

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT

Court of Appeals Appellate Case No.: 2012-208787

S.C. Supreme Court

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

Trial Court Case No.: 2008CP1003308

Court of Appeals Appellate Case No.: 2012-20878

Stephen George Brock, ... Petitioner,

v.

Town of Mount Pleasant, ... Respondent.

APPENDIX (VOLUME I)

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The South Carolina Court of Appeals

Stephen George Brock, Appellant,

v.

Town of Mount Pleasant, Respondent.

Appellate Case No. 2012-208787

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff

J.

Paul G. Spert, Jr.

J.

Jasper M. Curston

A.J.

Columbia, South Carolina

cc: Robert Clyde Childs, III, Esquire
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James J. Hinchey, Jr., Esquire
Jessica Sara Jubick, Esquire
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FILED

January 23, 2015



The South Carolina Court of Appeals

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January 23, 2015

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Re: Brock, Stephen v. Town of Mt. Pleasant
Appellate Case No. 2012-208787

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: James J. Hinchey, Jr., Esquire
Jessica Sara Jubick, Esquire
Julie J. Armstrong
J. C. Nicholson, Jr., Esquire

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

Stephen George Brock, Appellant,

v.

Town of Mount Pleasant, Respondent.

Appellate Case No. 2012-208787

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5279
Heard September 8, 2014 – Filed November 5, 2014

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Robert Clyde Childs, III, of Childs Law Firm, and J.
Falkner Wilkes, both of Greenville, for Appellant.

Jessica Sara Jubick and James J. Hinchey, Jr., both of
Hinchey Murray & Pagliarini, LLC, of Charleston, for
Respondent.

CURETON, A.J.: Stephen Brock sued the Town of Mount Pleasant (the Town) under South Carolina's Freedom of Information Act (FOIA) and Public Records Retention Act (RRA), requesting declaratory judgments and injunctive relief relating to how the Town conducted its meetings and kept its records. The trial court granted the requested relief as to some issues and awarded Brock \$42,000.00 in attorney's fees and costs. Brock appeals, arguing the trial court erred in failing to: (1) find the Town violated FOIA when it took action on matters without giving

the public proper notice; (2) find the Town violated FOIA when its announcements of executive sessions violated FOIA's specific purpose provision; (3) find the Town violated RRA by deleting e-mails; and (4) award the full amount of requested attorney's fees and costs. We affirm in part, reverse in part, and remand.

I. FACTS

In 2007, Mark Mason, an attorney in the Town, owned the "O.K. Tire Store property" (O.K. Tire Store), a large piece of property that included access to Shem Creek. The Town was very interested in obtaining the property and in the summer and fall of 2007, negotiations between the Town's town council (Town Council) and Mason increased. According to Mac Burdette,¹ the Town's administrator, the property was publicly discussed in Town Council's committee and council meetings, the topic "was written about many times in the *Post & Courier*, as well as [discussed on] television media," and a proposed six million dollar purchase price was quoted "many times" during the summer and fall of 2007. After Mason rejected Town Council's first offer, the parties commenced litigation.² That litigation, Town Council's eventual purchase of the property for six million dollars, and Brock's position on Town Council's planning commission³ during that time led to the series of meetings at issue in this case.⁴

Town Council's entire "meeting notice" for its November 13, 2007 meeting (November 13 meeting) stated:

I. EXECUTIVE SESSION

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

¹ "Mac" Burdette is also referred to as "Robert" Burdette.

² "O.K. Tire property litigation" and "Shem Creek property" are used interchangeably throughout the record to refer to the same piece of property and legal action.

³ Prior to filing his complaint, Brock was the general manager of a local news station in the Town and the chairman of Town Council's planning commission. In 2007, Town Council asked Brock to resign as chairman of the commission.

⁴ All three contested meetings were special meetings.

Once the mayor called the meeting to order, Burdette "indicated staff would like to ask Council to go into executive session to discuss legal and contractual matters pertaining to properties near Shem Creek and to also discuss personnel matters pertaining to appointments to Boards and Commissions." Thereafter, Town Council passed "a motion to amend the agenda to add . . . legal advice pertaining to an opinion from the Attorney General concerning the Planning Commission" and adjourned into executive session. Upon reconvening, the mayor indicated no actions or votes were taken during the executive session, and Town Council approved the following actions: "to direct the Town Attorney to move forward with the discussions as discussed in executive session pertaining to a piece of property on Shem Creek"; and "to authorize the Mayor and members of Council to obtain their individual attorneys for all lawsuits now and in the future with all fee statements to be reviewed by the Town Attorney." The Town's attorney clarified item two "relate[d] to all lawsuits related to Town business."

Town Council's "meeting notice" for its November 16, 2007 meeting (November 16 meeting) only included one item, stating:

- I. EXECUTIVE SESSION
 - A. Legal Advice pertaining to OK Tire property litigation
- II. Adjourn

Once the mayor called the meeting to order, Burdette "asked that Council amend the agenda to include personnel matters pertaining to the Clerk of Council." Town Council passed "a motion to amend the agenda as stated by" Burdette and "a motion to amend the agenda to add personnel matters relating to the Boards and Commissions." Thereafter, the mayor "indicated a motion was needed to adjourn into executive session regarding legal advice pertaining to the OK Tire property litigation and to discuss other personnel matters as mentioned," and the Town's attorney "clarified that this was an executive session regarding all three matters mentioned." Town Council then adjourned into executive session and upon reconvening, the mayor indicated no actions or votes were taken during the executive session. Subsequently, Town Council approved the following actions: "to adjust the position requirements and compensation for the Clerk of Council as discussed in executive session"; "to reject the offer that was tendered in reference to the Shem Creek property and OK Tire Store property litigation"; and "to

authorize the attorney to prepare a letter as discussed in executive session in reference to the personnel actions regarding boards and commissions."⁵

The "agenda" for the December 5, 2007 meeting (December 5 meeting) stated in pertinent part:

IV. APPROVAL OF AGENDA

...

VII. CORRESPONDENCE AND PUBLIC STATEMENTS^[6]

...

XII. NEW BUSINESS—Council

...

H. EXECUTIVE SESSION

(1) Legal Advice pertaining to Mathis Ferry Road Project (DEPAUL) relative to PBS&J.

(2) Legal Advice pertaining to an EEOC complaint relative to a firefighter applicant (Personnel matter)

[(3)] Personnel Matters pertaining to (1) Personnel action regarding the Planning Commission; and (2) Appointment to Boards & Commissions

Shortly after the meeting began, Town Council passed motions "to amend the agenda by adding under Item H Executive Session, an item to receive legal advice pertaining to the OK Tire Store Litigation" and "to amend the agenda by deferring item H.3 under Executive Session, until the January Town Council meeting."

During the meeting, after Town Council discussed items I through XII (G), Burdette asked Town Council to adjourn into executive session to discuss personnel matters pertaining to appointments to boards and commissions and legal advice regarding a road project, an EEOC complaint, and "the settlement of legal issues and purchase of property know[n] as the OK Tire Store and other properties." The Town's attorney "clarified that this would be legal advice on OK

⁵ The letter was a letter asking Brock to resign as chairman of the planning commission.

⁶ The meeting minutes reflect Brock signed-in to speak during the public comments portion of the meeting. However, when called to speak, Brock indicated he would "defer his comments."

Tire property litigation." Town Council adjourned into executive session and upon reconvening, the mayor indicated no actions or votes were taken during the executive session. Thereafter, Town Council approved, among other actions, the following: "to approve the settlement agreement discussed in executive session pertaining to the OK Tire Store property condemnation lawsuits and authorize Mayor Hallman to execute the agreement" and "authorize the Town Administrator to transfer an additional \$3 million into the water access property acquisition project for a total project budget amount of \$6 million."

In 2009, Brock filed an amended complaint against the Town arguing, among other things, the Town violated FOIA by: (1) failing to give notice of a proposed action at its December 5 meeting; (2) failing to announce the specific purpose for executive sessions held at its November 13 and November 16 meetings; and (3) participating in illegal communication via e-mail. Additionally, Brock argued the Town violated RRA by routinely destroying and deleting those e-mails. Thereafter, the parties proceeded to trial.

Mason testified he was never informed that any part of the O.K. Tire Store settlement agreement executed on December 6, 2007, was subject to further consideration or ratification by council. Mason maintained he would have given Town Council an additional twenty-four hours to make a decision had Town Council requested an extension. Yet, he admitted he delivered the settlement document to Town Council on December 5, 2007, and required Town Council to sign and return the document by 5:00 p.m. December 6, 2007, or he would have moved forward with the pending property litigation.

At their depositions in 2009, two councilmembers testified all e-mail communication exchanged between councilmembers regarding town business occurred on private e-mail accounts and they regularly deleted those e-mails. The councilmembers confirmed Town Council did not have a retention policy for e-mails sent to the councilmembers' personal e-mail accounts. In March 2010, the Town signed a resolution adopting "A Policy for Elected Officials' Use of Town Computers and E-mail Accounts" (Computer Policy). The Computer Policy required councilmembers to use computers issued by the Town when communicating with Town employees, officials, constituents or "other persons concerning matters related to Town business" and "[a]ll electronic communications *originating* on an official's Town-provided computer *and* all electronic communication received from sources other than a Town computer, along with all responses made by the official thereto, shall be retained on the computer, unless otherwise directed by the Clerk of Council."

The trial court issued a final order stating: "Regarding Mr. Brock's contentions Town Council violated S.C. Code Ann. § 30-40-80(a) (Notice of meetings of public bodies) on 5 December 2007, when Town Council added an item to the previously posted Town Council meeting agenda, the [trial c]ourt concludes the Town's actions did not violate FOIA." Therefore, the trial court dismissed "Count I of [Brock's] Amended Complaint which claimed the Town violated FOIA by amending Town Council meeting agendas." Further, the trial court found Brock failed to produce sufficient evidence showing the Town violated FOIA by failing to announce the specific purpose of executive sessions at the November 13, November 16, and December 5 meetings. The trial court declined to find the Town violated RRA by Town Council's past actions of deleting e-mails discussing town business, finding the law in that that area is constantly developing, and the Town has since assigned councilmembers laptops and e-mail accounts, and adopted the Computer Policy.

However, the trial court found Brock presented sufficient evidence demonstrating the Town violated FOIA by acts not subject to this appeal and awarded Brock injunctive relief on those issues. The trial court also enjoined Town Council from "deleting, destroying, or otherwise eliminating any Town electronic communications concerning public business except to the extent such destruction is accomplished in accordance with a lawfully established records retention policy." The trial court awarded Brock \$42,000.00 in attorney's fees and costs.

Brock filed a Rule 59(e) motion to amend or alter the judgment, arguing the order did not address the issue of whether a matter added to an executive session agenda may be acted upon by a public body after reconvening into open session.⁷ Brock maintained the public body could not take action on such matters without prior notice to the public. The trial court amended its order to include a finding that FOIA does not prohibit a public body from acting on items added to an agenda for executive session upon reconvening to open session. This appeal followed.

II. ISSUES ON APPEAL

1. Did the trial court err in failing to find the Town violated FOIA when it took action on matters without giving the public proper notice?
2. Did the trial court err in failing to find the Town violated FOIA when its announcements of executive sessions violated FOIA's specific

⁷ By amending its agendas for executive session, Town Council effectively amended the required agendas for special meetings.

