

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2013-CP-26-08446

Appellate Case No. 2014-000756

RECEIVED

OCT 07 2014

SC Court of Appeals

William H. Bailey, Jr. *Appellant,*

v.

Marilyn Hatley, individually and as Mayor
of the City of North Myrtle Beach,
Michael G. Mahaney, Christopher Noury,
and the City of North Myrtle Beach. *Respondents.*

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

William H. Bailey, Jr.,

Plaintiff,

vs.

Marilyn Hatley, individually and as Mayor of
the City of North Myrtle Beach, Michael G.
Mahaney, Christopher Noury, and the City of
North Myrtle Beach,

Defendants,

FOR THE FIFTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
CASE NO.: 2013-CP-26-08446

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS INDIVIDUAL
DEFENDANTS**

(Does not end case)

FILED
HORRY COUNTY
2014 MAR 28 PM 4: 25
MELANIE HUGGINS-WARD
CLERK OF COURT

Statement of Case

The matter came before the Court upon Defendants' motion to dismiss the individual defendants from Plaintiff's Freedom of Information Act lawsuit. A hearing was held on the motion on March 5, 2014. Present at the hearing was the Plaintiff William H. Bailey, Jr., and his attorney Kenneth Moss, Esq. Michael W. Battle, Esq. was present and represented the Defendants.

Plaintiff's lawsuit seeks a declaratory judgment and injunctive relief under South Carolina's Freedom of Information Act in connection with the manner in which the City of North Myrtle Beach held meetings in executive session prior to regularly scheduled meetings in 2013. The issue before the court is whether the above named individuals are proper party defendants under South Carolina's Freedom of Information Act.

Analysis and Findings

Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of South Carolina Freedom of Information Act in appropriate cases as long as such application is made no later than one year

following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of the act must be considered to be an irreparable injury for which no adequate remedy at law exists.

In the present case, Plaintiff is suing Marilyn Hatley, Michael G. Mahaney, Christopher Noury, in their individual capacities together with the City of North Myrtle Beach for acts that violate the public meetings provisions of FOIA. "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power. S.C. Code Ann. § 30-4-20. Meetings are acts of a public body.

The FOIA was created to allow citizens to 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. S.C. Code Ann. § 30-4-15 (2007). FOIA's equitable relief provisions are directed at those improper actions taken by the public body. Only the public body can perform such acts that are subject to FOIA's equitable provisions. See *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010).

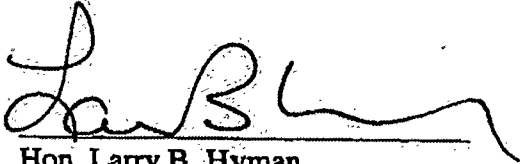
FOIA does provide criminal penalties for individuals who willfully cause public bodies to perform acts that violate FOIA. S.C. Code Ann. § 30-4-110 (Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor). In the present case, Plaintiff seeks an order in equity to stop the public body from allegedly violating the public meeting provisions of FOIA. Therefore, the proper party defendant is the public body and in this case the sole proper party defendant is the City of North Myrtle Beach. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010). Also see: *Truesdale v. U.S. Dep't of Justice*, 657 F. Supp. 2d 219, 226 (D.D.C. 2009);

Tipton, IV v. Hire Right, No. 1:12-CV-175, 2013 WL 5670886 (M.D. Ga. Oct. 16, 2013); and *Amawi v. BOP*, No. 13-cv-00536-GPM, 2013 WL 3467074 (S.D. Ill. July 10, 2013).

There are FOIA cases in South Carolina where individuals have been named as parties. However, the Court appears ^{to} treat such individual defendants as being one in the same as the public body because it is the public body that has allegedly violated FOIA. See *Lambries v. Saluda Cnty. Council*, 398 S.C. 501, 502, 728 S.E.2d 488, 489 (Ct. App. 2012), reh'g denied (July 25, 2012). One case that has addressed the question of whether individual defendants are proper party defendants in FOIA claims found that the claims against the individuals should be dismissed under *Rule 12 (b) 6, SCRPC*. See *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010). For the forgoing reasons, I find and conclude the facts as stated in Plaintiff's complaint in the above captioned lawsuit fail to state a FOIA cause of action against the individual defendants. *Rule 12 (b) 6, SCRPC*.

NOW THEREFORE, IT IS HEREBY ORDERED, Defendants' Motion to Dismiss Marilyn Hatley, Michael G. Mahaney, and Christopher Noury from the above captioned lawsuit is hereby granted. Plaintiff's claims against those individuals are hereby dismissed with prejudice.

March 20, 2014


 Hon. Larry B. Hyman
 Judge, Fifteenth Judicial Circuit
 Horry County Court of Common Pleas

6. The Defendant Christopher Noury (hereinafter "Noury") is employed by the City as its City Attorney and parliamentarian to the City Council, and is a citizen and resident of Horry County, South Carolina.
7. None of the natural defendants is or are entitled to the protections of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. §§ 501-591 (as amended) in connection with the matters alleged in this present action.
8. Pursuant to S.C. Code Ann. § 30-4-10 *et seq.*, the South Carolina Freedom of Information Act ("FOIA"), including but not limited to S.C. Code Ann. § 30-4-100, Bailey has standing to bring this action in his name in connection with the allegations herein.
9. All the matters complained of in this action occurred in the City, which is located in Horry County.
10. A justiciable controversy exists between the parties, this Honorable Court has subject matter jurisdiction over the matters in dispute between the parties, personal jurisdiction over the parties, and venue for this action is proper in Horry County.

GENERAL ALLEGATIONS

11. All prior allegations, denials and admissions (qualified or not as set forth above) are repeated as if set forth here verbatim.
12. The City has adopted a Code of Ordinances that are a public document or documents (the "Ordinances" or the "City Ordinances").
13. The City, each of its elected officials, and each of its employees is required to comply with the FOIA..
14. Upon information and belief, the City did not budget in the fiscal year commencing on October 01, 2012 through September 30, 2013 for the provision of regular, periodic or updated training on the FOIA to all elected members of the City Council or any employee of the City.
15. Upon information and belief, during the period from October 01, 2012 through September 30, 2013, no elected member of the City Council or employee of the City underwent any updated training on the FOIA at the expense of the City.
16. The City has contracted with the Municipal Code Corporation (the "Municode") to publish the City's Ordinances on Municode's Internet website.

17. The City Ordinances in force between June 21, 2010 and the date of the commencement of this present lawsuit included at all times the following unchanged provisions:
 - a. Chapter 1, Sec. 1-9. Enforcement of ordinances, etc., by officers and employees-- Required.
 - b. Chapter 2, Sec. 2-21. Mayor; ceremonial head; presiding at council meetings.
 - c. Chapter 2, Sec. 2-31.5. Executive sessions.
 - d. Chapter 2, Sec. 2-32. Quorum and rules of procedure.
 - e. Chapter 2, Sec. 2-33. Minutes of meetings.
 - f. Chapter 2, Sec. 2-34.2. City attorney to attend.
 - g. Chapter 2, Sec. 2-35. Agenda.
 - h. Chapter 2, Sec. 2-56(a)(2). Administrative powers generally; duties; execution of contracts; entitled to notice of special meetings of city council. (City Manager)
 - i. Chapter 2, Sec. 2-71. Duties. (City Attorney)
18. The texts of the preceding cited City Ordinances that appeared on the Municode website as of August 05, 2013 were complete and accurate as of that date.
19. The City publishes Agendas for and Minutes of regular and special Meetings of the City Council on the Internet website maintained at public expense by the City.
20. The City Agendas and Minutes as published by the City on the Internet are complete and accurate when published in that manner.

ALLEGATIONS OF VIOLATIONS OF THE FOIA & CITY ORDINANCES

21. All allegations of fact made previously are repeated as if set forth here verbatim.
22. The FOIA provides that if any person or group of persons willfully violate the provisions of the FOIA, those individual Defendants are personally liable for the violations.
23. The Defendant Mahaney, acting as City Manager, is required to prepare all Agendas for meetings of the City Council.
24. The Defendant Mahaney drafted and caused to be published Agendas for City Council Meetings held on June 21, 2010, July 19, 2010, July 11, 2011, July 18, 2011, February 20, 2012, March 15, 2012, March 19, 2012, June 04, 2012, December 17, 2012, January 07, 2013, February 04, 2013, March 18, 2013, July 01, 2013, and August 05, 2013.
25. The Defendant Hatley presided over City Council Meetings held on June 21, 2010, July 19, 2010, July 11, 2011, July 18, 2011, February 20, 2012, March 15, 2012, March 19,

- 2012, June 04, 2012, December 17, 2012, January 07, 2013, February 04, 2013, March 18, 2013, July 01, 2013, and August 05, 2013.
26. The Defendant Noury attended City Council Meetings on June 21, 2010, July 19, 2010, July 11, 2011, July 18, 2011, February 20, 2012, March 15, 2012, March 19, 2012, June 04, 2012, December 17, 2012, January 07, 2013, February 04, 2013, March 18, 2013, July 01, 2013, and August 05, 2013.
 27. The Defendant Noury drafted all notices of items related to Executive Sessions of City Council appearing on the Agendas for the Meetings of City Council held on June 21, 2010, July 19, 2010, July 11, 2011, July 18, 2011, February 20, 2012, March 15, 2012, March 19, 2012, June 04, 2012, December 17, 2012, January 07, 2013, February 04, 2013, March 18, 2013, July 01, 2013, and August 05, 2013.
 28. The Defendant Noury, acting as City Attorney, acts as parliamentarian at meetings of the City Council.
 29. Any amendment to a previously published Agenda for a meeting of City Council must be made by a Motion of City Council that has been voted upon.
 30. A vote of City Council must be taken to enter into an Executive Session of City Council.
 31. Each vote of City Council must be recorded in the official Minutes of City Council meetings.
 32. All Minutes published by the City that have been approved by a subsequent Motion of City Council, at a subsequent or later City Council Meeting, are the official record of the transactions and happenings of the City's Council.
 33. All Executive Sessions of City Council must be conducted in accordance with the provisions of the FOIA and the City Code of Ordinances.
 34. When moving into Executive Sessions on June 21, 2010, July 19, 2010, July 11, 2011, July 18, 2011, February 20, 2012, March 15, 2012, March 19, 2012, June 04, 2012, December 17, 2012, January 07, 2013, February 04, 2013, March 18, 2013, July 01, 2013, and August 05, 2013, the Defendants willfully, knowingly and variously violated the FOIA and the City Code of Ordinances by one or more of the following acts:
 - a. Failing to schedule and/or enter into Executive Sessions of City's Council in accordance with City Code of Ordinances and the FOIA; and/or

- b. Adding unscheduled items to agendas for Executive Sessions to allow private discussion of matters, including but not limited to matters concerning the Plaintiff, without giving notice of intention to hold such Executive Sessions in accordance with the City Ordinances and the FOIA; and/or
- c. Discussing matters in Executive Sessions of City Council without the giving of advance notice of those items to be discussed in the manner by the FOIA and the City Ordinances to amend a published agenda for a municipal council meeting; and/or
- d. Entering into, holding, and ending Executive Sessions of City Council without proper notice and following voting procedures prescribed by the City Ordinances and the FOIA; and/or
- e. Holding Executive Sessions of City Council without the production of Minutes of a lawful meeting of City Council at which a vote to enter into Executive Session was properly taken and recorded, in violation of City Ordinances and the FOIA.

