from their personal computers. No evidence was presented to the hierarchy of these emails as having, as established by the South Carolina Department of Archives and History, permanent value, transitory value or convenient value, which has a bearing on the length of retention, or if they have to be retained at all. (Tr. 201-203; R. p. 268, line 14 – p. 270, line 20). Moreover, the Record is clear that, any e-mail passing through the Town computer, either originating there or sent there, is retained, permanently. (Tr. 314; R. p. 381, lines 14-19). In light of these facts, it can hardly be maintained that the circuit court’s

decision, not entering a declaratory judgment, constitutes an abuse of discretion.

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD TO APPELLANT OF \$42,000.00 DOLLARS IN ATTORNEY FEES AND COSTS.

Under the FOIA, a person or entity that seeks relief and prevails may be awarded reasonable attorney fees and other costs of litigation. S. C. Code Ann. § 30-4-100. If such person or entity prevails in part, the court may, in its discretion, award him or it reasonable attorney fees or an appropriate portion thereof. Id.

As a general rule, the amount of attorney's fees to be awarded in a particular case is within the discretion of the trial judge. See Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989); see also Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist., 314 S.C. 30, 443 S.E.2d 574 (1994) (finding that, "as § 30-4-100(b) provides attorneys' fees may be awarded, the [judge] has discretion to award fees"); Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003) ("Where one party prevails in his claim for information under FOIA, Circuit Court has discretion to award attorney's fees."). The award, however, must be reasonable and supported by adequate findings. Baron Data Systems, 297 S.C. at 384, 377 S.E.2d at 297.

Six factors must be considered when determining an award of attorney's fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). Upon request for attorney's fees that are authorized by contract or statute, the trial court should make specific findings of fact on the record for each of these factors. See Jackson, 326 S.C. at 308, 486 S.E.2d at 760 ("[O]n appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor."); See also Blumberg

v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993) (“When an award of attorney’s fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor.”).

After considering each of these factors, the circuit court awarded Appellant (as a prevailing party) fees and costs in the amount of \$42,000.00. (Order 14-15; R. pp. 14-15; Supplemental Order 2-3; R. pp. 16-18). Appellant contends he is entitled to more because the circuit court was influenced by inappropriate considerations. The Record does not support this contention.

Appellant, referencing page 9 of the Order, contends the circuit court inappropriately utilized a “good faith” or “absence of bad faith” standard in the award of fees. (Br. of Appellant 35). However, nothing on page 9, or any other page, of the Order suggests the court considered “good faith” or “the absence of bad faith” in its determination of attorney fees. Next, Appellant contends a major factor considered by the circuit court in determining attorney fees was its finding that the Appellant prevailed on only two claims. (Br. of Appellant 36). Again, there is simply nothing in the Record to support this contention. The Order states, in general terms, “Mr. Brock has presented sufficient evidence to justify this Circuit Court issuing permanent injunctions against the Town as previously noted herein. ... Consequently, Mr. Brock is a prevailing party ... entitled to an award of litigation costs and attorney’s fees.” (Order 14; R. p. 14).

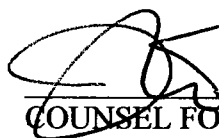
The circuit court properly considered, on the record, each of the six factors pertaining to an award of attorney’s fees. It awarded Appellant \$42,000.00, nearly 40% of his fees and costs. The award is supported by the Record and within the bounds of reason. There was no abuse of discretion. Accordingly, the award should not be disturbed by this Court.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted,

January 8, 2014



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THE STATE OF SOUTH CAROLINA
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J.C. Nicholson Jr., Circuit Court Judge

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Respondent,

v.

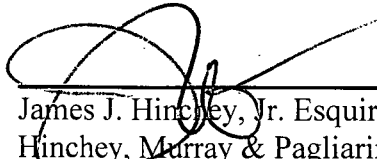
Stephen George Brock,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR.

January 8, 2014



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SC Court of Appeals

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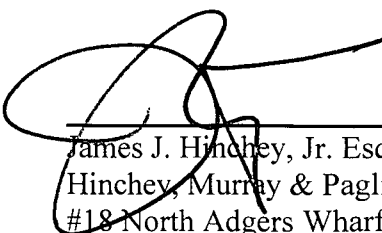
Appellant.

CERTIFICATE OF SERVICE

I certify that I have on the 8th day of January, 2014, served the Respondent's Final Brief on the Appellant by placing a copy of same in the U.S. Mail, first class postage prepaid, addressed to counsel of record as follows:

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