- purpose provision?
3. Did the trial court err in failing to find the Town violated the RRA by destroying e-mails?
 4. Did the trial court err in failing to award attorney's fees and costs?

III. STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). "Actions for injunctive relief are equitable in nature." *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). "In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Id.* at 140-41, 691 S.E.2d at 470 (quotation marks and citation omitted).

IV. PUBLIC NOTICE

Relying in part on *Lambries I*,⁸ Brock argues the trial court erred in failing to find the Town violated the notice provisions of FOIA when Town Council took action on matters not properly noticed to the public and press. Specifically, Brock maintains: (1) "unnoticed actions [of] December 5, November 13, and November 16, 2007[,] violated the agenda notice provision of section 30-4-80 of FOIA"; (2) "liability of a public body for violations of FOIA is not excused by subsequent actions to resolve actions undertaken during those meetings"; (3) "the December 5th action failed to qualify as a recognized exception to FOIA's notice requirement pursuant to section 30-4-80"; (4) he demonstrated Town Council's pattern of "similar acts of actions without notice"; and (5) he was entitled to a finding that the Town repeatedly violated FOIA's notice provisions. Brock maintains the trial court erred in ruling Town Council's actions at the December 5 meeting were

⁸ *Lambries v. Saluda Cnty. Council*, 398 S.C. 501, 505, 728 S.E.2d 488, 490 (Ct. App. 2012) (*Lambries I*). In *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 760 S.E.2d 785 (2014) (*Lambries II*), our supreme court reversed *Lambries I*.

ratified by its actions at a December 17, 2007 meeting based on *Multimedia*.⁹ Brock asserts *Multimedia* is no longer applicable because the ratification provisions relied on in *Multimedia* were removed from FOIA. Therefore, according to Brock, the trial court's reliance on *Multimedia* and *Herald*¹⁰ supporting ratification "to erase the FOIA violation" was in error.

FOIA was enacted based on the General Assembly's finding "that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." S.C. Code Ann. § 30-4-15 (2007). Accordingly, FOIA's essential purpose is to protect the public from secret government activity. *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). Because FOIA is remedial in nature, it should be liberally construed to carry out the purpose mandated by the legislature. *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166.

Section 30-4-80(a) of the South Carolina Code (2007) distinguishes between the notice requirements for regular, special, and emergency meetings of public bodies. The statute provides the notice for regular meetings "must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings." *Id.* For special meetings, the statute provides: "public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting." *Id.* Finally, the statute states, "This requirement does not apply to emergency meetings of public bodies." *Id.* Further, the term "agenda" is not defined in FOIA. *See* S.C. Code Ann. § 30-4-20 (2007); *Lambries II*, 409 S.C. at 12, 760 S.E.2d at 790 (stating "agenda (which is undefined in FOIA)" (quotation marks and citation omitted)).

In *Lambries I*, 398 S.C. at 505-06, 728 S.E.2d at 490-91, this court decided a published agenda for a regularly scheduled meeting could not be amended during the meeting without violating FOIA. Recently, however, our supreme court in *Lambries II*, 409 S.C. at 18, 760 S.E.2d at 794, reversed *Lambries I* and held: "In

⁹*Multimedia, Inc. v. Greenville Airport Comm'n*, 287 S.C. 521, 339 S.E.2d 884 (Ct. App. 1986).

¹⁰*Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986).

the absence of such a legislative directive here, we decline to judicially impose a restriction on the amendment of an agenda for a regularly scheduled meeting, especially when it is clear that no agenda is required at all." Further, the *Lambries II* court stated, "We find this is also the better public policy in light of the fact that a violation of FOIA can carry a criminal penalty, and we note this Court has previously declined to impose restrictions that are not expressly provided by the General Assembly in FOIA." *Id.*

Although FOIA declares the public's right to attend all meetings of public bodies, it also provides for executive sessions, closed to the public for any of six specific purposes. S.C. Code Ann. §30-4-70(a) (2007). A public body may hold a closed meeting for one or more of the following reasons:

- (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body
- (2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.
...
- (5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body.

Id.

FOIA "originally allowed formal action to be taken in executive session if the action was later ratified in public." *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 129, 459 S.E.2d 876, 878 (Ct. App. 1995), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996). "However, the 1987 amendments to [FOIA] deleted the language allowing ratification of votes taken in executive session and specifically prohibited voting while in executive session." *Id.* "By affirmatively deleting the ratification

language, the legislature made its intent clear. Ratification no longer validates a vote cast during an executive session." *Id.* at 129, 459 S.E.2d at 879.

As an initial matter, we find Brock's arguments regarding the trial court's rulings on: the applicability of *Multimedia*, *Herald*, and ratification provisions; exemptions to FOIA's provisions; and the alleged repeated FOIA violations are not preserved. While Brock's Rule 59(e) motion and reply to the Town's return outlined these issues, Brock chose not to make these arguments during the motion hearing. Instead, Brock limited his argument to one issue—paragraph C of the motion—stating his sole issue was the order did not include "a specific ruling on . . . whether voting on matters added to an agenda without notice to the public constitutes a violation of the notice provision of section[] 30-4-8[0]." Importantly, the trial court's supplemental order did not rule on the other issues. Accordingly, because those arguments on appeal were not presented to nor ruled upon by the trial court, we do not need to address them. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Therefore, the only argument left for this court to consider is whether the trial court erred in finding FOIA does not prohibit a public body from acting on items added to a special meeting agenda upon reconvening to open session.

To the extent Brock's notice issue is preserved, section 30-4-80 does not support his position. That section requires public bodies to post agendas for special meetings twenty-four hours before the meetings; however, it does not specifically require the agenda to include what action the public bodies plan to take. *See* § 30-4-80 ("All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting."). In fact, Brock points to no provision in the statutory language of FOIA which states the public body must include the exact action it plans to take on a meeting agenda. *See Lambries II*, 409 S.C. at 12, 760 S.E.2d at 790 (stating "agenda (which is undefined in FOIA)" (quotation marks and citation omitted)). Brock conceded Town Council regularly posted an agenda at least twenty-four hours before each regular and special meeting. As the trial court noted, Town Council could not have known what action it would take—to include on an agenda—prior to discussing the relative legal issues and personnel matters during executive session. From the posted and amended agendas, the public and press had notice Town Council desired to confer with its attorney in closed session regarding certain matters and

may take some action upon reconvening to open session. Brock is not appealing the trial court's finding that Town Council did not violate FOIA by amending its agendas,¹¹ and once those agendas were amended, it seems Town Council could certainly act on the agenda items upon reconvening to public session.

Furthermore, as the Town correctly points out, FOIA does not mandate an agenda for executive sessions. *See Herald*, 291 S.C. at 11, 351 S.E.2d at 883 ("The Act does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session."); *id.* ("Practically speaking, it is easily foreseeable that public bodies might not know what will be taken up in executive session until they are meeting in an open session."). To require Town Council to notify the public of the exact actions it plans to take after an executive session seems inapposite to provisions allowing for closed sessions. *See Cooper v. Bales*, 268 S.C. 270, 274-75, 233 S.E.2d 306, 308 (1977) (holding sections of FOIA must be harmoniously construed to preclude disclosure of minutes of executive sessions). Town Council gave the public notice of pending issues, allowed the public to present its comments on the topics, and never took action during executive session. Accordingly, we hold the trial court did not err as to this issue.

V. SPECIFIC PURPOSE PROVISION

Citing *Quality Towing*,¹² Brock argues the trial court erred in finding Town Council's announcements of executive sessions did not violate FOIA's specific purpose provision. We agree the Town failed to announce the specific purpose for its executive session at the November 13 meeting.

¹¹ Indeed, at the motion for reconsideration hearing, Brock stated:

Let me be clear that I agree absolutely you can add an item [to the agenda] in the executive session. If you want to talk about something there is no harm to the public, in fact it helps the public. It is absolutely in their interest to seek legal advice to discuss contracts or things approved for executive session. This is the meeting after the executive session that I'm referring to. . . . Again, it is about the open meeting following the executive session is the issue.

¹² *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001).

Section 30-4-70(b) of the South Carolina Code (2007) provides:

Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the *specific purpose* of the executive session. As used in this subsection, 'specific purpose' means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section.

(emphasis added).

In *Quality Towing*, 345 S.C. at 164, 547 S.E.2d at 866, the city council's meeting minutes stated:

C. Towing—Contractual Recommendation

Mayor Grissom advised this matter would be discussed in Executive Session

Upon motion by Councilman Cain, seconded by Councilman Woods, Council voted unanimously to go into executive session.

The *Quality Towing* court held the meeting minutes reflected the city council failed to announce the specific purpose of the executive session. 345 S.C. at 164, 547 S.E.2d at 866.

We find this case is distinguishable from *Quality Towing* with regards to the November 16 and December 5 meetings. Here, unlike *Quality Towing*, Burdette, along with the Town's attorney's clarifications, sufficiently announced the purpose of these two executive sessions when they disclosed exactly what was going to be discussed. See § 30-4-70 (b) (defining "specific purpose"). Brock maintains Town Council should have been more specific in its announcements. For example, Brock avers Town Council should have stated "settlement offer for O.K. Tire Store" instead of "legal advice pertaining to O.K. Tire Store" or "adjustment of the position requirements and compensation for the clerk of council" instead of "personnel matters related to the clerk of council." We find FOIA does not require such specificity. Accordingly, the trial court did not err in finding the Town did not violate FOIA by failing to state the specific purpose for adjourning into executive sessions at the November 16 and December 5 meetings.

However, we find the trial court erred in finding the Town did not violate FOIA by failing to announce the specific purpose of its executive session at its November 13 meeting. Town Council never announced it would discuss whether or not it may retain its own individual attorneys "for all lawsuits now and in the future" relating "to all lawsuits related to Town business" at the public's expense. Moreover, the actions taken were not consistent with the announced purpose. Announcing it would discuss "legal matters" or obtain "legal advice" on a particular issue was an insufficient announcement when Town Council obtained individual attorneys for "all lawsuits now and in the future" as a result of the executive session discussion. Therefore, we reverse the trial court's decision regarding the announcement of Town Council's specific purpose for the executive session at the November 13 meeting.

VI. PUBLIC RECORDS ACT

Brock argues that while the trial court correctly granted injunctive relief to prevent future occurrences of the destruction of e-mails, it erred in failing to find Town Council's past destruction of e-mails constituted a violation of the RRA. We disagree.

RRA refers to FOIA for its definition of "public record." S.C. Code Ann. § 30-1-10(A) (2007). FOIA defines public record as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20(c) (2007). RRA provides, "A person who unlawfully removes a public record from the office where it usually is kept or alters, defaces, mutilates, secretes, or destroys it is guilty of a misdemeanor." S.C. Code Ann. § 30-1-30 (2007).

The trial court did not issue a judgment with regard to Town Council's past actions of deleting e-mails, properly finding the law in this area is ever developing and the Town has since adopted the Computer Policy. We find the trial court did not abuse its discretion in declining to issue a declaratory judgment as to this issue.¹³ *See S.*

¹³ *See generally Schill v. Wisconsin Rapids Sch. Dist.*, 786 N.W.2d 177, 208 (Wis. 2010) ("During the last several decades, technological advancements have revolutionized document storage and electronic communication. Prior to these advancements, [a public official's] personal communications . . . would not have been subject to disclosure under the public records law. . . . This fact presents new challenges to record custodians who are required to determine whether particular documents are records subject to disclosure." (Bradley, J., concurring)); Cherie

Ry. Co. v. Order of Ry. Conductors of Am., 210 S.C. 121, 134, 41 S.E.2d 774, 779 (1947) ("It is generally held that the jurisdiction to render a declaratory judgment is discretionary, and should be exercised with great care, and with due regard to all the circumstances of the case.").