JUNE 21, 2010

- 35. All allegations of fact made previously are repeated as if set forth here verbatim.
- 36. The Agenda as published before the City Council Meeting held on June 21, 2010 contained a provision for an Executive Session of City Council, at which two (2) items of business would be discussed.
- 37. The Defendant Hatley was the presiding officer at the City Council Meeting held on June 21, 2010.
- 38. At the City Council Meeting held on June 21, 2010 the Defendant Hatley as presiding officer announced the purposes of the Executive Session in an open session of City Council before entering into Executive Session to be for the purpose of discussion of three (3) items of business.
- 39. An item styled as "*a legal briefing on a proposed tolling agreement*" was added to those matters shown on the Agenda published before the Meeting on June 21, 2010.
- 40. The City Council did not vote at its Meeting held on June 21, 2010 to amend the Agenda as previously published.
- 41. The Defendant Hatley as presiding officer did not describe the "*legal briefing on a proposed tolling agreement*" as a matter exempt from disclosure pursuant to S.C. Code

Ann. §§ 30-4-70(a)(1) and 30-4-70(b) at the City Council Meeting on June 21, 2010 before the City Council entered into Executive Session.

42. The City Council did not vote on the item styled as "*legal briefing on a proposed tolling agreement*" on June 21, 2010 as being a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b).
43. The City Council did not vote at its Meeting held on June 21, 2010 to enter into Executive Session.
44. The City Council did not vote at its Meeting held on June 21, 2010 to adjourn from Executive Session into open session of City Council.
45. The Defendant Noury did not advise the City Council that their actions on June 21, 2010 were contrary to the City Ordinances and the FOIA.

JULY 19, 2010

46. All allegations of fact made previously are repeated as if set forth here verbatim.
47. The Agenda for the City Council Meeting held on July 19, 2010 contained a provision for an Executive Session of City Council, at which three (3) items of business would be discussed.
48. The Defendant Hatley was the presiding officer at the City Council Meeting held on July 19, 2010.
49. The Defendant Hatley acting as presiding officer of the City Council Meeting on July 19, 2010 announced the purposes of the Executive Session in an open session of City Council before entering into Executive Session to be for the purpose of discussion of five (5) items of business.
50. The City Council Meeting held on July 19, 2010 discussed in Executive Session two (2) items styled as [1] "*a legal briefing concerning Kevin Chignall vs the City of North Myrtle Beach*" and [2] "*a legal briefing in reference to a personnel matter.*"
51. The Defendant Hatley as presiding officer did not describe the "*legal briefing in reference to a personnel matter*" as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b) at the City Council Meeting on July 19, 2010
52. The City Council did not vote on the item styled as "*a legal briefing in reference to a personnel matter*" on July 19, 2010 as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b).

53. The City Council did not vote at its Meeting held on July 19, 2010 to amend the Agenda as previously published.
54. The City Council did not vote at its Meeting held on July 19, 2010 to enter into Executive Session.
55. The City Council did not vote at its Meeting held on July 19, 2010 to adjourn from Executive Session into open session of City Council.
56. The Defendant Noury did not advise the City Council that their actions on July 19, 2010 were contrary to the City Ordinances and the FOIA.

JUNE 20, 2011

57. All allegations of fact made previously are repeated as if set forth here verbatim.
58. The Agenda for the City Council Meeting held on June 20, 2011 contained a provision for an Executive Session of City Council.
59. The City Council on June 20, 2011 did not first meet in open session of City Council and vote to go into Executive Session.
60. The Defendant Hatley presided over the City Council Meeting held on June 20, 2011, but as presiding officer did not announce the purpose of the Executive Session in an open session of City Council before entering into Executive Session.
61. The City Council did not vote at its Meeting held on June 20, 2011 to enter into Executive Session.
62. The City Council did not vote at its Meeting on June 21, 2010 to adjourn from Executive Session into open session of City council.
63. The Defendant Noury did not advise the City Council that their actions on June 20, 2011 were contrary to the City Ordinances and the FOIA.

JULY 18, 2011

64. All allegations of fact made previously are repeated as if set forth here verbatim.
65. The Agenda for the City Council Meeting held on July 18, 2011 contained a provision for an Executive Session of City Council.
66. The Agenda for the City Council Meeting on July 18, 2011 listed for discussion in Executive Session a "*Personnel matter.*"

67. The Defendant Hatley as presiding officer did not describe the "*Personnel matter*" as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b) at the City Council Meeting on July 18, 2011.
68. The City Council did not vote on the item styled as "*Personnel matter*" on July 18, 2011 as being a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b).
69. The City Council did not vote at its Meeting held on July 18, 2011 to enter into Executive Session.
70. The Defendant Noury did not advise the City Council that their actions on July 19, 2011 were contrary to the City Ordinances and the FOIA.

FEBRUARY 20, 2012

71. All allegations of fact made previously are repeated as if set forth here verbatim.
72. The Agenda for the City Council Meeting held on February 20, 2012 contained a provision for an Executive Session of City Council.
73. The Defendant Hatley was the presiding officer at the City Council Meeting held on February 20, 2012.
74. The Agenda for the City Council Meeting on February 20, 2012 listed for discussion in Executive Session "*Legal briefing regarding pending litigation.*"
75. The Defendant Hatley as presiding officer did not describe the "*Legal briefing regarding pending litigation*" as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b) at the City Council Meeting on February 20, 2012.
76. The City Council did not vote on the item styled as "*Legal briefing regarding pending litigation*" on February 20, 2012 as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b).
77. The City Council did not vote at its Meeting held on February 20, 2012 to enter into Executive Session.
78. The Defendant Noury did not advise the City Council that their actions on February 20, 2012 were contrary to the City Ordinances and the FOIA.
79. Upon information and belief, the City has not published Minutes of the City Council Meeting held on February 20, 2012 on the City's Internet website.

MARCH 15, 2012

80. All allegations of fact made previously are repeated as if set forth here verbatim.
81. The Agenda for the City Council Meeting held on March 15, 2012 contained a provision for an Executive Session of City Council.
82. The Defendant Hatley was the presiding officer at the City Council Meeting held on March 15, 2012.
83. The Defendant Hatley acting as presiding officer of the City Council Meeting on March 15, 2012 did not announce the purposes of the Executive Session in an open session of City Council before entering into Executive Session.
84. The City has not published Minutes of the City Council Meeting held on March 15, 2012 on the City's Internet website.
85. The City Council did not compile or approve Minutes of any meeting of City Council on March 15, 2012.
86. The City Council did not first meet in open session on March 15, 2012 before going into Executive Session.
87. The City Council did not vote on March 15, 2012 to go into Executive Session.
88. The City Council did not vote on March 15, 2012 to adjourn from Executive Session.
89. The Defendant Noury did not advise the City Council that their actions on March 15, 2012 were contrary to the City Ordinances and the FOIA.

MARCH 19, 2012

90. All allegations of fact made previously are repeated as if set forth here verbatim.
91. The Defendant Hatley acted as presiding officer at the City Council Meeting held on March 19, 2012.
92. The Agenda for the City Council Meeting held on March 19, 2012 contained a provision for an Executive Session of City Council.
93. The Agenda for the City Council Meeting on March 19, 2012 listed for discussion in Executive Session "*Legal briefing regarding pending litigation.*"
94. The Defendant Hatley as presiding officer did not describe the "*Legal briefing regarding pending litigation*" as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b) at the City Council Meeting on March 19, 2012.

95. The City Council did not vote on the item styled as "*Legal briefing regarding pending litigation*" on March 19, 2012 as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b).
96. The City Council did not vote at its Meeting held on March 19, 2012 to adjourn from Executive Session.
97. The Defendant Noury did not advise the City Council that their actions on March 19, 2012 were contrary to the City Ordinances and the FOIA.

JUNE 04, 2012

98. All allegations of fact made previously are repeated as if set forth here verbatim.
99. The Agenda for the City Council Meeting held on June 04, 2012 contained a provision for an Executive Session of City Council.
100. The Defendant Hatley was the presiding officer at the City Council Meeting held on June 04, 2012.
101. The City Council did not vote on June 04, 2012 to enter into Executive Session.
102. The Agenda for the City Council Meeting on March 19, 2012 listed for discussion in Executive Session "*legal briefing on status of pending legal issues.*"
103. The Defendant Hatley as presiding officer did not describe the "*legal briefing on status of pending legal issues*" as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b) at the City Council Meeting on June 04, 2012.
104. The City Council did not vote on the item styled as "*legal briefing on status of pending legal issues*" on June 04, 2012 as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b).
105. The City Council did not vote at its Meeting held on June 04, 2012 to adjourn from Executive Session.
106. The Defendant Noury did not advise the City Council that their actions on June 04, 2012 were contrary to the City Ordinances and the FOIA.