VII. ATTORNEY'S FEES AND COSTS

Brock argues the trial court erred in failing to award the attorney's fees and costs necessary in bringing this action.

Section § 30-4-100 (b) of FOIA provides: "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 award, however, must be reasonable and supported by adequate findings." *Burton v. York Cnty. Sheriff's Dep't*, 358 S.C. 339, 357-58, 594 S.E.2d 888, 898 (Ct. App. 2004). "No good faith exception exists for an award of attorney's fees under FOIA." *New York Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7*, 374 S.C. 307, 313, 649 S.E.2d 28, 31 (2007). "Further, on appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

Among the several factors to be weighed by the trial court in setting a reasonable attorney's fee in a FOIA action is the beneficial result accomplished. In view of our holding the Town also violated FOIA by failing to state the specific purpose for its executive session at the November 13 meeting, we remand the issue of attorney's fees for further consideration consistent with this opinion. See *Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, ___, 762 S.E.2d 687, 689 (2014) ("As the prevailing party under these circumstances, the trial court erred in not awarding Sloan his reasonable attorney's fees and costs. Sloan is entitled to recover his reasonable attorney's fees and costs in this action." (footnote omitted)).

VIII. CONCLUSION

We affirm the trial court's finding that the Town did not violate section 30-4-80 of FOIA by acting on items added to special meetings agendas upon reconvening to open session. Additionally, we affirm the trial court's finding that the Town did

Ballard & Gregory E. Perry, *A Chip by Any Other Name Would Still Be A Potato: The Failure of Law and Its Definitions to Keep Pace with Computer Technology*, 24 Tex. Tech L. Rev. 797, 799 (1993).

not violate FOIA's specific purpose provision by failing to announce the specific purpose of its executive sessions at the November 16 and December 5 meetings, and its decision not to declare the Town violated RRA by deleting e-mails. However, we reverse the trial court's finding that the Town did not violate the specific purpose provision by failing to announce the specific purpose of its executive session at its November 13 meeting, and remand the attorney's fees issue for further consideration consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT
Appellate Case No.: 2012-208787

J. C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No.: 2008CP1003308
Appellate Case No.: 2012-208787

Stephen George Brock, ... Appellant,

v.

Town of Mount Pleasant, ... Respondent.

PETITION FOR REHEARING

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PETITION

The Appellant respectfully submits that the Court's decision in this case overlooked or misapprehended points that are essential to the determination of issues, and moves for a rehearing based on the following:

(IV) PUBLIC NOTICE

This Court's opinion fails to properly apply the Supreme Court's holding in Lambries II, which distinguished between the notice requirements for regular meeting agendas and those for special meetings:

"Moreover, although the specific types of meetings are not defined in FOIA itself, in light of the General Assembly's references to these different meetings in Section 30-4-80(a) and its general references in section 4-9-110 to meeting requirements, we believe the General Assembly made an intentional delineation because the terms do have commonly understood distinctions in the common parlance for procedures governing public bodies."

Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014) (Lambries II),

Lambries II, which was decided after the briefing of this case, recognized that the permissible topics of a special meeting are limited to the "objects of the call" on the noticed agenda. Because all of the meetings at issue in this case were special meetings, a properly noticed agenda is required under Lambries II. To be proper: "Such notice must be posted as early as is practicable *but not later than twenty-four hours before the meeting*. The notice *must include the agenda*, date, time, and place of the meeting." S.C. Code Section 30-4-80. *Emphasis added.*

Finding that there is no definition of "agenda" in state law, this Court's opinion fails to give any substance to agenda requirement under 30-4-80. It further fails to consider the applicability of the Town's rules of order and the definition of agenda provided therein. *Robert's*

Rules of Order is cited as Respondent's parliamentary authority. *Roberts* states that order of business, orders of the day, agenda, and program are related concepts having to do with the order in which business is taken up in a session...". (§41 (15) *Robert's Rules of Order, Newly Revised, 10th Edition*)... Usually an agenda covers an entire session, in which case it is the order of business for that session...". (*id*).

This Court's decision holds that notice of a special meeting to hold an executive session is implied notice to the public that formal action might follow: "from the posted and amended agendas, the public and press had notice Town Council desired to confer with its attorney in closed session regarding certain matters and *may take some action upon reconvening to open session*." This allows the Town to avoid having to provide 24 hour notice of formal action to be taken in special meetings, even where the only matter on the agenda is an executive session.

In this case the posted agenda for special meetings of November 13 and November 16 indicated only that the Council would hold an executive session. There was no notice that Council might take formal action during the special meeting. The November 16 agenda specifically indicates an executive session and followed by adjournment. For both the object of the call for the special meetings was only for the board to go into executive session, not for the board to take any formal action. The Court's holding therefore leaves the public to speculate as to whether any special meetings set only to have an executive session, might result in some formal action. This clearly defeats the purpose of the 24 hour notice provision applicable to special meetings under 30-4-80 and is contrary to the reasoning in Lambries II.

This Court further erred in holding that Brock did not appeal from the trial court's finding that Town Council could amend its special meeting agendas and then take formal action. The

Court's decision focuses on the argument relating to the amendment of the executive session agenda while overlooking the fact that this is also an argument on the improper amendment of the special meeting agenda, of which the executive session agenda is simply a part. Brock has argued that Council violated FOIA by adding items to its meeting agenda during special meetings. Brock does not argue that the Town is prohibited from discussing anything it wants in executive session. The requirement for announcing the specific purpose of the executive session are clear, as is the lack of any posting requirement for executive session topics. Allowing executive sessions to satisfy the notice requirements for special meetings is clearly in conflict with FOIA. Brock has clearly argued that notice of executive session does not constitute adequate notice that the Town might decide to take otherwise take unnoticed formal action, especially in a special meeting where the only properly noticed action for the special meeting is to convene into executive session.

This Court's decision fails to distinguish between special and regular meetings. The reasoning of Lambries II shows this to be error: "By mandating an agenda for regularly scheduled meetings and forbidding County Council from amending its agenda, the Court of Appeals is, effectively, treating a regularly scheduled meeting as a called, special, or rescheduled meeting." Contrary to Lambries II this Court has held: "To the extent Brock's notice issue is preserved, Section 30-4-80 does not support his position. That section requires public bodies to post agendas for special meeting twenty-four hours before the meetings; however, it does not specifically require the agenda to include what action the public bodies plan to take." This simply eviscerates Section 30-4-80 and is contrary to the entire analysis in Lambries II.

This Court has misperceived important aspects of Brock's argument. Here, Brock has not

argued that the Town Council is required to notify the public of the actions it plans to take after an executive sessions of regular meetings since agendas of regular meetings can be amended. Brock argues that the public must be notified by posted agenda of formal action intended to be taken at special meetings to meet the requirements of FOIA, and that notice with agenda must be posted 24 hours in advance of a special meeting. Brock does not seek to have the public notice 24 hours in advance of executive sessions as no such notice is required under FOIA and Lambries II.

The Court further misperceives the fact that Town Council never actually publicly proposed or voted on the amendment of the special meeting agendas at issue. Even if Lambries II made no distinction between regular and special meetings, this Court's decision would still be in error as there was never a proper amendment providing notice of subsequent formal action. And even if there had been an amendment of the special meeting agenda during the special meeting, it would still be insufficient as it would fail to meet the 24 hour notice for special meetings. This Court's decision is, therefore, in direct conflict with the reasoning of Lambries II.

The Court has further erred in holding Brock's argument as to "ratification" not being raised or preserved. The issue of ratification was raised and ruled on by the trial court. The December 5th special meeting could not be "ratified" to cure the FOIA violation. Although subsequent properly noticed formal action might correct any contractual deficiencies between Mason and the Town as to the purchase of the property, it could not erase the FOIA violation existing on December 5th, or Brock's right to have a declaration as to the violation.

V. SPECIFIC PURPOSE PROVISION

The Court erred in finding that the specific purpose announcements of November 16,

2007 and December 5, 2007 disclosed "exactly" what was going to be discussed, and therefore met the requirements of 30-4-70. In the November 16th special meeting the announcement of the specific purpose of the executive session included amending the executive session agenda "to include personnel matters pertaining to the Clerk of Council" and personnel matters relating to the Boards and Commissions." The actions by Town Council following the executive session of the November 16 were: ...adjust the position requirements and compensation of the Clerk of Council (and) to prepare a letter as discussed in executive session.

Although compensation is a defined purpose for an executive session, "personnel matters" is not, and is insufficient to inform the public as to specific purpose of the session. In light of the existence of several boards and commissions in Mt. Pleasant, the Town failed to name even which board or commission was the subject of "personnel matters". The following motion to prepare a letter fails to reveal any identifiable purpose to the session. Similarly, the December 5th special meeting the resulted in a motion to settle a lawsuit by the purchase and financing of property for \$6 million. The stated "specific purpose" was for "legal advice". This Court's finding that the public knew of a pending settlement, so as to somehow make the otherwise vague statement specific and clear, is inconsistent with the holding of Quality Towing: "FOIA is clear in its mandate that the specific purpose of an executive session shall be announced." Therefore, FOIA is not satisfied merely because citizens may have some idea of what a public body might discuss in private. This Court errs in relying on what the public might have guessed would be discussed in executive session to cure what is otherwise vague and undefined.

VI. PUBLIC RECORDS

This Court's decision fails to address numerous issues raised by Brock in regards to the issue of public records. The Court's decision interprets Brock's argument in regard to the destruction of e-mails among Town Council members as solely involving e-mails concerning discussion of public business. (See Amended Complaint. Page 6- Illegal Communication Concerning Pending Legislation). The Amended Complaint sets out the broader claim of destruction of e-mail due to the absence of a defined e-mail management and retention policy as required by law (Count IV misnumbered Count VI).

The record shows that the Town violated FOIA by communicating on public business via e-mail, as well as violating the RRA by routinely destroying and deleting those emails. Here the record shows that the Town failed to have an adequate policy as required by the Public Records Act, S.C. Code Section 30-1-10. Respondent's Final Brief admits to the absence of the policy required for e-mail management stating in part: "No evidence was presented to the hierarchy of these (deleted) e-mails as having, as established by the South Carolina Department of Archives and History, permanent value, transitory value or convenient (sic) value which had a bearing on the length of retention of if they have to be retained at all." No "hierarchy of e-mail" was in existence due to Respondent's failure to enact SCDAAH policy for e-mail retention. Instead, the deletion of e-mails was left solely to individual preference, thus presenting obvious legal, operational, and public relations risks recognized by SCDAAH policy.

Nor does this Court's decision address the failure of the Town's policy for elected officials use of Town computers and e-mail accounts to comply with the requirements for e-mail management. (Trial Exhibit - Plaintiff's No. 40). Reliance on the basis that the law regarding

e-mail management is "ever-developing" is unsupported by any in the record and ignores the fact that the Town failed to act timely and, when it did actually implement a policy, it still failed to meet the requirements of the RRA.

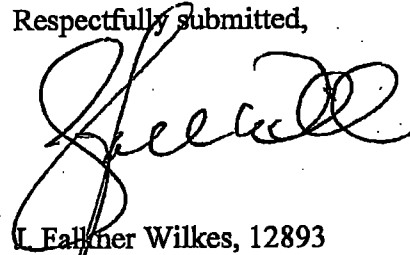
VII. ATTORNEYS COSTS AND FEES

This the court erred in failing to include for consideration on remand the additional beneficial results Brock obtained relating to the e-mail deletion. Here, although Brock was successful in having the Town enjoined from further destruction of emails, the trial court failed to consider this in its consideration or remand of attorney fees and costs. The remand for further consideration of attorney fees and costs should therefore include consideration of the additional beneficial results obtained in relating to the injunctive relief obtained. On the basis of the injunction issued by the trial court to prevent further destruction of public records, Brock should be further considered the prevailing party for consideration of additional attorney fees and costs on remand. See Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006). "To the extent that Brock obtains further relief as outlined above, the Court should include in the remand for attorney fees consideration of any additional beneficial results.

CONCLUSION

Based on the foregoing, the Appellant petitions this Court for a rehearing.

Respectfully submitted,



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November 20, 2014.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT
Appellate Case No.: 2012-208787

J. C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No.: 2008CP1003308

Stephen George Brock, ... Appellant,

v.

Town of Mount Pleasant, ... Respondent.

BRIEF OF APPELLANT

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ISSUES ON APPEAL

1. Did the Court err in failing to find that the town violated FOIA when it took action on matters not properly noticed to the public and press?
2. Did the Court err in holding the town's announcements of executive session did not violate FOIA's specific purpose provision?
3. Did the Court err in refusing to hold the destruction of emails and other information violated South Carolina's Public Records Retention Act?
4. Did the Court err in limiting Appellant's award attorney fees and costs necessary in the bringing of this action?

STATEMENT OF THE CASE

This matter came to Court by way of a Complaint filed by Stephen Brock seeking remedies pursuant to FOIA and the PRRA. The Defendant timely filed an Answer. The matter subsequently went before the Circuit Court as a non-jury matter. A trial was held on January 24, 2011. From that trial an Order was entered was entered on August 22, 2011, by the Honorable J.C. Nicholson, Jr. The Appellant filed timely post trial motions seeking to alter or amend the judgment. A hearing was held on the post trial motions on January 17, 2012. A Supplemental Order was entered February 8, 2012. A Second Supplemental Order awarding attorney's fees and costs was entered on February 8, 2012. The Appellant timely filed notice of appeal. A portion of the transcript was inaudible and a Motion to Settle the Record was filed by Appellant and an Order settling the record was entered on February 1, 2013.

At trial the Appellant was represented by Thomas S. Tisdale . On appeal the Appellant is represented by Robert C. Childs, III, and J. Falkner Wilkes. The Respondent, was represented at trial by Francis Cantwell and is represented on appeal by David Guy Pagliarini..

STATEMENT OF FACTS

Appellant, Stephen Brock, holds a BA in Journalism from the University of South Carolina. Brock has been a resident of Mount Pleasant since 1972 and initiated this action in 2008 while on the Town Planning Commission. Brock was chairman of the first Shem Creek Management Committee and served on the Mount Pleasant Planning Commission from 2005 through 2009. 38-40. Brock was in broadcasting for thirty years, the last fifteen of which he was the president and general manager of a local television station in Mount Pleasant. Brock's observations while on the Commission led him to take this action with regard to FOIA issues. R. 194-196.

Six essential issues were raised below in the case. First, proper use of agendas for meetings and whether the Town is entitled to amend an agenda at will and act on matters not noticed on the meeting agenda. Second, the Town's pattern of conducting executive sessions without announcing specific purpose; (also calls attention to Quality Towing). Third, the Town's pattern of having committee meetings with non-committee members present and participating constituting a meeting; Fourth, does communication by e-mail on matters of public business among Council members constitute a meeting; Fifth, electronic communication is a public document and the town's rules and the public records act, with extensive guidelines, says that public documents cannot be destroyed without a retention policy which the town does not have; e-mail was used for public business and deleted. Sixth, injunctive relief and attorneys fees as allowed under FOIA. R. 77-81.

The Town took the position that e-mails among Council members are not necessarily public records but that as of the time of trial, all e-mails that went through the town system were

being preserved indefinitely. The Town further claimed that Council goes into executive session after announcing its purpose and that it may vote on any item addressed in executive session even if it was not on the meeting's posted agenda for action.87-95. In deposition, the Town Administrator (Burdette) admitted that the Town may not vote on matters not on the agenda. Depo. Burdette. R. 462-463.

Section 30.34 - Mount Pleasant Town Council Rules of Order - was admitted and the authority of Roberts Rules of Order established as being applicable. R. 104. Roberts Rules of Order sets forth the permissible purpose for special meetings as well as the applicable rules. R. 113.

The Mount Pleasant Town Council has twelve regular meetings a year, one each month. R. 110. Town council also has special meetings, more some months than others. R. 110. During the period of time that the present case covers, a special meeting was held prior to every council meeting. Brock testified that he had read and studied the minutes of all the regular and special Council meetings. R. 111.

S.C. Code Section 30-4-80 requires agenda for special meetings and the purpose of a noticed special meeting must be established in advance and may not be changed. R. 116. The Town's Rules of Order place executive sessions inside regular meetings, but are more often executive sessions are held at special meetings. R. 111. This practice is at odds with the applicable Rules of Order. Pl. Ex. 39, 30.29(A)(6). The Town had a practice of setting special meetings which were held immediately prior to regularly scheduled meetings. The "overriding purpose" of these special meetings was for executive sessions prior to the opening of regular meetings. The Court's Order encouraged the Town to "abandon this procedure in the future"

finding that the conduct of Town Council "fails to comply with the spirit of FOIA". R. 13.

Brock testified that the harm from adding matters to a posted agenda during a meeting is that under the Town's practice, the public can't know in advance what is to be addressed at any particular meeting. R. 117. Appellant also testified that from his experience, in addition to hindering the public's direct involvement, the Town's practice affected the local news from timely reporting the Council's upcoming actions as the news department relied on published agendas and other announcements to plan daily news coverage. R. 21.

Between July 1, 2007 and June 30, 2008 there were approximately 10 meetings, in addition to those above, at which agendas were improperly amended and matters added without proper notice to the public. R. 138-139. Of those, eight or nine amendments were made at the Special Meetings, one or two at the Regular Meetings.¹ R. 40. During his testimony at trial, the Town Administrator, Burdette, admitted that Council had in the past gone into executive session without properly announcing the purpose of the executive session. R. 340, 344. Burdette stated that amendments to agendas similar to the amendment made regarding the Shem Creek matter are not done "as a matter of course." R. 358, l. 25. Burdette admitted that the public would have no way of knowing in advance what would be considered under an amended agenda. R. 359. Burdette admitted that due to the lack of notice in the agenda, members of the public, whether for or against the appropriation of six million dollars to purchase of the OK Tire property, would have no advance notice unless they were already present. R. 360.

AUGUST 14, 2007 - R. 619.

¹There were twenty-two Special Meetings during the period encompassed by the Complaint in this case.

On August 14, 2007 the only noticed event on the agenda for the Special Meeting was "Executive Session". R. 174. The announcement for the executive session was "discussion of legal and contractual matters associated with property acquisition which is related to recreation leisure services associated with the Shem Creek in other areas, (2) SCE&G right-of-way and (3) legal advice regarding pending cases." R. 619. The Town attorney stated the cases involved drainage issues and street repair issues in two subdivisions. R. 619. The Town Administrator added that staff would also like to suggest that Council add to the executive session agenda "discussion with legal counsel in reference to legal representation regarding possible pending legal cases". The town attorney stated that this would only be legal advice. R. 619.

Upon reconvening from Executive Session, Council made several motions: "(1) to direct the Town Attorney to negotiate a piece of property as discussed in executive session; (2) to direct legal counsel to proceed with legal and contractual matters in reference to property acquisition and right-of-way as discussed in executive session; (3) to authorize legal counsel to proceed as discussed in executive session pertaining to Dunes West Boulevard , Old Park and proceed with litigation; (4) to authorize approval of payment for individual attorneys for Town Council members relative to current activities related to their official positions saving and excepting any court finding of type of illegal activity and additionally the fee statement for these attorneys to be received and reviewed by the town attorney and the town administrator through the normal process." All motions passed. No information other than the executive session agenda and the executive session announcement was available to the public. R. 177-178. There was never any prior notice that Council would take action on any matter after the executive session. R. 619.

OCTOBER 9, 2007 - R. 613; 636

On October 9, 2007, the Town held a Special Meeting immediately prior to a regularly scheduled monthly meeting. Announcements for executive session were: (1) legal matters pertaining to the Buist lawsuit; (2) contractual matters pertaining to property acquisition in the vicinity of Town Hall; (3) legal and contractual matters concerning Shem Creek property; (4) a proposed economic development project, and; (5) some personnel matters pertaining to a employee grievance and (5) appointments to Boards and Commissions. R. 613.

Upon reconvening to open session, a motion was made to with regard to the Shem Creek property to "authorize the Town Attorney to make a final offer and if not accepted to pursue formal legal action as discussed in executive session." The motion passed. Two documents related to the "final offer" were presented at trial: (1) Council letter to administrative services requesting funds in the amount of \$2,285,000 dollars for the OK Tire property and; (2) a check dated October 5th payable to the Charleston County Clerk of Court of two million two hundred and eighty-five thousand dollars. R. 184; 636. At the time the letter was written and the check issued (October 5th), there was nothing in Town Council minutes that this action was even being considered for this October meeting. R. 184-185. The property purchase seen in the December 5th Meeting was being decided without public notice as early as this meeting.

The Town's Rules of Order provide that citizens may speak at all Council meetings on matters on the agenda. R. 654 at §30.29 (E)(7); §30.35 (B)(2). In deposition, the Town Administrator testified that there is always a public comment period before every Council meeting that anyone could speak if they wished. R. 450-520; 633. Agendas for the special meetings on November 13, November 16, August 14, and October 9 did not

schedule public comment periods. R. 613; 629; 631; 633.

NOVEMBER 13, 2008 - R. 633.

On November 13th there was a Special Meeting scheduled immediately prior to the regularly scheduled, monthly meeting of Town Council. R. 132. The posted agenda showed only: "Executive Session (1) Legal and contractual matters pertaining to properties near Shem Creek and (2) Personnel Matters - Appointments to Boards and Commissions (3) committees listed for for appointments." Two additions were made to the executive session agenda - "Item C - Legal advice pertaining to Ordinance 07060, pertaining to the comprehensive plan; and "Item B - Legal advice pertaining to an opinion from the Attorney General concerning the planning commission." R. 136; 633.

Council came out of Executive Session during the November 13, 2007, Special Meeting, and made two motions: (1) a motion to direct the Town Attorney to move forward to and obtain the property on Shem Creek. R. 133-134. (2) a motion to authorize the mayor and members of Council to retain individual attorneys for all lawsuits "now and in the future " paid for by the Town. R. 133-134; 633. Neither action was on the meeting agenda.. The second motion was even not added to or announced for the executive session. R. 134-135; 633.

NOVEMBER 16, 2008 - R. 629.