AUGUST 06, 2012

107. All allegations of fact made previously are repeated as if set forth here verbatim.
108. The Agenda for the City Council Meeting held on August 06, 2012 contained a provision for an Executive Session of City Council.

109. The Defendant Hatley was the presiding officer at the City Council Meeting held on August 06, 2012.
110. The City Council did not vote at its Meeting held on August 06, 2012 to adjourn from Executive Session.
111. The City Council on August 06, 2012 voted to "*proceed as discussed with representation in the William Bailey lawsuit.*"
112. The City Council had discussed the matter styled as "*Legal Briefing regarding Bailey vs. City of NMB*" in Executive Session.
113. The City Council did not conduct in any open session of City Council on August 06, 2012 any discussion concerning representation of any person in the civil action referred to in the Minutes of the Meeting as the "*William Bailey lawsuit.*"
114. The City Council polled its members in Executive Session on August 06, 2012 on the course of action to be adopted as to representation of defendants in the civil action referred to in the Minutes of the Meeting as the "*William Bailey lawsuit.*"
115. The Defendant Noury did not advise the City Council that their actions on August 06, 2012 were contrary to the City Ordinances and the FOIA.

AUGUST 20, 2012

116. All allegations of fact made previously are repeated as if set forth here verbatim.
117. The Agenda for the City Council Meeting held on August 20, 2012 contained a provision for an Executive Session of City Council.
118. The Defendant Hatley was the presiding officer at the City Council Meeting held on August 20, 2012.
119. The City Council did not vote at its Meeting held on August 20, 2012 to adjourn from Executive Session.
120. The Defendant Noury did not advise the City Council that their actions on August 20, 2012 were contrary to the City Ordinances and the FOIA.

DECEMBER 17, 2012

121. All allegations of fact made previously are repeated as if set forth here verbatim.
122. The Agenda for the City Council Meeting held on December 17, 2012 contained a provision for an Executive Session of City Council.

123. The official Minutes of the City Council Meeting held on December 17, 2012 were approved on January 04, 2013.
124. The Defendant Hatley as presiding officer of the City Council Meeting on December 17, 2012 did not ask for or receive a vote of City Council in an open session of City Council to approve the entry into the Executive Session.
125. The City Council did not first meet in open session of City Council on December 17, 2012 and vote to go into Executive Session.
126. The Defendant Hatley presided over the City Council Meeting held on December 17, 2012, but as presiding officer did not announce the purpose of the Executive Session in an open session of City Council before entering into Executive Session.
127. The City Council met in Executive Session on December 17, 2012.
128. The Defendant Noury did not advise the City Council that their actions on December 17, 2012 were contrary to the City Ordinances and the FOIA.

JANUARY 07, 2013

129. All allegations of fact made previously are repeated as if set forth here verbatim.
130. The Agenda as published before the City Council Meeting held on January 07, 2013 contained a provision for an Executive Session of City Council.
131. The Defendant Hatley was the presiding officer at the City Council Meeting on January 07, 2013.
132. The Defendant Hatley as presiding officer did not announce the purpose of the Executive Session in an open session of City Council before entering into Executive Session on January 07, 2013.
133. The Defendant Hatley as presiding officer of the City Council Meeting on January 07, 2013 did not ask for or receive a vote of City Council in an open session of City Council to approve the entry into the Executive Session.
134. The City Council met first in Executive Session on January 07, 2013, but did not first meet in open session of City Council and vote to go into Executive Session.
135. The Defendant Noury did not advise the City Council that their actions on January 07, 2013 were contrary to the City Ordinances and the FOIA.

FEBRUARY 04, 2013

136. All allegations of fact made previously are repeated as if set forth here verbatim.

137. The Agenda as published before the City Council Meeting held on February 04, 2013 contained a provision for an Executive Session of City Council.
138. The Defendant Hatley was the presiding officer at the City Council Meeting held on February 04, 2013.
139. The Defendant Hatley as presiding officer of the City Council on February 04, 2013 announced the purpose of the Executive Session in an open session of City Council before entering into Executive Session to be for discussion of "*pending legal matters.*"
140. The Defendant Hatley as presiding officer of the City Council meeting held on February 04, 2013 did not announce the specific purpose of the proposed Executive Session.
141. The Defendant Hatley as presiding officer of the City Council Meeting on February 04, 2013 did not ask for or receive a vote of City Council in an open session of City Council to approve the entry into the Executive Session.
142. The City Council did not first meet in open session of City Council on February 04, 2013 and thereafter vote to go into Executive Session.
143. The Defendant Noury did not advise the City Council that their actions on February 04, 2013 were contrary to the City Ordinances and the FOIA.

MARCH 18, 2013

144. All allegations of fact made previously are repeated as if set forth here verbatim.
145. The Agenda as published before the City Council Meeting held on March 18, 2013 contained a provision for an Executive Session of City Council.
146. The City Council did not first meet in open session on March 18, 2013 and thereafter vote to go into Executive Session.
147. The Minutes for the City Council Meeting held on March 18, 2013 do not describe the subject matter of all items to be discussed in Executive Session of the City Council.
148. The Defendant Hatley as presiding officer of the City Council meeting held on March 18, 2013 did not announce the specific purpose of the proposed Executive Session.
149. The Defendant Hatley as presiding officer of the City Council Meeting on March 18, 2013 did not ask for or receive a vote of City Council in an open session of City Council to approve the entry into the Executive Session.
150. The Agenda for the City Council Meeting on March 18, 2013 listed for discussion in Executive Session "*legal briefings on status of pending legal matters.*"

151. The Defendant Hatley as presiding officer did not describe the "*legal briefings on status of pending legal matters*" as a matter exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b) at the City Council Meeting on March 18, 2013.
152. The City Council did not vote on the item styled as "*legal briefings on status of pending legal matters*" on March 18, 2013 as a matter or matters exempt from disclosure pursuant to S.C. Code Ann. §§ 30-4-70(a)(1) and 30-4-70(b).
153. The Defendant Noury did not advise the City Council that their actions on March 18, 2013 were contrary to the City Ordinances and the FOIA.

JULY 01, 2013

154. All allegations of fact made previously are repeated as if set forth here verbatim.
155. The Agenda as published before the City Council Meeting held on July 01, 2013 contained a provision for an Executive Session of City Council.
156. There are no Minutes of a City Council Meeting held on July 01, 2013 approved by a later vote of City Council, that show that the City Council on July 01, 2013 first met in an open session of City Council and thereafter voted to go into Executive Session.
157. The official Agenda for the City Council Executive Session held on July 01, 2013 did not describe the subject matter of all items to be discussed in Executive Session of City's Council.
158. The Defendant Hatley as presiding officer of the City Council meeting on July 01, 2013 did not announce in open session of City Council the specific purpose of the proposed Executive Session.
159. The Defendant Noury did not advise the City Council that their actions on July 01, 2013 were contrary to the City Ordinances and the FOIA.

AUGUST 05, 2013

160. All allegations of fact made previously are repeated as if set forth here verbatim.
161. The Agenda as published before the City Council Meeting held on August 05, 2013 contained a provision for an Executive Session of City Council.
162. The City Council did not first meet in open session on August 05, 2013 and thereafter vote to go into Executive Session.
163. The Defendant Hatley as presiding officer of the City Council meeting held on August 05, 2013 did not announce the specific purpose of the proposed Executive Session.

164. The Defendant Noury did not advise the City Council that their actions on August 05, 2013 were contrary to the City Ordinances and the FOIA.

VIOLATION OF ORDINANCES AND FOIA BY DEFENDANT HATLEY

165. All allegations of fact made previously are repeated as if set forth here verbatim.
166. The Defendant Hatley is required *inter alia* by the FOIA and other provisions of State law and the City Ordinances to preside over City Council meetings and ensure compliance with the FOIA with regard to executive sessions of City Council.
167. The failure of Defendant Hatley to comply with her duties under City Ordinances and the FOIA causes an irreparable injury for which no adequate remedy at law exists.
168. The violations of FOIA and the City Ordinances by the Defendant Hatley were not legislative, judicial or quasi-judicial actions or acts by the Defendant Hatley within the meaning of S.C. Code Ann. § 15-78-60 (Supp. 2010, as amended).
169. The violations of FOIA and the City Ordinances by the Defendant Hatley are not exempted or barred from suit by the Plaintiff Bailey against the Defendant Hatley by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (Supp. 2010, as amended).
170. The violations of FOIA by the Defendant Hatley were knowing, willful, reckless and repeated after she had actual knowledge of her duty to comply with the FOIA.

VIOLATION OF ORDINANCES AND FOIA BY DEFENDANT MAHANEY

171. All allegations of fact made previously are repeated as if set forth here verbatim.
172. The acts of Defendant Mahaney in composing and publishing Agendas that violate the FOIA causes an irreparable injury for which no adequate remedy at law exists.
173. The failure of Defendant Mahaney to comply with his duties under City Ordinances and the FOIA causes an irreparable injury for which no adequate remedy at law exists.
174. The violations of FOIA and the City Ordinances by the Defendant Mahaney were not legislative, judicial or quasi-judicial actions or acts by the Defendant Mahaney within the meaning of S.C. Code Ann. § 15-78-60 (Supp. 2010, as amended)
175. The violations of FOIA and the City Ordinances by the Defendant Mahaney are not exempted or barred from suit by the Plaintiff Bailey against the Defendant Mahaney by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (Supp. 2010, as amended).

176. The violations of the FOIA by the Defendant Mahaney were knowing, willful, reckless and repeated after he had actual knowledge of his duty to comply with the FOIA.

VIOLATION OF ORDINANCES AND FOIA BY DEFENDANT NOURY

177. All allegations of fact made previously are repeated as if set forth here verbatim.
178. Defendant Noury is required by City Ordinance to advise City Council as City Council parliamentarian, and ensure compliance by City Council with the FOIA pursuant to the City Code of Ordinances and the FOIA.
179. The failure of Defendant Noury to comply with his duties under City Ordinances and the FOIA causes an irreparable injury for which no adequate remedy at law exists.
180. The violations of FOIA and the City Ordinances by the Defendant Noury were not legislative, judicial or quasi-judicial actions or acts by the Defendant Noury within the meaning of S.C. Code Ann. § 15-78-60 (Supp. 2010, as amended).
181. The violations of FOIA and the City Ordinances by the Defendant Noury are not exempted or barred from suit by the Plaintiff Bailey against the Defendant Noury by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (Supp. 2010, as amended).
182. The violations of the FOIA by the Defendant Noury were knowing, willful, reckless and repeated after he had actual knowledge of his duty to comply with the FOIA

VIOLATION OF ORDINANCES AND FOIA BY DEFENDANT CITY

183. All allegations of fact made previously are repeated as if set forth here verbatim.
184. The conduct of City Council Meeting and compliance with the FOIA and City Ordinances are corporate acts of the Defendant City.
185. The Defendant Mahaney is the dominant corporate officer and *alter ego* of the Defendant City, and his acts are imputable to the Defendant City as well as being personal violations of the City Ordinances and the FOIA by the Defendant Mahaney.

WILLFUL VIOLATIONS

186. All allegations of fact made previously are repeated as if set forth here verbatim.
187. Defendant City is a defendant in another civil action, 2010-CP-26-5145, *Bailey vs. City of North Myrtle Beach et al.* that was filed on June 11, 2010 (the "First Bailey Lawsuit").
188. The First Bailey Lawsuit alleged violations of the FOIA as a continuing practice by Defendant City and Defendant Hatley, and was filed and continued while the Defendant

Mahaney and Defendant Noury were employed by Defendant City with the duties and obligations that continue and remain as of the date of the present lawsuit.

189. The First Bailey Lawsuit and was filed while the Defendant Hatley was mayor of the City.
190. Actual knowledge of the requirements of the FOIA by all the Defendants makes their conduct willful, scandalous, and arrogant violations, committed in bad faith, of the requirements of the City Ordinances and State law, for which no adequate remedy at law exists.
191. Plaintiff Bailey is informed and believes that this Court should issue an Order enjoining the Defendants from conducting the business of the City in violation of the City Ordinances and the FOIA.
192. Plaintiff Bailey is informed and believes that, upon a finding that the Defendants have violated the FOIA, this Court should award to Plaintiff his costs and attorney fees as provided in S.C. Code Ann. § 30-4-100 (Supp. 2010, as amended), and take such other action that is necessary to deter future violations of the FOIA by the Defendants.

WHEREFORE, having shown just cause why judgment should be entered against the Defendants, the Plaintiff prays for the following relief:


- A. An Order or Orders declaring that the willful violations, failures and refusals of Defendants City, Hatley, Mahaney, and Noury to comply with the FOIA at those meetings of City Council that are subject to the authority and jurisdiction of this Honorable Court pursuant to S.C. Code Ann. 30-4-100(a) are wrongs for which no adequate remedy of law exists; and/or
- B. An Order or Orders enjoining and restraining the Defendants City, Hatley, Mahaney, and Noury from future violations of the FOIA, together with such other relief as may be deemed appropriate by the Court; and/or
- C. An Order or Orders awarding Plaintiff Bailey his costs and attorney fees for the violations by the Defendants City, Hatley, Mahaney, and Noury of the FOIA as provided in S.C. Code Ann. § 30-4-100 (Supp. 2010, as amended); and/or
- D. An Order or Orders finding that the Defendant City has not acted with substantial justification in failing to comply with the City Ordinances, and accordingly that

Plaintiff Bailey is entitled pursuant to S.C. Code Ann. § 15-77-300 (Supp. 2010, as amended) to an award of his reasonable attorney's fees and costs; and/or

- E. Such further and ancillary relief as this Honorable Court may find proper in the circumstances.

Respectfully submitted,

Wright, Worley, Pope, Ekster & Moss, PLLC
Attorneys for William H. Bailey, Jr.



Kenneth R. Moss, S.C. Bar No. 15520
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North Myrtle Beach, South Carolina 29566
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KennethMoss@wwpemlaw.com

December 23, 2013
North Myrtle Beach, South Carolina

COPY

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

FOR THE FIFTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
CASE NO.: 2013-CP-26-08446

William H. Bailey, Jr.,

Plaintiff,

vs.

Marilyn Hatley, individually and as Mayor of
the City of North Myrtle Beach, Michael G.
Mahaney, and Christopher Noury, and Steven
E. Thomas, and the City of North Myrtle
Beach,

Defendants,

ANSWER OF DEFENDANTS

JAN 15 PM 3:17
CLERK OF COURT

Marilyn Hatley, Michael G. Mahaney, Christopher Noury, Steven E. Thomas, and City of North Myrtle Beach, (hereinafter "Defendant(s)"), by and through its undersigned counsel, hereby amend and respond to Plaintiff's Complaint pursuant to Rule 15 (a) SCRPC and would show this Honorable Court as follows:

FOR A FIRST DEFENSE
(Failure to Allege Sufficient Facts)

1. The Complaint fails to state facts sufficient to constitute a cause of action or causes of action and should be dismissed under S.C.R.C.P. 12 (b)(6).

FOR A SECOND DEFENSE
(Qualified General Denial)

2. Each and every allegation of the Complaint not hereinafter specifically and expressly admitted is hereby denied.

3. Answering the allegations in paragraph 1, Defendant is without knowledge to admit or deny this information.

4. Defendants admit the allegations in paragraph 2 through 6.

5. Paragraphs 7, 8, and 10 call for a legal conclusion and do not require a response by this party.
6. Defendants admit the allegations in paragraph 9.
7. Defendants deny the allegations in paragraph 11.
8. Defendants admit the allegations in paragraph 12.
9. Paragraph 13 calls for a legal conclusion and does not require a response by this party.
10. Defendants admit the allegations in paragraph 14.
11. Defendants deny the allegations in paragraph 15.
12. Paragraph 16 calls for a legal conclusion and does not require a response by this party.
13. Defendants admit the allegations in paragraph 17.
14. In response to paragraph 18, Defendants cannot confirm or deny the contents of the Municode website on August 5, 2013 and consequently deny any factual allegations this paragraph may contain.
15. Defendants admit the allegations in paragraph 19.
16. In response to paragraph 20, the published minutes and agendas are summations and copies of the actual documents approved by City Council. Defendants would refer to the original documents for a complete and accurate record and the remaining allegations are otherwise denied.
17. Defendants deny the allegations in paragraph 21.
18. Paragraphs 22 and 23 call for legal conclusions and do not require a response by this party.
19. Defendants are informed and believe the allegations in Paragraph 24 through 28 are true.

20. Paragraphs 29 through 33 call for a legal conclusion and do not require a response by this party.
21. Defendants deny the allegations in paragraph 34, its subparts, and 35.
22. Defendants admit the allegations in paragraphs 36 through 39.
23. Defendants deny the allegations in Paragraphs 40 through 46.
24. Defendants admit the allegations in Paragraphs 47 through 50.
25. Defendants deny the allegations in Paragraph 51 through 57.
26. Defendants admit the allegations in Paragraph 58.
27. Defendants deny the allegations in Paragraph 59 through 64.
28. Defendants admit the allegations in Paragraph 65 through 66.
29. Defendants deny the allegations in Paragraph 67 through 71.
30. Defendants admit the allegations in Paragraph 72 through 74.
31. Defendants deny the allegations in Paragraph 75 through 80.
32. Defendants admit the allegations in Paragraph 81 through 82.
33. Defendants deny the allegations in Paragraph 83 through 90.
34. Defendants admit the allegations in Paragraph 91 through 93.
35. Defendants deny the allegations in Paragraph 94 through 98.
36. Defendants admit the allegations in Paragraph 99 through 100.
37. Defendants deny the allegations in Paragraph 101 through 107.
38. Defendants admit the allegations in Paragraph 108 through 109.
39. Defendants deny the allegations in Paragraph 110 through 116.
40. Defendants admit the allegations in Paragraph 117 through 118.
41. Defendants deny the allegations in Paragraph 119 through 121.

42. Defendants admit the allegations in Paragraph 122 through 123.
43. Defendants deny the allegations in Paragraph 124 through 129.
44. Defendants admit the allegations in Paragraph 130 through 131.
45. Defendants deny the allegations in Paragraph 132 through 136.
46. Defendants admit the allegations in Paragraph 137 through 138.
47. Defendants deny the allegations in Paragraph 139 through 144.
48. Defendants admit the allegations in Paragraph 145.
49. Defendants deny the allegations in Paragraph 146 through 154.
50. Defendants admit the allegations in Paragraph 155.
51. Defendants deny the allegations in Paragraph 156 through 160.
52. Defendants admit the allegations in Paragraph 161.
53. Defendants deny the allegations in Paragraph 162 through 165.
54. The allegations in paragraph 166 through 167 call for a legal conclusion to which no response is required by the Defendants.
55. Defendants deny the allegations in paragraphs 168 through 171.
56. The allegations in paragraph 172 through 173 call for a legal conclusion to which no response is required by the Defendants.
57. Defendants deny the allegations in 174 through 177.
58. The allegations in paragraph 178 through 179 call for a legal conclusion to which no response is required by the Defendants.
59. Defendants deny the allegations in paragraphs 180 through 186.
60. Defendants admit the allegations in paragraph 187.
61. Defendants deny the allegation in paragraph 188.

62. Defendants admit the allegations in paragraph 189.
63. Defendants deny the allegations in paragraphs 190 through 192.

FOR A THIRD DEFENSE
(Good Faith)

64. The allegations contained in the previous paragraphs are herein realleged as if set out verbatim.
65. At all times herein the Defendants acted in good faith and substantially complied with the requirements of the S.C. Freedom of Information Act.