The published agenda for the Special Town Meeting held on November 16, 2007, shows only a single entry: "Executive Session - Legal advice for OK Tire (Shem Creek) property litigation." R. 129; 180; 629. In addition that single entry, during the meeting, the Town Administrator asked the Council to amend for executive session to include "personnel matters

pertaining to the Clerk of Council" and "personnel matters relating to boards and commissions".
R. 129-130.

The announcement for the executive session did not disclose with specificity that the Town was considering whether to accept a settlement offer on the OK Tire/Shem Creek property, or raising the pay and altering the other requirements for the Town Clerk's position. The public was not informed of the nature of the offer on the OK Tire/Shem Creek matter. R. 180. After returning to open session, Council took unnoticed formal actions. R. 629. A motion was made and approved to "reject the offer tendered in reference to the OK Tire litigation". R. 629. Another motion was made to adjust the position requirements and compensation of the Clerk of Council "as discussed in executive session". Testimony of the Town Administrator revealed that the Clerk of Council had apparently tendered her resignation and that the Town intended to change the pay and requirements for that position. R. 364.

The Town Administrator testified that he didn't think the public was entitled to know that the Clerk of Council had resigned or that the Town intended to change the requirements and pay for the position. R. 371-372. The meeting agenda for November 16th contained no notice that the Council would consider personnel matters at the meeting or, that it intended to vote on any matter discussed in executive session. R. 130. All motions passed.

The issue of Shem Creek property was listed in the executive session agenda for the November 16th Special Meeting only as "legal advice". R. 629. There was no statement in the required announcement of specific purpose that Council was considering a settlement offer. R. 179-180; 630. The public was not informed of the nature of the settlement offer in regard to the Shem Creek property or that formal action was intended subsequent to the executive session. R.

180; 629. Yet after returning from executive session Council voted "reject the offer tendered in reference to the OK Tire property litigation." R. 180; 629.

DECEMBER 5, 2007 - R. 539.

The December 5, 2007 Special Town Council Meeting had a posted agenda. R. 117; 539. The December 5th meeting that was held in lieu of the Council's December 11 regular meeting which was cancelled during the December 5th special meeting. R. 209. Council provided a full agenda for the December 5th special meeting just as it did with a regular meeting. R. 209; 539; 605.

The OK Tire/Shem Creek issue involved a proposed project to develop condominiums on the site of the former OK Tire Store near Shem Creek. The project included the construction of docks on Shem Creek for each Condominium. R. 119. The property proposed for development was owned by local attorney Mark Mason. The Town tried to purchase the property after Mason announced plans for development shortly after the area's annexation by the Town. R. 119. When Mason would not sell, the Town filed a condemnation action. Mason responded with a counterclaim against the Town, Town Council and Council members as individuals. R. 122. Thereafter, secret settlement negotiations between Town Council and Mason began sometime in October 2007, and were ongoing at the time of the December 5, 2007 Special Town Council Meeting. R. 635; 636.

The Town provided no public notice that the Town had received a settlement offer from Mason or that during the December 5th special meeting that it would consider taking formal action on an agreement to settle litigation and purchase the property for six million dollars. R. 118; 122-125; 539; 543; 629; 633. During the meeting the executive session agenda was

amended during the meeting "to receive legal advice pertaining to the OK Tire Store litigation."² R. 121; 543. The announcement prior to executive session indicated only "Legal advice regarding the settlement of legal issues and purchase of property known as the OK Tire Store and other properties." R. 120; 543. Without any prior notice of potential formal action Council returned from executive session and voted to approve a settlement and authorized the Mayor to sign the settlement agreement. R. 121; 543. A separate motion was made adjusting the Town's budget to transfer \$3 million into "the water access acquisition project" with funding to come from "various TIF projects".³ The motion did not clearly state the purpose of the funds appropriated although it later became clear that it related to the purchase of the OK Tire/Shem Creek property. R. 122. The minutes of the December 5th special meeting did not reflect the contents of the settlement agreement referred to in the first motion and the purchase land was not mentioned in either motion. R. 123. The Town disclaimed the existence of an emergency on December 5, 2007. R. 459-462.

Mason executed the agreement on December 5, 2007. R. 285; 535. The agreement was executed by the Mayor on December 6th. R. 285. On December 6th Town Administrator, Burdette, sent an email to Mark Mason stating: "We are pleased to have settled the matter...Would you and Mr. Smith [plaintiff's partner] consider coming over to Town Hall for a ceremonial signing...". R. 567. The same day, Mason responded:... "Philip [Smith] and I are also

²Throughout minutes, agenda and testimony the property that was the subject of the December 5 meeting of Mount Pleasant Town Council is referred to as OK Tire and/or Shem Creek property and OK Tire/Shem Creek property.

³TIFF: tax increment financing fund used for redevelopment projects.

glad to have settled the matter". R. 288; 567. Burdette emailed the Town Council members: "He [Mason] asked that we consider a ceremony after closing on December 18..." R. 569. The public had no prior notice of the Town's decision to purchase the OK Tire/Shem Creek property for \$6 million. R. 122. On December 7th, the local newspaper ran an article on the purchase. R. 122.

Although the Town claimed that Mason's ultimatum forced its action on December 5, Mason was never asked for an extension of time in regard to the Council's consideration of the settlement agreement. Mason testified that had he been asked, he would have consented to additional time to secure a sound agreement. R. 287. Mason was not asked for additional time and, he believed that when the Town had taken whatever necessary procedural steps in advance of the Mayor's execution of the agreement. R. 286. After it was signed by the Mayor, Mason assumed that it was in final form and binding. R. 285-286. Ratification was never mentioned. R. 286. Mason's basis for the suit against the Town included fraud and deceit and a FOIA violation. R. 291.

On December 7th, upon learning of the vote to purchase the property a reporter for the local newspaper wrote the Town Administrator stating: "I can't know and the public can't know what's happening at meetings when agendas are amended during the meeting". R. 629. Brock, as former president and general manager of a television station, testified to the importance of the Town's agenda in the coverage of daily news. R. 21.

DECEMBER 17TH - R. 543.

During the December 5th, 2007 Special Meeting, Town Council cancelled its regular monthly meeting scheduled for December 11. R. 567. As of December 5th, no further regular/any at all Town Council meetings were scheduled for the remainder of the year. A regular

meeting of Council was scheduled for December 11th but was cancelled during the December 5th meeting. R. 209. The agenda for December 17th indicated the purpose of the meeting was to "confirm settlement agreement". R. 543. An email notifying Council Members of the purpose for the upcoming December 17th meeting stated: "to confirm your previous action advance notice and avoiding problems with title insurance on the Shem Creek property". R. 643. At the December 17th special meeting Council voted again to approve the settlement and purchase of the property. R. 543.

The Charleston County Parks & Recreation Commission subsequently obtained an as-is appraisal for the Shem Creek property on October 31, 2008 (10 months following purchase). The property was appraised at only \$3 million dollars. R. 142-143; 639. The appraisal gives the market value of three million dollars for the property, eleven months after Town Council voted to obtain it for six million dollars in public funds. R. 143; 639.

E-MAIL RECORDS

The Town Administrator testified Council members exchange e-mails on public business and that prior to the present litigation, there was no prohibition for deletion of e-mail on public business among Council members. R. 379-380. The 2010 Town policy represents the first implementation of any e-mail guidelines for the Town. R. 380. Town Administrator, Burdette admitted that the Town's 2010 e-mail relates only to town computers. R. 280. Burdette testified that the Town accepts the policies of the South Carolina Department of Archives and History and maintain its records and complies with that state regulation. R. 489, 1. 12-14; 535; 539; 543; 728.

ARGUMENT

I. THE COURT ERRED IN FAILING TO FIND THAT THE TOWN VIOLATED FOIA WHEN IT TOOK ACTION ON MATTERS NOT PROPERLY NOTICED TO THE PUBLIC AND PRESS.

Standard of Review

Statutory interpretation is a question of law. Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct.App. 2007). This court may decide matters of law with no particular deference to the circuit court. Pressley v. REA Constr. Co., 374 S.C. 283, 28788, 648 S.E.2d 301, 303 (Ct.App. 2007); Lambries v. Saluda County Council, 398 S.C. 501, 728 S.E.2d 488 (Ct.App. 2012); Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991)

Issues Presented

The Town of Mount Pleasant has a practice of taking formal action on matters that are not noticed by the required, posted meeting agenda. Following noticed executive sessions, Town Council routinely takes action on matters noticed and/or added to an executive session agenda for "legal advice" or "discussion". The Town has held that executive session notice is permission to act on any matter from an executive session without a posted agenda providing notice to the public that any formal actions will be taken during the a meeting. Under examination the Town Administrator addressed the practice.

- Q. Is that routine operating procedure
- A. If there is an executive session, I would say that probably half the time there's an action following the executive session.
- Q. So, fifty percent of the time -- what you're testifying to is that fifty percent of the time, probably, in the Town of Mt. Pleasant the Town Council acts on

matters that are discussed in executive Council (sic) without any notice to the public whatsoever that action is going to be taken.

- A. Well, I think it is implied that when you go into executive session that there's going to be action taken, so I think there some reason to believe that some action may be taken. 303-304.

By its express terms, FOIA requires the posting of an agenda for meetings at least 24 hours in advance of the meeting:

All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting.

FOIA Section 30-4-80.

The trial court held that Appellant failed by a preponderance of the evidence to establish a single FOIA violation at meetings of December 5, November 13 and November 16, 2007. With regard to a December 5 Special Meeting of Town Council (Count I - Amended Complaint), Council voted to approve an agreement to settle litigation and purchase property for \$6 million dollars without notice. At a subsequent meeting on December 17, with notice, Town Council voted a second time to approve the same agreement. The Court found that the second vote ratified the first vote taken without notice. Although the impetus for the second vote was an apparent FOIA violation, the Court found that ratification excused any violation. Additionally, it proposed that "exigent circumstances" allowed matters to be added to agendas for votes during meetings. The December 5 vote by Council was not added to the meeting agenda. Instead, a motion was made and the matter approved following an executive session for "legal advice" on the matter.

During meetings on November 13 and November 16, 2007, (Count III - Amended Complaint) Town Council violated the notice provisions of FOIA when it voted on matters not on the posted meeting agenda, again, following executive sessions for which matters were announced for "discussion" or "legal advice".

In addition to the meetings cited in the Amended Complaint, Appellant testified at trial to ten additional meetings at which matters were voted on without any notice to the public by posted agenda. Two of those meetings, August 14, 2007, and October 9, 2007, were admitted to evidence to demonstrate a pattern of conduct.

A. Unnoticed Actions December 5, November 13 and November 16, 2007 Violated the Agenda Notice Provision of Section 30-4-80 of FOIA.

The posted agenda for the December 5th Special Meeting of Mount Pleasant Town Council contained no reference to the ongoing OK Tire Store/Shem Creek, which was added to the Executive Session agenda for "legal advice pertaining to the OK Tire litigation". There was no notice by posted agenda that any formal action was contemplated in this matter. Following the executive session, the meeting agenda contained only "appointments to boards and commissions". The minutes reflect that Town Council convened its executive session at 9:25PM. The OK Tire matter was announced for the Executive Session as "legal advice on settlement of legal issues and purchase of property" - substantively different from the amendment to the executive session agenda earlier in the meeting.