FOR A FOURTH DEFENSE
(Sovereign Immunity)

66. The allegations contained in the previous paragraphs are herein realleged as if set out verbatim.
67. At all times herein the Defendants are immune from liability by virtue of the defense of sovereign immunity.

FOR A FIFTH DEFENSE
(South Carolina Tort Claims Act)

68. The allegations contained in the previous paragraphs are herein realleged as if set out verbatim.
69. As to any portion of the Complaint that may be interpreted as brought under the South Carolina Tort Claims Act, § 15-78-10, entire sequence, of the South Carolina Code of Laws, COMB pleads said Act and all pertinent provisions contained therein as a limitation or bar on the Plaintiff's claims.

AS AN SIXTH DEFENSE
(Laches, Waiver, and Estoppel)

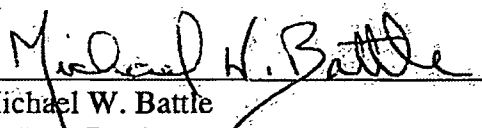
70. The allegations of the preceding defenses are restated as if set forth verbatim.
71. Plaintiff's claims are barred by the doctrines of laches, waiver, and estoppel.

FOR AN SEVENTH DEFENSE
(Statute of Limitations)

72. Defendants affirm and reallege the allegations above as fully as if set out verbatim herein.

73. Plaintiffs' claims under the S.C. Freedom of Information Act are barred by the applicable statute of limitations.

WHEREFORE, having fully answered the Complaint, it is prayed that the same be dismissed, for costs, attorney's fees, and for such other relief as may be just and proper.


Michael W. Battle
M. Kirk Battle
BATTLE LAW FIRM, LLC.
PO Box 530
Conway, SC 29528
(843)248-4321
Attorneys for Defendants

Conway, SC
January 15, 2014

RECEIVED

APR 07 2014

SC Court of Appeals

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2013-CP-26-8446

DEPARTMENT OF COURT
11 APR -3 AM 9:08

William H. BAILEY, Jr.,

Appellant,

vs.

Marilyn HATLEY, individually and as Mayor of
the CITY OF NORTH MYRTLE BEACH, a
South Carolina Municipal Corporation, Michael
G. MAHANEY, Christopher NOURY, and the
CITY OF NORTH MYRTLE BEACH


Respondent.

NOTICE OF APPEAL

William H. Bailey, Jr., by and through his undersigned attorneys, appeals the Order of the Honorable Larry B. Hyman dated March 20, 2014. Appellant received a copy of the Order on April 02, 2014. A copy of the Order against which appeal is made is attached hereto and made part of this Notice by reference.

Wright, Worley, Pope, Ekster & Moss, PLLC
Attorneys for the Appellant

April 02, 2014


Kenneth R. Moss, S.C. Bar No. 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: 843/ 281-9901/ Fax: 843/ 281-9903

000030

Other Counsel of Record:

Michael W. Battle
P.O. Box 530
Conway, SC 29528
Tel: 843/ 248-4321 / Fax: 843/ 248-4512

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

William H. Bailey, Jr.,

Plaintiff,

vs.

Marilyn Hatley, individually and as Mayor of the City of North Myrtle Beach, Michael G. Mahaney, Christopher Noury, and the City of North Myrtle Beach,

Defendants,

FOR THE FIFTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
CASE NO.: 2013-CP-26-08446

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS INDIVIDUAL
DEFENDANTS**

(Does not end case)

2014 MAR 28 PM 4: 25
CLERK OF COURT
JUDICIAL CIRCUIT

Statement of Case

The matter came before the Court upon Defendants' motion to dismiss the individual defendants from Plaintiff's Freedom of Information Act lawsuit. A hearing was held on the motion on March 5, 2014. Present at the hearing was the Plaintiff William H. Bailey, Jr., and his attorney Kenneth Moss, Esq. Michael W. Battle, Esq. was present and represented the Defendants.

Plaintiff's lawsuit seeks a declaratory judgment and injunctive relief under South Carolina's Freedom of Information Act in connection with the manner in which the City of North Myrtle Beach held meetings in executive session prior to regularly scheduled meetings in 2013. The issue before the court is whether the above named individuals are proper party defendants under South Carolina's Freedom of Information Act.

Analysis and Findings

Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of South Carolina Freedom of Information Act in appropriate cases as long as such application is made no later than one year

following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of the act must be considered to be an irreparable injury for which no adequate remedy at law exists.

In the present case, Plaintiff is suing Marilyn Hatley, Michael G. Mahaney, Christopher Noury, in their individual capacities together with the City of North Myrtle Beach for acts that violate the public meetings provisions of FOIA. "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power. S.C. Code Ann. § 30-4-20. Meetings are acts of a public body.

The FOIA was created to allow citizens to 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. S.C. Code Ann. § 30-4-15 (2007). FOIA's equitable relief provisions are directed at those improper actions taken by the public body. Only the public body can perform such acts that are subject to FOIA's equitable provisions. See *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010).

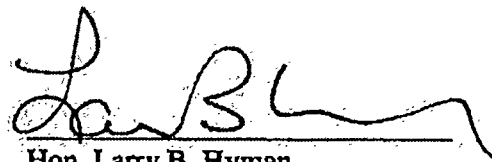
FOIA does provide criminal penalties for individuals who willfully cause public bodies to perform acts that violate FOIA. S.C. Code Ann. § 30-4-110 (Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor). In the present case, Plaintiff seeks an order in equity to stop the public body from allegedly violating the public meeting provisions of FOIA. Therefore, the proper party defendant is the public body and in this case the sole proper party defendant is the City of North Myrtle Beach. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010). Also see: *Truesdale v. U.S. Dep't of Justice*, 657 F. Supp. 2d 219, 226 (D.D.C. 2009);

Tipton, IV v. Hire Right, No. 1:12-CV-175, 2013 WL 5670886 (M.D. Ga. Oct. 16, 2013); and *Amawi v. BOP*, No. 13-cv-00536-GPM, 2013 WL 3467074 (S.D. Ill. July 10, 2013).

There are FOIA cases in South Carolina where individuals have been named as parties. However, the Court appears ^{to} treat such individual defendants as being one in the same as the public body because it is the public body that has allegedly violated FOIA. See *Lambries v. Saluda Cnty. Council*, 398 S.C. 501, 502, 728 S.E.2d 488, 489 (Ct. App. 2012), reh'g denied (July 25, 2012). One case that has addressed the question of whether individual defendants are proper party defendants in FOIA claims found that the claims against the individuals should be dismissed under *Rule 12 (b) 6, SCRPC*. See *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010). For the forgoing reasons, I find and conclude the facts as stated in Plaintiff's complaint in the above captioned lawsuit fail to state a FOIA cause of action against the individual defendants. *Rule 12 (b) 6, SCRPC*.

NOW THEREFORE, IT IS HEREBY ORDERED, Defendants' Motion to Dismiss Marilyn Hatley, Michael G. Mahaney, and Christopher Noury from the above captioned lawsuit is hereby granted. Plaintiff's claims against those individuals are hereby dismissed with prejudice.

March 20, 2014



Hon. Larry B. Hyman
Judge, Fifteenth Judicial Circuit
Horry County Court of Common Pleas

000034

NOTICE OF APPEAL IN A CIVIL CASE

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM HORRY COUNTY
Court of Common Pleas**

Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2013-CP-26-8446

William H. BAILEY, Jr.,

Appellant,

vs.

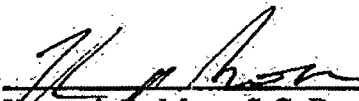
**Marilyn HATLEY, individually and as Mayor of
the CITY OF NORTH MYRTLE BEACH, a
South Carolina Municipal Corporation, Michael
G. MAHANEY, Christopher NOURY, and the
CITY OF NORTH MYRTLE BEACH**

Respondents;

PROOF OF SERVICE OF NOTICE OF APPEAL

I certify that I have served the Notice of Appeal on the Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on April 03, 2014 addressed to their attorney of record, Michael W. Battle, P.O. Box 530, Conway, SC 29528.

**Wright, Worley, Pope, Ekster & Moss, PLLC
Attorneys for the Appellant**



**Kenneth R. Moss, S.C. Bar No. 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: 843/ 281-9901/ Fax: 843/ 281-9903**

**North Myrtle Beach, SC
April 3, 2014**

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

COURT OF COMMON PLEAS

2013-CP-26-08446

William H. Bailey, Jr.)

vs.)

Marilyn Hatley, et. al.)

DEFENDANTS)

TRANSCRIPT OF RECORD

March 5, 2014

Conway, South Carolina

B E F O R E:

THE HONORABLE LARRY B. HYMAN, JR., JUDGE.

A P P E A R A N C E S:

KENNETH R. MOSS, ESQ.
Attorney for the Plaintiff

MICHAEL W. BATTLE, ESQ.
Attorney for the Defendants

KESHIA REED
Official Court Reporter

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I N D E X

(WHEREUPON, there were no witnesses called.)

1 THE COURT: Bailey vs. Hatley. It's Mr.
2 Battle's motion. It's a 12(b)(6) motion.

3 MR. BATTLE: Basically, what we have here is a
4 Freedom of Information Act Claim. Mr. Bailey, petitioner,
5 brings an action seeking a declaration that in certain
6 meetings the City of North Myrtle Beach entered into
7 executive session in a matter that violated the act. The
8 alleged violations are that the purpose of the executive
9 session was not adequately described in a published notice
10 and that the City voted to enter the executive session
11 prior to convening the regularly scheduled meeting that
12 occurred immediately after the executive session. The
13 last alleged violation occurred on August the 5th of 2013.
14 In addition this, petitioner seeks injunctive relief and
15 attorney's fees.

16 What is before you to be decided today is our
17 motion for an order dismissing the individuals whom he has
18 named in the lawsuit and an order dismissing claims for
19 acts that occurred more than one year. The FOIA claim
20 against the City of North Myrtle Beach would remain intact
21 if you were to grant our motion. What we're seeking to do
22 is simply to clean up this action so it doesn't get into
23 areas that are just unnecessary for the Court to decide.
24 I'll talk about first of all the individual.