By the time Council reconvened in open session at 10:03PM, Plaintiff and the press had left the Council meeting understanding from the meeting agenda that the executive session was the last business of the evening, other than appointments to boards and commission. When the

open session reconvened, without notice, two motions were made on the OK Tire matter. While the Order states "Town Council adopted a motion to settle the OK Tire litigation which included spending \$6 million in public funds to purchase the property", this is an error. The executive session agenda (as amended) does not mention purchase of property. There was no mention that purchase of the OK property was a condition of the settlement. Two motions were made. The first was to accept a settlement agreement on the OK Tire litigation. The second motion appropriated \$6 million for an unspecified purpose. The property was appraised several months later by the Charleston County Parks and Recreation Commission at \$3 million dollars.

The press frustration over the unnoticed action was expressed in an email from a reporter at the local newspaper to the Town Administrator; "I can't know and the public can't know what is happening at meetings when agendas are amended during the meeting". R. 629.

Despite finding that the Council took formal action without meeting FOIA's 24 hour notice requirement, the trial court declined to find a FOIA violation. It did so based on two grounds: (1) the alleged existence of exigent circumstances; and (2) that the FOIA violation was somehow erased when the vote on the settlement agreement, including the purchase of real estate, was ratified/endorsed/affirmed on December 17th. Neither of these grounds are supported by law or fact. The Town admitted at trial and in deposition that no emergency existed on December 5. "And the meeting we're talking about on December 5, '07, was not an emergency meeting was it?" "No, sir." R. 460, L.18-22.

Absent agenda notice, the public could not have known the intention of Town Council to settle litigation and spend \$6 million for the property.

In addition to the December 5th meeting, meetings on November 13 and November 16,

2007, exhibited the same pattern on the part of the Town voting on matters from executive sessions noticed and/or announced for discussion or legal advice.

On November 13, 2008, Town Council held a Special Town Council meeting immediately prior to a regularly scheduled meeting. The single matter on the agenda for the Special meeting was "Executive Session". R. 633. Upon reconvening in open session, a motion was made and approved to authorize the Mayor and members of Council "to obtain their individual attorneys for all lawsuits now and in the future...".

A second motion directed the Town Attorney "to move forward with discussions as discussed in executive session for a piece of property near Shem Creek". The "discussions" may or may not have referred to an unnoticed action from October for a nearly three million dollar offer on the former site of the OK Tire store on Shem Creek and an accompanying authorization for legal action if the offer was rejected. As with the December 5 meeting, Council took formal action without meeting FOIA's requirement for posted agenda to provide notice to the public of actions to be taken. The Court in this instance, did not hold that the circumstances constituted an emergency, nor did it cite "exigent circumstances". There was no later ratification and no agenda notice to the public or press that these actions or would be considered for formal action in violation of S.C. Code Section 30-4-80.

On November 16, 2007, the agenda provides Executive Session and Adjournment as the order of business. Upon reconvening to open session, Council voted on three matters without required notice. The meeting agenda did not notice that the Council would vote on anything. Council voted to raise the salary of the Clerk of Council, reject a settlement offer on the OK Tire property, and write a letter to the Chairman the Planning Commission suggesting he resign. The

lower court did not apply the exigent circumstances finding to this meeting or any Council meeting other than December 5, instead issuing a broader ruling in its Second Supplemental Order. R. 20. There the lower court held that FOIA does not preclude formal action without notice:

Plaintiff argues the Order on the merits did not address the issue of whether a matter may be added to an agenda for executive session may be acted upon by public body upon reconvening to open session. To the extent this issue was not addressed in the previous Order, I find that FOIA does not preclude such action.

The votes taken without notice constituted violations of the 24 hour notice provisions under S.C. Code Section 30-4-80.

B. Liability of a Public Body for Violations of FOIA is Not Excused By Subsequent Actions to Resolve Actions Undertaken During Those Meetings.

Ruling on the December 5 meeting, the trial Court further erred by holding that a FOIA violation was excused or somehow erased simply because the Council took "the same action on the same matter" at its December 17 special meeting which "ratified any defective action on the issue which occurred at the earlier (December 5) meeting when agenda was not timely posted" confirming the absence of notice. As a basis for this holding, the trial court relied on Multimedia a. Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App. 1986). This was erroneous for two reasons. First, it misconstrues the holding of Multimedia. Multimedia a. Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App. 1986) Second, the 1987 FOIA amendment eliminated ratification from FOIA entirely.

Multimedia interpreted the ratification provision of Section 30-4-70(a)(1), Code of Laws of South Carolina, 1976, as it existed prior to the 1987 amendments, as it provided that "[a]ny formal action taken in executive session shall thereafter be ratified in public session prior

to such action becoming effective." Section 30-4-70(a)(5), Code of Laws of South Carolina, 1976. Multimedia held only that where a formal action was taken in executive session, such action would be valid if subsequently ratified in open session pursuant to Section 30-4-70(a)(5). Subsequent to Multimedia, however, the ratification provisions relied on in Multimedia were removed from FOIA.

Cases from Arizona were cited in Multimedia and Herald with reference to "ratification". The Arizona Open Meeting Law (OML) §§38.431.05 has since been amended providing a detailed process for ratification of only a "prior action", not an OML violation.

Ratification merely validates the prior action; it does not eliminate liability of the public body or others for the sanctions under the open meeting law such as civil penalties and attorney's fees.

(Section 7.11.2, Arizona Agency Handbook)

The trial court's reliance on Multimedia and Herald and the cases underlying those decisions for any theory of ratification to erase the FOIA violation in this case was therefore in error. R. 5, Footnote 18.

In this instance, the "action" (the settlement agreement and purchase of property) was signed, sealed and delivered on December 6. While a potential defect in the agreement (as opposed to the FOIA violation) from unnoticed action may have been "cured" by a vote at a properly noticed meeting, allowing a public body to expunge a FOIA violation by this means would fatally weaken FOIA. Public bodies could violate FOIA at will, then schedule a later meeting to erase the violations.

With regard to the meetings of November 13, November 16, August 14, and October 9, no later "ratification" was undertaken.

C. The December 5th Action Failed to Qualify as a Recognized Exception to FOIA's Notice Requirement Pursuant to Section 30-4-80.

By its express terms, FOIA requires the posting of an agenda for special meetings at least 24 hours in advance of the meeting:

All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but *not later than twenty-four hours before the meeting*. The notice must include the agenda, date, time, and place of the meeting.

Section 30-4-80. *Emphasis added.*

Although an emergency meeting is an exception to FOIA's 24 hour notice rule, it is the only exception to the rule. The Town Administrator admitted, and the record shows, that the December 5th meeting was not an emergency meeting. R. 362-364; 460-462. As a result, the December 5th meeting did not qualify as exempt from FOIA's notice requirement and therefore constituted a violation under Section 30-4-80.

In its order the trial court did not expressly hold that the meeting was exempt from notice provisions of Section 30-4-80 as an emergency meeting. Instead, it created a completely new rule to exempt the Town's notice from FOIA's notice requirements by holding that: "exigent circumstances sometimes require the late addition of one or more items to a meeting agenda for the proper and expeditious conduct of public business". For this proposition the trial court cited to Herald. Unfortunately, Herald does not address this issue, nor does Herald support such a rule. To the contrary, the very recent case of Lambries held that "to allow an amendment of the agenda regarding substantive public matters undercuts the purpose of the notice requirement in section 30-4-80." Lambries v. Saluda County Council, 398 S.C. 501, 728 S.E.2d 488 (Ct.App. 2012). The trial court's order has misconstrued Herald and created a rule contrary to the spirit of FOIA

and this Court's holding in Lambries.

In addition to the trial court's error in its application of law, the record in this case fails to support the court's ruling that matters can be added to meeting agendas for the proper and expeditious conduct of public business as a basis for exemption from FOIA's notice requirements. A review of the record makes clear that no emergency existed on December 5th. In fact, the record shows that the Town had apparently been considering various settlement offers involving Mason for months. On more than one occasion Council took formal action on the OK Tire/Shem Creek matter without the matter being on the agenda for action. The December 5th actions relating to Mason were only a continuation of the Town's pattern of conduct, rather than any emergency justifying a notice violation. The lack of any emergency is apparent upon review of the minutes of that meeting.

The agenda and minutes of the December 5th meeting show a substantial number of matters addressed at that meeting. After the local band played and high school coaches made announcements the meeting recessed for thirty minutes. Ironically, the meeting reconvened with an announcement by Town Attorney Young that the Town was in compliance with FOIA. Despite having a six million dollar contract in hand that supposedly demanded emergency action, Council went on to conduct routine business for two hours without any announcement of the pending matter or that they would be taking emergency action that night.

It was not until the end of the meeting at 9:30 p.m. that the OK Tire/Shem Creek matter was first mentioned. And even then it was only mentioned as one of the purposes for an executive session. When the open session reconvened after 10:00 p.m. two motions were made and approved relating to the OK Tire/Shem Creek matter. Clearly, had this been an emergency

warranting the suspension of FOIA's notice provisions, the existence of the emergency and potential action would have been announced at the beginning of the meeting and the agenda amended to include an emergency action.

FOIA's notice provision provides that notice be given as soon as practical. In this case, even if an emergency existed, the Town still violated the notice provision by making no announcement during the meeting of the supposed emergency or that emergency action would be taken at the meeting. Had it done so, at least the press and public that was in attendance would have been alerted two hours prior to the action. By the time Council reconvened in open session at 10:03PM, the Appellant and the press had left the Council meeting with the belief that other than appointments to board and commissions, the executive session would be the last business of the evening. This belief was reasonable in light of the published agenda and the limited scope of an executive session.

The December 5th meeting is especially egregious as it resulted in the expenditure of six million dollars of public funds by the Town in a blatant violation of FOIA's notice provision. The facts relating to the history of the OK Tire/Shem Creek matter seen in other meetings shows that the OK Tire/Shem Creek matter escaped public scrutiny and input as a result of the Town's repeated FOIA violations.

The trial court's ruling that exigent circumstances exempted the Town from the notice requirement are therefore without factual support as well as contrary to the law. Here, the trial court's ruling frustrates the overriding purpose of FOIA to provide the citizens of Mount Pleasant with advance notice of potential actions by the Town's Council.

D. There Are Multiple Instances of Similar Acts of Action Without Notice

To illustrate pattern, Plaintiff introduced evidence of two meetings in addition to those of December 5, November 13, and November 16, 2007, which demonstrated a pattern of taking formal action on matters noticed for executive session and/or added to executive session agendas but not noticed on the meeting agenda for action as required by FOIA Section 30-4-80.

The posted agenda for the August 14, 2007 Town Council Special Meeting, which immediately preceded a regularly scheduled meeting, contained a single item of business - Executive Session. The agenda contains no notice to the public or press that any action would be taken. R. 619. The Minutes of the Special Meeting show that despite the absence of notice, Council voted to further negotiations on a "piece of property", to proceed with legal and contractual matters in reference to an undisclosed property acquisition and right of way, and authorized payment for individual attorneys for all council members. All of the actions at the August 14th Special Meeting constituted violations of FOIA's notice provisions.

Similarly, the October 9th Special Town Council Meeting resulted in numerous actions without any prior notice. Most notable was an offer for the OK Tire Property. R. 613. The minutes do not disclose that Council is appropriating \$2,285,000 for the purchase - learned by the public some time after the meeting. The motion for the unnoticed "legal action" action authorizes the town attorney to institute an unspecified action in the event the offer is not accepted. All matters were voted on without notice by posted agenda.