25 THE COURT: All right.

1 MR. BATTLE: He is named Chris Nurri because he
2 was parliamentarian for the City of North Myrtle Beach and
3 he says Chris Nurri should have stopped him from going
4 into executive session before they actually opened the
5 general regularly scheduled meeting. He is named Mike
6 Mahainey, who is the city manager, says he prepared the
7 agendas and because he prepared the agendas he had
8 something to do with them going into executive session
9 before the meeting started. The regularly scheduled
10 meeting started. And he has named the Mayor, Mayor
11 Marilyn Hatley, because she was a presiding officer for
12 the City of North Myrtle Beach.

13 The first argument that I would make on these
14 things that the individuals respondents are not proper
15 parties. And that's taken strictly from the case of
16 Cricket Tow Ventures vs. Gillian. Mr. Moss tried this
17 type of maneuver in the past. I'll hand up a copy of the
18 case. The excerpt from the case ---

19 THE COURT: Doesn't the Torte Claims Act
20 prohibit it?

21 MR. BATTLE: Well, this is not a Torte Claims
22 Act case. This is strictly an act that arises under
23 Freedom of Information Act.

24 THE COURT: Okay, it's FOIA case. Go ahead.

25 MR. BATTLE: I'll just let you read that. It'll

1 be easier than me explaining.

2 (WHEREUPON, a pause in the proceedings.)

3 THE COURT: Go ahead.

4 MR. BATTLE: So basically what they said this is
5 an act which has a limited cause of action that arises.
6 It's under 30-4-100 says that any petitioner or any
7 citizen may seek declaratory relief and injunctive relief.
8 And you go to the Killing case, the declaratory relief or
9 the injunctive relief would be against the entity that has
10 the authority to act. If individuals violate this act or
11 willfully go about violating the act, the acts provides
12 for a criminal penalty and that's in the 30-4-110.

13 THE COURT: That does criminal penalty give rise
14 to any civil remedy?

15 MR. BATTLE: No, sir.

16 THE COURT: Okay.

17 MR. BATTLE: And generally what you are seeking
18 to do is to use some sort of civil injunctive equitable
19 relief to enforce a criminal penalty. And as a general
20 rule, you don't do that. I mean the Court's don't avoid
21 doing that. There are some exceptions where if someone
22 were to continue to practice law or medicine, you could --
23 and it's against the law you could in addition to that if
24 it's not being effective -- effectively or not able to be
25 effectively addressed in a criminal process. You could do

1 it in a civil process. But here in the Gillian case, they
2 specifically said Mr. Moss you cannot bring individual
3 actions -- an action against individuals for this type of
4 relief in under the Freedom of Information Act.

5 THE COURT: Well, how about it, Mr. Moss?

6 MR. MOSS: Judge, I disagree completely. I
7 assume that's why we are here.

8 THE COURT: All right.

9 MR. MOSS: First off, this isn't a maneuver.
10 The code case is a case that I took up in the Court of
11 Appeals. And in that case ---

12 THE COURT: What did they say?

13 MR. MOSS: They said in the facts of that case,
14 we had satisfied the private cause of action, but that was
15 under the facts of that case and that case only. In this
16 particular case, I disagree that that as limited -- it's a
17 limited cause of action. This is a very wide open cause
18 of action. I'll read from 30-4-100 specifically it says
19 any citizen may apply through the circuit court for either
20 or both the declaratory judgment and injunctive relief to
21 enforce the provisions of the chapter. And then also in
22 the same section the court may order equitable relief as
23 it considers appropriate, and a violation in this chapter
24 must be considered irreparable harm or irreparable injury
25 actually for which no adequate remedy of law exists.

1 Now, in this complaint, there are -- it is pled
2 that since 2010 Mr. Bud has been in some litigation with
3 the City and FOIA violations were asserted in 2010 case.
4 And there has been an ongoing frankly arrogance of the
5 City of North Myrtle Beach in the way they conduct their
6 business. And so we actually brought this case to the
7 Court, these facts, these alleged violations to the Court
8 and sought to amend our ongoing complaint to amend by way
9 of supplementation of violations that occurred since the
10 filing of the initial complaint.

11 THE COURT: Well, let me ask you this, Mr. Moss,
12 why in the world would you want to name him as a
13 plaintiff? They're certainly necessary for the relief you
14 seek, are they?

15 MR. MOSS: Absolutely, they are.

16 THE COURT: Oh, tell me why, Mr. Moss? Come on,
17 Mr. Moss, let's be candid with the Court. You want to get
18 FOIA request; is that correct? You want to get them to
19 respond? What do you want?

20 MR. MOSS: This is not about a response.

21 THE COURT: Okay.

22 MR. MOSS: Now, a lot of times ---

23 THE COURT: What are you asking the Court to do?

24 MR. MOSS: We're asking for injunctive relief.

25 THE COURT: In what form?

1 MR. MOSS: We're asking for injunctive relief of
2 these individuals in this city to stop doing what they're
3 doing.

4 THE COURT: Okay, go ahead.

5 MR. MOSS: I have deposed Mr. Nurri and I
6 deposed the mayor in the other case and this case. What I
7 have learned since 2010 when they basically had violations
8 which are clear. They have had no training. They've not
9 budget any training. They don't even have a handbook in
10 their office, okay. And so what we have here is
11 incompetence ---

12 THE COURT: What kind of handbook, what kind
13 training?

14 MR. MOSS: When you're elected as a council
15 member, you're given by the league of municipalities
16 you're given a four-year handbook. And it tells you the
17 dos and don'ts. They acknowledge that they have it, but
18 they don't even have one on site. And so what we have
19 here is an ineptness associated with what FOIA requires in
20 the way that you run meetings. Now, these particular
21 allegations involve -- let me give you an example 30-4-70
22 provide expressly before going into executive session the
23 public agency shall vote in public on the question. And
24 when the vote is favorable, the presiding officer shall
25 announce a specific purpose of the executive session.

1 Now, it's clear that they have be in a meeting
2 and vote to go into executive session. Now, what's clear
3 in this complaint and what's clear from the records that
4 have been certified is they have executive sessions before
5 they even have the meeting. And then they come in and
6 they announce that we're going to call the meeting to
7 order. Well, they already had the executive session, so
8 they have violated 34-70 on many occasions. In addition
9 to that, they have when going into executive session in
10 other meetings in announcing the purpose for executive
11 session, they have include added items that were not on
12 the agenda. In the Lambry's case, which I think is very
13 relevant to this conversation ---

14 THE COURT: Have can you point to any case, any
15 case where the appellate courts have upheld the naming of
16 individual city or state or county officers or employees
17 as defendants -- proper defendants in a FOIA action?

18 MR. MOSS: Maybe, and I'll hand you the case and
19 you can make that decision.

20 THE COURT: Okay.

21 MR. MOSS: I prepared a memorandum for today.
22 And there's four cases attached. The last one is the
23 Lambry's case. The first three have to do with the
24 12(b)(6) standard of review. And the last one is Lambry.
25 This is a FOIA case. And this is currently pending in the

1 Supreme Court right now and I don't know what they're
2 going to do with it. But in this case, what was
3 petitioned for the circuit court was in addition to other
4 causes, it was alleged that the Saluda County Council had
5 violated FOIA by meeting their agenda at a meeting because
6 they post an agenda in advance. And this is a two to one
7 decision, okay. A cert was sought and a cert was
8 accepted. But in this decision, the Court of Appeals
9 reversed the trial court and actually said that the period
10 of FOIA requires that they not amend the agenda during a
11 meeting and that currently what our law is.

12 THE COURT: But that's not the question I ask
13 you. The question I ask you is were they allowed the
14 bringing in of employees, officers, officials in a FOIA
15 action instead of the entity?

16 MR. MOSS: Well, and I said may be and this is
17 the reason I said may be. In this case, the individual
18 council members were named, but I don't know if that's on
19 the field right now with the Supreme Court. This is a
20 case where they were named individually. Now, we don't
21 seek and can't seek any damages against these individuals,
22 okay. We understand that. The injunctive relief is what
23 we seek. I told you 2010 just an arrogance and a absolute
24 uncompromising position with respect to hearing our
25 concerns. Now, we have blatant violations of FOIA. And

1 if I seek injunctive relief from the Court, the only way
2 that I get real injunctive relief is to enjoin the people
3 that are doing things wrong, okay.

4 THE COURT: If you enjoin the City from doing
5 it, haven't taken care problem in the future? I mean,
6 these people may work for the City now. One may be the
7 mayor. One may be -- I don't know what Mr. Nurri does now
8 he's something with the City I know that and ---

9 MR. MOSS: He's city attorney and
10 parliamentarian under their statute.

11 THE COURT: Mr. Horne I have no idea what he
12 does, but it looks like some councilmen or excuse me --
13 I'm looking at the wrong thing. Ms. Hatley's the mayor.
14 Mr. Mahainey is -- what is he?

15 MR. MOSS: He's the city manager.

16 THE COURT: And Mr. Nurri is the city attorney.
17 They may be gone tomorrow.

18 MR. MOSS: They may be.

19 THE COURT: But if you enjoin the City...

20 MR. MOSS: It would be nice to think enjoining
21 the City would be enough, but I don't think it would be
22 and I'll tell you why. We've already been down this road
23 with FOIA case with the City and they were already made to
24 pay \$21,000 in attorney fees on another FOIA case, okay.

25 Now, that would you think -- may be got to pay

1 attention to FOIA a little better, but when I deposed him
2 two years later, they have not done any training,
3 no budgeting for training, no handbooks. The city
4 attorney doesn't have a handbook. They mayor didn't know
5 the rules, but she's admitted they changed executive
6 session agenda during the meeting. And so even after the
7 Court has awarded relief under FOIA against the City and
8 they've had to pay attorney's fees. And in between paying
9 their attorneys and paying Mr. Bailey's attorney, they
10 paid over \$50,000. They still haven't even read the act.
11 The admission was they haven't read the act. And so I
12 don't think enjoining the City is enough with this city
13 and that's what's proven. So this act says the court can
14 grant order equitable relief as it considers appropriate.
15 Now, what's pled in here are about 13 blatant violations.

16 THE COURT: I mean, if you get an order against
17 the City, wouldn't the proper way, proper way to handle it
18 if you had a city official, who was not performing his
19 duties as he should have, wouldn't the proper device be
20 something like a writ of mandamus?

21 MR. MOSS: There again that would be against the
22 City.

23 THE COURT: That would be against the
24 individual.

25 MR. MOSS: Well, I seek a write of mandamus

1 against the individual for an order that wasn't binding on
2 the individual, so I'm confused ---

3 THE COURT: If it's binding on the City and it
4 has established his duty and he's failed to perform his
5 duty, that's what a writ of mandamus is for to compel him
6 to comply with his official duties.

7 MR. MOSS: And we see those when we're asking
8 for administrative acts to be performed. I don't candidly
9 know if they'll work or not. Certainly, I ---

10 THE COURT: I mean, what you're asking the Court
11 to do is to give you an order that tells Ms. Hatley,
12 Mr. Mahainey and Mr. Nurri to obey the law.

13 MR. MOSS: Exactly.

14 THE COURT: Is that any stronger than the law?

15 MR. MOSS: I'm asking first for him to say
16 Ms. Hatley and Mr. Mahainey and Mr. Nurri you have
17 violated the law and don't do it again. That's what I'm
18 asking for. And I think I'm entitled under 12(b)(6) basis
19 to that. As I read some of the cases that are in this
20 memorandum dismissing under Rule 12(b)(6) is improper.
21 The facts alleged and inferences reasonably deducted,
22 deduced from them even in the like most favorable to the
23 plaintiff would entitle the plaintiff to relief on any
24 theory and that's the Doe case.

25 THE COURT: The only issue before me is whether

1 or not you can seek relief against these individuals.

2 MR. MOSS: Well, it's clear from the ---

3 THE COURT: I mean, that's the crux of
4 Mr. Battle's motion. Mr. Battle's motion is a 12.(b) (6)
5 motion. And he says if everything he alleges in his
6 complaint is true, he still does not state a cause of
7 action because these are improper defendants. Right,
8 Mr. Battle?

9 MR. BATTLE: That's correct, Your Honor.

10 THE COURT: I mean, that's what he said. It all
11 boils down to one thing. Are these proper or improper
12 defendants?

13 MR. MOSS: That is what he's saying, but I
14 submit to you the legislature has defined a person to
15 include individuals in 30-4-20 includes any individual,
16 corporation, partnership, organization or association,
17 that's a person. Then it says those persons can be held
18 criminally liable and we realize we're not seeking that in
19 our case. But I can't imagine the statute will be
20 interpreted in such a way that you can charge them with a
21 crime, but you can't sue them for injunctive relief when a
22 statute that allows for injunctive relief provides that
23 the Court can grant any equitable relief it considers
24 appropriate. And so we get to the trial court level we
25 have some evidence, I think it's very reasonable that a

1 trial court might determine it's appropriate to grant some
2 injunctive relief against these individuals. The Court
3 hadn't heard that evidence yet and that's where I get back
4 to the case I cited on the standard of 12(b)(6) and under
5 any theory of relief I think we're entitled.

6 THE COURT: All right. I understand where
7 you're coming from. I understand where Mr. Battle is
8 coming from. I want each of you to submit me a proposed
9 order within ten days and I want you to talk about the
10 issue we have narrowed this to here whether or not there
11 can be individual defendants, that's what -- we got the
12 Cricket Code case out there, let's see what it says.

13 MR. BATTLE: Your Honor, I have an additional
14 part of this motion.

15 THE COURT: Okay, I'm sorry. I didn't mean to
16 cut you off.

17 MR. BATTLE: I understand. The second part of
18 the motion is baring in mind this is a statute remedy that
19 he's seeking under the Freedom of Information Act and he
20 has alleged acts that go back beyond what the statute
21 specifically allows. The specific statutes specifically
22 allow ---

23 THE COURT: A year.

24 MR. BATTLE: A one year time. If it occurs
25 before a year, you don't have a right to bring it up under

1 that statute.

2 THE COURT: How about that, Mr. Moss?

3 MR. MOSS: He's partly right and partly wrong.
4 No questions it's a one year statute. It's in that same
5 30-4-100. We haven't pled them as a cause of action or
6 established liability for those acts that are more than
7 one year old not seeking it.

8 MR. BATTLE: Your Honor, here's the point and
9 this is where Mr. Moss and I disagree. This gets to the
10 nut of the agreement. What Mr. Moss is seeking to get the
11 court to do is to go in and start running the City of
12 North Myrtle Beach council meetings. And he wants you to
13 make a declaratory judgments as to each individual set of
14 facts going back as far as 2010. And he wants to say what
15 you're doing is wrong stop it. And what we are saying is
16 that the Court makes a decision on a case by case basis.
17 And he is put in there several cases of incidents that go
18 back as far as 2010.

19 THE COURT: I saw it. It's something like 70
20 paragraphs in his complaint or more.

21 MR. BATTLE: And what that's going to mean if
22 you leave those claims in there, if you don't cut him off
23 at a year and say this is what we'll make declaratory
24 judgments on, is we're going to have to do discovery and a
25 trial is going to be based on the facts that occurred back

1 in 2010.

2 THE COURT: Well, I'm going to grant that. He
3 acknowledges it's a year.

4 MR. MOSS: With all due respect, Your Honor, may
5 I be heard?

6 THE COURT: You can, Mr. Moss, but I got a
7 feeling how I'm going to rule on that.

8 MR. MOSS: I haven't alleged liability
9 associated with those acts that are older. Let me tell
10 you ---

11 THE COURT: And we're not going to talk about
12 them because they're irrelevant under 401.

13 MR. MOSS: Well, I don't think they are. And
14 the reason they are not is because of what the statute
15 says. The Court -- they're in there for one reason. The
16 Court is called upon to find out if the violations are
17 willful. And they go to whether or not the violations are
18 willful. And there is no discovery done on them because
19 it's been done in the other case. Depositions have been
20 taken. We have the agendas. We have the minutes. We
21 have the depositions. They go to the element of
22 willfulness. They're not pled in here as a cause of
23 action. They're pled as a factual history. And they're
24 absolutely important to the willfulness component that's
25 in the statute for the Court's consideration.

1 MR. BATTLE: Your Honor, the willfulness only
2 deals with criminal penalties. If he's willing to take as
3 a matter of judicial estoppel that he can't prove his
4 Freedom of Information Act ---

5 THE COURT: No one has filed a motion in limine
6 yet, but I expect it.

7 MR. BATTLE: I'm sorry what?

8 THE COURT: But I expect a motion in limine.
9 I'm sure it's going to be one filed. I'm not sure that
10 what you are talking about here by way of 12(b)(6). You
11 said there was another component to your 12(b)(6) motion.
12 Are you moving to strike part of the complaint? What are
13 you exactly doing?

14 MR. BATTLE: I mean, he has alleged them.

15 THE COURT: I understand that. This things more
16 than a year old. He's alleged it.

17 MR. BATTLE: And, you know, it could be in my
18 other motion that I made in similar case is brought. I
19 had motion to dismiss or strike. I didn't draw up this
20 particular motion, but it would be a motion to strike
21 anything going into that or at least a protective order or
22 to just dismiss that part of the complaint ---

23 THE COURT: Or the motion in limine.

24 MR. BATTLE: In limine that would be -- that's
25 more of a trial thing. I want to -- as many allegations

1 as you see in the complaint there been many more
2 interrogatories and that sort of stuff that have just been
3 mounted up on this particular case. But my point on all
4 that is is that if we could just say this is case about
5 the five actions that took place within a year and dismiss
6 the rest of them, that's kind of the way I'm asking the
7 Court to take this motion to 12(b)(6).

8 THE COURT: Why don't you promise that the City
9 want violate FOIA any more and hand me a consent order and
10 I'll sign it and give it to Mr. Moss?

11 MR. BATTLE: I don't want to give him attorney's
12 fees. And second of all we don't agree that we have
13 violated the Freedom of Information Act.

14 THE COURT: I didn't ask you to do that, just
15 say you want.

16 MR. BATTLE: I have already put in a -- an
17 affidavit saying that what we done -- if I could explain
18 it, I don't want to take up your time too much and it
19 doesn't have anything to do with the motion. But what
20 happened was they decided it be more efficient to do the
21 executive sessions at the beginning of the meeting before
22 they entered the regular meeting. They gave notice of it.
23 They do it and it would be treated as a special meeting
24 under the statutes. Mr. Moss doesn't agree with that. He
25 says you got to do it during your regularly scheduled

1 meeting, after opening your regularly scheduled meeting
2 and then go into executive session. We said we could do
3 it by a special exception. I've told them and they have
4 agreed to change that policies that it want be any
5 question now. They'll open the general meeting and then
6 at that point in time when they have the motion for
7 executive session and they go into it and it's done to
8 satisfy him. But these five things admittedly they said
9 they put it out as part of the agenda. We're going to
10 have these executive sessions, give a 24-hour notice. And
11 under the way statute is written, they would be
12 constituted and be created as special meetings. He
13 doesn't think that's appropriate or proper. We say, well,
14 that's a matter for declaratory judgment. It may resolve
15 it, it may not at some point in time.

16 THE COURT: Well, they could certainly have a
17 special meeting the day before.

18 MR. MOSS: Your Honor, I agree and they could
19 have a special meeting immediately before, okay. I agree
20 with that, but that's not what they did, okay. And that's
21 not what I've have argued.