E. Appellant was Entitled to a Finding that a Violation occurred.

The clear and unmistakable intent of FOIA is expressed in the purpose outlined in Section 30-4-15:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.

§ 30-4-15. *Findings and purpose*

The standard of "liberal construction" urged for FOIA is not necessary to recognize the violations of the notice provisions of FOIA in the meetings cited in the Amended Complaint or the two meetings allowed in evidence to demonstrate a pattern of taking action on matters without notice.

As this Court recently held:

[t]o allow an amendment of the agenda regarding substantive public matters undercuts the purpose of the notice requirement in section 30-4-80. A narrow construction of FOIA may support the position that so long as regularly scheduled meetings are open to the public, they are conducted in compliance with FOIA. However, such a construction would be inconsonant with the agenda notice requirement for regularly scheduled meetings and would go against the instruction that FOIA is to be liberally construed. See N.Y. Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007) (stating FOIA is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the legislature); Evening Post Publ'g Co. v. City of N. Charleston, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005) (holding FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government).

Lambries v. Saluda County Council, 398 S.C. 501, 728 S.E.2d 488 (Ct.App. 2012).

In a 2009 opinion of the Attorney General of South Carolina posed circumstances that parallel events in this case:

...interpreting section 30-4-80(a) to permit last minute changes to agendas gives public bodies the ability to post agendas with only non-controversial items and later amend those agendas to include more controversial matters without notice to the public. Accordingly, we believe this reading would deny the public some of

the protection FOIA seeks to afford.

Op. S.C. Atty. Gen., 2009 WL 1968596.

FOIA was enacted to prevent the government from acting in secret. South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994); Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156; 547 S.E.2d 862 (2001). In this case Council's failure to provide notice of action items allowed it to act without public scrutiny, input, inquiry, objection, comment, or knowledge is - for all practical purposes, in secret and precisely what FOIA was created to prevent.

Due to the magnitude, regularity, and nature, the FOIA violations at issue are substantial and can simply not be minimized. There is no ambiguity in the 24 hour notice requirement of FOIA and, aside from emergencies, no exceptions. As a consequence, there is simply no legal or factual basis to find that the Council was in compliance with FOIA. The trial court erred in failing to find or otherwise excusing or erasing, FOIA violations where lawful and proper notice was not provided.

Here the Appellant was entitled to a finding that the Town repeatedly violated the notice provisions of FOIA Section 30-4-80.

II. THE COURT ERRED IN HOLDING THE TOWN'S ANNOUNCEMENTS OF EXECUTIVE SESSION DID NOT VIOLATE FOIA'S SPECIFIC PURPOSE PROVISION. (Count III of Amended Complaint)

Mount Pleasant Town Council repeatedly violated FOIA by failing to properly announce the specific purpose for executive sessions. Despite evidence of the Town's repeated violations, the trial court refused to find any violation. In doing so the trial court, relying on Herald

Publishing which predates the "specific purpose" amendment to FOIA, erroneously applied a lesser standard in its review. R. 6.

Prior to each executive session Council must announce the specific purpose for the executive session:

(b) Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, "specific purpose" means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section.

S.C. Code Section 30-4-70(6)(b).

During the 2007-2008 period covered by this action, the Town of Mount Pleasant held only 12 regular meetings, but 22 special meetings, most of which were solely for the purpose of conducting an executive session. A review of the minutes from those meetings, and specifically the unnoticed votes that followed the executive sessions, reveal that the Town routinely either made no mention at all of matters to be discussed in executive session or, gave so little detail that the specific purpose of the session could not be known or divined. Despite clear and undisputable evidence of this practice, the trial court failed to find a FOIA violation.

In reaching its decision the trial court gave an analysis of the purpose requirement under Multimedia and Herald. Both Multimedia and Herald predate the 1987 "specific purpose" amendment of FOIA and the more recent case of Quality Towing. The trial court's analysis failed to even mention Quality Towing, which addressed the same notice requirements at issue in the present case under the new law. Quality Towing specifically addresses executive session announcements post Herald and Multimedia. Quality also addressed the same type of generalized

statements seen in the present case. Quality Towing is therefore controlling.

In Quality this Court reviewed an announcement for executive session and found that a generalized statement of purpose was insufficient to meet FOIA's specific purpose test. In Quality the purpose for the executive session was:

"C. Towing — Contractual Recommendation".

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

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

Quality Towing.

Under Quality, announcements of the general nature of the matter were simply found insufficient in light of the "specific purpose" requirement under S.C. Code Section 30-4-70. Here, the Town's practice of making such generalized statements cannot be distinguished from that seen in Quality Towing.

On November 13, 2007, the posted agenda for the executive session immediately prior to a regular meeting showed executive session items: (1) "legal and contractual matters pertaining to properties near Shem Creek" and (2) "to discuss personnel matters pertaining to appointments to Boards and Commission". The announcement for executive session added: (3) "legal advice pertaining to Ordinance 07060 pertaining to the comprehensive plan" and (4) "legal advice pertaining to an opinion from the Attorney General concerning the Planning Commission".

When the Council came out of Executive Session in the November 13, 2007, Special Meeting, it authorized the Town Attorney to move forward pertaining to a piece of property on

Shem Creek. R. 133-134; 633. On its face, Council's generalized announcement failed to provide the specific purpose for this action, whether it was to discuss settlement negotiations or the appropriation of additional funds.

More importantly, the motion for members of Council to "obtain their individual attorneys for all lawsuits now and in the future with all fee statements reviewed by the Town Attorney" cannot be specifically tied to any announcement for the executive session, yet it was clearly discussed. It was the second occasion on which Council apparently discussed obtaining private counsel for each Council member (see also August 14) without it being included in the announcement for executive session. R. 137. In this instance, Town Council voted for an open-ended expenditure that would not be again voted on.

The Court imputed a "clear description" standard in finding that the Town had met FOIA's standard for executive session announcements. There is nothing in these two announcements for executive session on November 13th that provides a clear description, much less meets the "specific purpose" standard of FOIA.

Similarly, on November 16, 2007, a Special Meeting was convened for executive session only. The only matter in the agenda for the executive session was "Legal advice pertaining to OK Tire property litigation". During the hearing two additional matters were added to the executive session: "Personnel matters related to Boards and Commissions" and "Personnel matters related to the Clerk of Council". R. 129-130.

Following the executive session, a motion followed "to adjust the position requirements and compensation of the Clerk of Council". R. 179; 629. Reviewing the motion and vote from the minutes it is clear that the generalized announcement of "Personnel matters related to the

Clerk of Council" failed to reveal specifically that the adjustment of the position requirements and compensation for the Council clerk position were the specific purpose for the session.

The failure of the Town to be specific in its announcement was clearly not an oversight.

According to testimony of the Town Administrator during trial:

Q. But don't you agree, Mr. Burdette, that if in this particular case...it [the announcement of for the executive session] said that Town Council will discuss the matter of the resignation of the Clerk of Council and that we will appoint a new clerk of court (sic), would that not give the public information to which it was entitled?

A. "I do not believe that they're entitled to information in that way".

T. 371, L. 22-p. 372, L. 5.

A second motion was also made to "reject the offer that was tendered in reference to Shem Creek property and the OK Tire Store property litigation". The announced purpose of the executive session was only: "legal advice pertaining to the OK Tire property". From the motion made it is clear that the actual purpose of the session was not just legal advice, but discussion of whether to accept a settlement offer. There was simply no way from the executive session announcement for the public to know that the specific purpose of the session was to discuss a settlement offer Council had received on the OK Tire/Shem Creek matter. This type generalized announcement is precisely what has been held insufficient under Quality Towing.

On December 5th Council announced the purpose for executive session was for "Legal advice regarding the settlement of legal issues and purchase of property known as the OK Tire Store and other properties. R. 565. Immediately after reconvening from executive session Council voted on a motion "to approve a settlement agreement as discussed in executive session

pertaining to the OK Tire Store property condemnation lawsuits and authorize the Mayor to execute the agreement". A second motion was made "to transfer an additional \$3 million in the water access property acquisition project for a total project budget of \$6 million". R. 566.

In light of the motions, it is clear that the actual purpose of the executive session was to discuss the acceptance of a settlement offer which included the expenditure of \$6 million dollars. From Council's announcement the public could not possibly know that Town Council was discussing a \$6 million dollar expenditure.

On August 14, 2007, a Special Meeting of Town Council was scheduled immediately prior to the regular meeting. The only agenda item was executive session. The announcement for executive session included "discussion with legal counsel in reference to legal representation regarding possible pending cases". A review of the minutes finds a motion to provide payment for private counsel for each member of council, which is a precursor to the November 13th meeting which added "now and in the future." R. 619.

Also in the announcement for August 14th were "discussion of legal and contractual matters associated with property acquisition which is related to recreation leisure services associated with Shem Creek and other areas," "personnel matters regarding the Town Administrator, Legal Counsel and Board & Commissions as well as appointments to Boards and Commissions." None of which are particularly revealing as to what specifically was to be discussed.

Additionally, a review of the minutes and motions for unannounced actions at this meeting includes a motion with regard to Shem Creek, to make a final offer and if not accepted to proceed with formal legal action if not accepted. The offer was \$2,285,000 and the formal

legal action turned out to be condemnation of the property which lead to the OK Tire litigation of December 5. This example alone establishes clearly the deficiency of the Town's announcements for executive session. There is, however, the motion to "to respond to the request for legal fees not to be found among the announcements for executive session.

On October 9, 2007, the executive session announcement included: (1) "legal matters pertaining to the Buist lawsuit", (2) "contractual matters pertaining to property acquisition in the vicinity of Town Hall" (2) "legal and contractual matters concerning Shem Creek property", (3) "a proposed project near Six Mile Road and US 17 (3) an economic development prospect" and (4) "some personnel matters pertaining to a employee grievance", and (5) appointments to Boards and Commissions. Again, none of the foregoing reveal specifically what was to be discussed.

Following the executive session, a review of the minutes of the meeting reveals a vote authorizing the Town Attorney to make a final offer on the OK Tire/Shem Creek property and if not accepted to undertake formal legal action. There was no disclosure of anything more than legal advice on OK Tire/Shem Creek property. Additionally, Town Council voted "to respond to a request for legal fees as discussed in executive session". The matter of legal fees, clearly discussed in the executive session, was not included anywhere in the announcement for the executive session. This example alone establishes clearly the deficiency in the Town's announcements for executive session.

In upholding a lower court ruling in 1993, the Pennsylvania Commonwealth Court cited a Mississippi Supreme Court decision on executive sessions as the "best rationale" for requiring specificity. The Court enjoined a county board from holding executive sessions to discuss litigation unless it was identified by court, style and number. The Mississippi Court held that

specificity was essential:

The reason given, of course, must be meaningful. It must be more than some generalized term which in reality tells the public nothing. To simply say "personnel matters" or "litigation" tells nothing. The reasons stated must be of sufficient specificity to inform those present that there is, in reality, a specific, discrete matter or area which the board had determined should be discussed in executive session...When a board chairman tells a citizen he may not hear the board discuss certain business, he is taking liberties with the rights of that citizen, and the reason given for this interference must be genuine and meaningful, and one the citizen can understand. To permit generalized fluff would frustrate the very purpose of the Act.

Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107

(Miss.1989).

In light of FOIA's often stated purpose of preventing secret government action, the harm in the Town's practice is obvious. Based on the clear evidence in record, the trial court's failure to find the Town's practice a violation of the specific purpose requirement under S.C. Code Section 30-4-70, and the holding in Quality Towing, was in error.