22 MR. BATTLE: That is for discovery.

23 MR. MOSS: Well, and I respect the fact that
24 Mr. Battle's not been involved in all discovery I had been
25 involved in, okay. I've had depositions in a case he

1 wasn't involved in. And so what they actually did was
2 they met in the back room in executive session and then
3 came out and called the meeting to order with no minutes
4 from that special meeting, okay, that's a fact in section
5 seven against within the statute.

6 MR. BATTLE: I've never seen evidence of that.

7 MR. MOSS: The last seven of the 13 pled are
8 within the one year. But they actually had meetings with
9 no minutes, no agenda, no announcement of the purpose for
10 their session. And they would come in to public session
11 and call the meeting to order. It's not satisfying Ken
12 Moss because Ken Moss is a nobody. The legislature said
13 it had to happen and they've not done that. So it's not
14 me -- they're not changing anything -- to trust me, they
15 won't do anything to satisfy me. If they would, we
16 wouldn't be in four years litigation. The unfounded area
17 that's up there with the mayor frankly and that city
18 manager and that city attorney is not gone change our
19 ways. Well, the law says they have to and that's what
20 we're seeking.

21 THE COURT: All right. Mr. Battle, I'm not sure
22 I understand the second component. I would feel more
23 comfortable if it was a motion in limine or something to
24 strike, but I'm not real sure what you want me to do on a
25 12(b)(6) motion.

1 MR. BATTLE: I will withdraw that portion of the
2 motion, Your Honor. And then I will go forward with a
3 motion to strike at a later date.

4 THE COURT: Thank you, get me some orders in
5 about ten days. All right, thank you.

6 END OF REQUESTED TRANSCRIPT

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

FOR THE FIFTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
CASE NO.: 2013-CP-26-08446

William H. Bailey, Jr.,

Plaintiff,

vs.

Marilyn Hatley, individually and as Mayor of
the City of North Myrtle Beach, Michael G.
Mahaney, and Christopher Noury, and Steven
E. Thomas, and the City of North Myrtle
Beach,

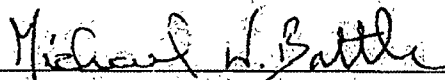
Defendants,

MOTION TO DISMISS

14 JAN 15 PM 3:17
CLERK OF COURT

TO: PLAINTIFF AND HIS ATTORNEY

PLEASE TAKE NOTICE that Defendants Marilyn Hatley, Michael G. Mahaney, Christopher Noury, Steven E. Thomas, and City of North Myrtle Beach moves and will move, no sooner than ten days after service of this Notice and Motion, at such time and place as the Court may direct, for an Order dismissing this action for failure to state a claim on which relief may be granted. This motion is based on the pleadings and any additional matter timely submitted or allowed.



Michael Warner Battle
M. Kirk Battle
THE BATTLE LAW FIRM
1200 Main St.
PO Box 530
Conway, SC 29528
(843)248-4321

January 15, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO. 2013-CP-26-8446

William H. BAILEY, Jr.)
)
 Plaintiff,)

-vs.-)

Marilyn HATLEY, individually and as Mayor)
 of THE CITY OF NORTH MYRTLE BEACH,)
 Michael G. MAHANEY, and)
 Christopher NOURY, and)
 THE CITY OF NORTH MYRTLE BEACH,)
 Defendants.)

**RETURN TO MOTION
 TO DISMISS**

FILED
 HURRY COUNTY
 CLERK OF COURT
 JANUARY 5 PM 12:49

PROCEDURAL HISTORY

The Complaint in this action alleged violations of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.* (Supp. 2010, as amended) (the "FOIA") by the City of North Myrtle Beach, and that the individual Defendants were both the causes of those violation and are personally liable for causing the willful violations of the FOIA.

The Defendants (inadvertently including Steven E. Thomas, Assistant City Manager in their Caption to their Motion, although he was not named in the Complaint) have moved the Court to Dismiss the Complaint "for failure to state a claim on which relief may be granted." The Defendants have also plead Rule 12(b)(6), SCRCF as a first defense in their Answer to the Complaint. Both the Motion and the Answer of the Defendants are dated January 15, 2014.

Rule 12(b)(6), SCRCF provides that if, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Defendants have not sought prior to the hearing of this Motion to present any matter outside the pleadings. This Honorable Court therefore must determine the Motion solely upon the pleadings to date in this civil action.

APPLICABLE LAW

In deciding whether to dismiss a Complaint for failure to state a claim upon which relief may be granted, the Court must examine each cause of action plead by the plaintiff.

An appellate court and the trial court apply the same standards when considering dismissal of an action pursuant to Rule 12(b)(6), SCRCF. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe*, 373 S.C. at 395, 645 S.E.2d at 247. Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.* at 395, 645 S.E.2d at 248. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007).

The FOIA provides at § 30-4-100 that:

(a) Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

(b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. 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.

The FOIA further provides at § 30-4-110 that:

Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or imprisoned for not more than thirty days for the first offense, shall be fined not more than two hundred dollars or

imprisoned for not more than sixty days for the second offense and shall be fined three hundred dollars or imprisoned for not more than ninety days for the third or subsequent offense.

Individuals involved in the holding of local government meetings are liable to personal suit alleging violations of the FOIA. *E.g. Lambries v. Saluda County Council, et al.*, 398 S.C. 501, 728 S.E.2d 488 (Ct. App. 2012)(Pieper, J., dissenting)¹, in addition to any criminal penalties provided under the FOIA.

APPLICATION OF THE LAW TO THE FACTS OF THE CASE

The Plaintiff's Complaint must be viewed by this Honorable Court in the light most favorable to the plaintiff, and with every doubt resolved in his behalf. *Ptyler, supra*. The FOIA provides that the Plaintiff must be considered to have suffered an irreparable injury for which no adequate remedy at law exists. FOIA § 30-4-100(a).

As to the Defendant Hatley, the Court must assume, for the purposes of the present Motion, that there has been a failure by her to comply with the FOIA and other State laws and the Ordinances of the City in the manner in which she has presided over City Council Meetings (Complaint ¶ 166).

The Complaint alleges that the Defendant Mahaney violated the FOIA when he composed and published Agendas for City Council Meetings and was instrumental in the violations of the FOIA that occurred during the Meetings at issue (e.g. Complaint ¶¶ 23, 24, 172).

The Complaint further alleges that the Defendant Noury has failed in his duties set forth in the City Ordinances, and caused or was complicit in the resulting violations of the FOIA (e.g. Complaint ¶¶ 17, 27, 178).

The Complaint alleges that all the Defendants had knowledge after June 11, 2010 that there had been conduct of City Council Meetings in violation of the FOIA, and that the decisions of the Defendants to continue such violations were willful and made in bad faith (e.g. Complaint ¶ 190).

¹ Rehearing denied by *Lambries v. Saluda County Council*, 2012 S.C. App. LEXIS 225 (S.C. Ct. App., July 25, 2012). Writ of certiorari granted *Lambries v. Saluda County Council*, 2013 S.C. LEXIS 284 (S.C., Oct. 18, 2013).

The FOIA provides at § 30-4-100 that the Court may issue a declaratory judgment and injunctive relief to enforce the provisions of the FOIA in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The Plaintiff in his Complaint (Prayer for Relief ¶A) seeks a declaration that as to those City Council Meetings over which this Honorable Court has jurisdiction, he has suffered an irreparable harm. He has not alleged that the Court has jurisdiction for the purposes of declaratory and injunctive relief over all the examples shown of City Council Meetings at which the Defendants violated the FOIA.

The Plaintiff has alleged six (6) City Council Meetings involved violations of the FOIA that occurred less than one year prior to the commencement of his action². He has also alleged violations dating back to June 21, 2010 as evidence in support of his allegations of willful conduct. While the Court may lack jurisdiction to issue a declaratory judgment as to events more than one year before the commencement of this action, the Court must examine the entire record to determine if the pattern of the FOIA violations shows willful conduct by the Defendants.

In Lambries v. Saluda County Council, et al., *supra*, Judge Peiper, while dissenting from the majority decision, agreed that:

"[I]t 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" *S.C. Code Ann. § 30-4-15* (2007). FOIA must be construed to make it possible for citizens to learn and report fully the activities of public officials. *Id.*

Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006).

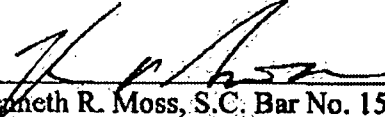
The Plaintiff in the present action has alleged that the public business of the City was not performed in public, and that he, along with each other citizen of the State was precluded from knowing what the public officials of the City were discussing and doing. The FOIA makes clear that each citizen has a separate individual right to bring an action to restrain violations of the FOIA (§ 30-4-100: "Any citizen of the State may apply to the circuit court....").

² The Minutes of the City Council Meeting on December 17, 2012 were not approved until January 2013, less than one year before the Plaintiff filed this action.

For the reasons set forth, above, the Plaintiff respectfully requests the Court to deny the Defendants' Motion to Dismiss.

Respectfully submitted,

Wright, Worley, Pope, Ekster & Moss, PLLC
Attorneys for William H. Bailey, Jr.



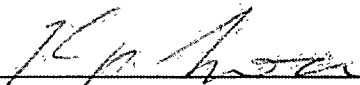
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March 5, 2014
North Myrtle Beach, South Carolina

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

**WRIGHT, WORLEY, POPE,
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North Myrtle Beach, South Carolina
October 6, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2013-CP-26-08446

Appellate Case No. 2014-000756

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SC Court of Appeals

William H. Bailey, Jr. *Appellant,*

v.

Marilyn Hatley, individually and as Mayor
of the City of North Myrtle Beach,
Michael G. Mahaney, Christopher Noury,
and the City of North Myrtle Beach *Respondents.*

PROOF OF SERVICE

I certify that I have served a copy of the Record on Appeal, along with the Proof of Service of same in the above-captioned appeal, on counsel for the Respondents by United States Mail, with sufficient first-class postage affixed, addressed as follows:

Michael W. Battle, Esq.
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Conway, South Carolina 29528

*** signature page follows ***

Respectfully submitted,

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& MOSS, PLLC**



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