III. COURT ERRED IN REFUSING TO HOLD THE DESTRUCTION OF EMAILS AND OTHER INFORMATION VIOLATED PUBLIC RECORDS RETENTION ACT.

The trial court in this case refused to rule that the Town was in a violation of the Public Records Retention Act (PRA) despite its admitted destruction of e-mail correspondence by Town Council members. The court refused to rule on "past actions" of Council, based on its finding that the law in this area is "ever developing" and, that the Town "does have a records retention policy."

In its analysis of the issue the Court mis-characterizes the allegation in Count IV of the

Amended Complaint. Appellant in this case did not allege that the Town did not have an overall records retention policy. Appellant alleged specifically that the Town did not have a policy for the retention of e-mail records relating to Town business. During the course of the trial the Town Administrator admitted that no e-mail policy existed before 2010. In accord with evidence of the improper destruction of emails, yet contrary to the refusal to find a violation, the Court granted injunctive relief to prevent future occurrences of the destruction of emails. The Court simply erred in refusing to find that past destruction of emails constituted a violation of the PRA as alleged.⁴

The use of e-mail for discussion of public business was evident in a collection of e-mails to and among members of Council on a pending ordinance to limit the authority of the Mount Pleasant Commercial Design Review Board as well as a proposed amendment to limit the time allowed the Planning Commission to consider matters before it. Destruction of e-mail was confirmed in the depositions of two members of Council and the Town Administrator. R. 378-380; 521-534.

The South Carolina Public Records Act, applicable at all times pertinent to this action, provides for the retention of public records as well as setting standards for the management and disposal of records. See S.C. Code Ann. Section 30-1-10 *et. seq.* The Public Records Act refers to FOIA for its definition of public records:

“Public record includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared,

⁴This error causes prejudice as attorney fees were determined based on the trial court's determination of how many issues the Appellant prevailed on.

owned, used, in the possession of, or retained by a public body.”

S.C. Code § 30-4-20(c). The PRA also refers to FOIA’s relief provisions found in S.C. Code Section 30-4-100.

In 2005, by the South Carolina Department of Archives and History (SCDAH), published “E-Mail Management” - a detailed guide for the management, retention, and lawful destruction of e-mail correspondence and records advising on its importance:

[b]oth statute and case law make clear that e-mail must be included in your overall records management strategy...allowing e-mail to be managed by personal preference or routine systems back-ups and administrative procedures that treat all e-mail alike can result in serious legal, operational, and public relations risks.

The most cursory comparison of the Town Council's 2010 Resolution Adopting a Policy for Elected Officials Use of Town Computers and E-Mail Accounts, presented at trial as its e-mail policy, would find the Town's two-page policy non-compliant with SCDAH guidelines.

The “ever developing” theory presented by the Court to excuse the Town's violation of the Public Records Act is not supported by evidence, nor is it a reasonable excuse for the failure of the Town to enact the 2005 guidelines. The SCDAH e-mail management guidelines cite a 1993 federal case in support of the retention of e-mail as public records: Armstrong v. Executive Office of the President, 1 F.3d 1274 [DC Cir 1993]. In addition, FOIA's definition of a public record as “other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body” is long established.

At the time of the destruction of the emails at issue (2007-2008), the duty to protect emails as public documents was well established. At trial, when questioned on whether he had

read the 2005 e-mail management guidelines of the SCDAH, the Town Administrator testified, "Probably a long time ago. I couldn't possibly tell you what it says." It is apparent that the Town was aware of the requirement to protect and preserve the emails in question. It is equally apparent that they did not. The trial court clearly recognized the error of the Town's ways, enjoining further destruction of emails. In light of the record and the Court's ruling, there is no basis for the trial court's refusal to find a FOIA violation in the destruction of those records.

IV. THE COURT ERRED IN FAILING TO AWARD ATTORNEY FEES AND COSTS NECESSARY IN THE BRINGING OF THIS ACTION.

In its determination of attorney's fees and costs pursuant to S.C. Code Section 30-4-100, the trial court erred in applying a good faith analysis, in failing to consider the chilling effect of a partial award of fees, in considering any remedial actions by the Town, and in misperceiving the beneficial results achieved by the Appellant in this case.

The Order offers "good faith" and the "absence of bad faith" on the part of the Town, and the finding that there was no intent to violate FOIA despite evidence to the contrary. Page 9.

The Court: The beneficial results as Mrs. Cantwell had said were partial, not complete, and the Court did not find any bad faith on the part of the city. Although the court did find some technical violations on the part of the city, the committee (referring to the finding for Plaintiff, Count I and VII) I think the council members were acting in good faith trying to stay abreast of what was taking place in the committees not necessarily intentionally violating FOIA.

T. 9, August 22.

It has been previously decided that good faith is not a consideration for award of fees.

Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984) and further, action by a public body taken after filing of a lawsuit to resolve the question, does not dismiss the

offense. Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984). To the extent that the trial court considered what it found to be the good faith, or lack of bad faith, on the part of the Respondent or any remedial measures, it erred in the reduction of Appellant's attorney's fee award.

Additionally, in the present case the beneficial effect of this action far exceeds any minor issues which the Appellant did not prevail on. The trial court erred in failing to consider the overall benefit as the overriding factor in the determination of attorney's fees and costs: ...one who successfully prosecutes an action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention. Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) citing Heath v. City of Aiken, 203 S.C., 178, 182-183, 394 S.E. 2d 709-711 (1990).

A major factor considered by the trial court in its determination of fees was its finding that Appellant prevailed on only two issues. Contrary to this finding the record shows that the Appellant prevailed on Counts II, V and VII of the Amended Complaint - meetings noticed as committee meetings with quorums of Council present and participating and, executive sessions at those committee meetings which quorums of Council attended. Each of those counts resulted in injunctive relief, Count V. As to Count III and IV, Destruction of Public Records, the Court refused to hold the Town accountable for past destruction of public records but, nevertheless, enjoined further destruction. Town Council's pattern of holding special meetings prior to regular meetings for the purpose of executive sessions, during which Council would take formal actions without notice, was brought to light, and the Court urged the Town to abandon the practice, which it has as a result of the present action. Using the court's own analysis, but looking to the

beneficial results achieved, the Appellant has won the overwhelming bulk of his allegations. As a result, his award should not be diminished simply because he did not prevail to the full extent on every single allegation in the complaint.

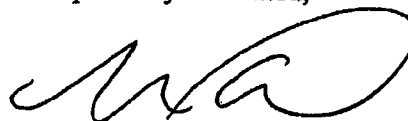
In pursuing relief from the Town's pattern of substantial FOIA violations the Appellant incurred fees of approximately \$118,000. The Court awarded the Appellant \$42,000 which was intended to cover the \$41,374.52 in fees that were outstanding at that time. R. 15. This placed an ultimate burden on the Appellant of approximately \$76,000 to enforce FOIA in this case. Placing such a huge financial burden on a single citizen because he was not perceived to have won each and every allegation in the complaint will render FOIA absolutely useless, as it will have a chilling effect on the public's willingness to continue to safeguard and enforce compliance with FOIA. The major and overriding benefits of this case warrant a full award of fees and costs.

Appellant is further entitled to an increase in attorney's fees and costs based on any beneficial results of this appeal. To the extent that Appellant prevails on issues herein, he should be entitled to an increase in his award of fees and costs accordingly.

CONCLUSION

Based on the foregoing, the relevant portions of the lower court's decision should be reversed.

Respectfully submitted,



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December 18, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT
Appellate Case No.: 2012-208787

J. C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No.: 2008CP1003308

Stephen George Brock, ... Appellant,

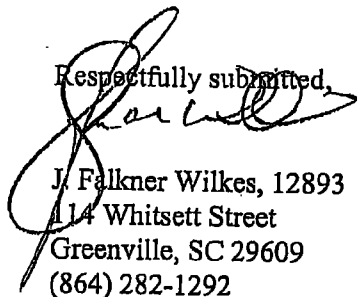
v.

Town of Mount Pleasant, ... Respondent.

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant complies with Rule 211(b).

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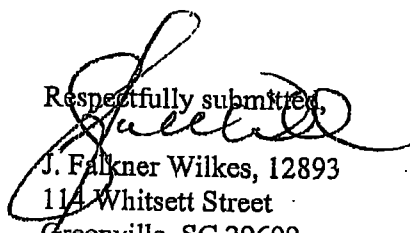
Town of Mount Pleasant, ... Respondent.

CERTIFICATE OF SERVICE

I certify that I have on the 18th of December, 2013, served the Final Brief of Appellant and the Reply on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as follows:

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THE STATE OF SOUTH CAROLINA
County of Marion

APPEAL FROM CHIEF JUSTICE COURT
County of Marion, South Carolina

vs. Chosen, Jr., Circuit Court Judge

Case No. 2018-CP-100243

Respondent: George B. Chosen, Jr.

Respondent's Brief

Whoever writes this
Response

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office this _____ day of _____, 2018.

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COCKNEY COURT REPORTING

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

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

RESPONDENT'S STATEMENT OF THE CASE

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

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

RESPONDENT'S STATEMENT OF THE FACTS

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

The Freedom of Information Act and Executive Sessions

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

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

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

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

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

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

August 14, 2007 Special Town Council Meeting

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

I. EXECUTIVE SESSION

A. Legal and Contractual Matters

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

B. Legal Advice regarding pending cases

C. Personnel Matters

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

Id.

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

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

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

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

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

Id.

October 9, 2007 Special Town Council Meeting

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

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

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

Id. (emphasis in original).

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

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

Id.

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

November 13, 2007 Special Town Council Meeting

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

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

Id.

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

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

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

Id.

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

November 16, 2007 Special Town Council Meeting

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

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

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

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

Id.

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

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

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

December 5, 2007 Special Town Council Meeting

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

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

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

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

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

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

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

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

Id.

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

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

December 17, 2007 Special Town Council Meeting

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

The posted agenda listed the following items for discussion:

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

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

Id.

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

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

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

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

Records Retention Act and Email Retention

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

Id. at 11-12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1985)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

January 8, 2014



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT
Appellate Case No.: 2012-208787

J. C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No.: 2008CP1003308

Stephen George Brock, ... Appellant,

v.

Town of Mount Pleasant, ... Respondent.

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ARGUMENT**I. RESPONDENT'S ARGUMENTS MISCHARACTERIZE THE FACTS.**

Respondent's brief misstates facts as well as the legal issues raised by Appellant in this case. The gravamen of the Appellant's complaint, as set forth in Count I, is that the Town of Mount Pleasant frequently violates the South Carolina Freedom of Information Act (FOIA) by announcing matters to executive session and then, upon reconvening in open session, takes action on matters without prior notice to the public. Respondent mischaracterizes the issue to cast Appellant as objecting to amendments of executive session agendas. To that end, Respondent argues: "Appellant contends the actions of the Town in adding matters to executive session and acting on those matters in public session violate FOIA" and "the circuit court correctly concluded that such actions did not violate FOIA". (Respondent's Brief, pp.13-14)

Contrary to Respondent's mischaracterization, circuit court's order makes no mention of executive session agendas. The precise issue described in Count I of the Amended Complaint is Town Council's pattern of announcing matters for executive sessions for legal advice or discussion and then, upon reconvening to open session, taking formal action on such matters without notice to the public as required by 30-4-80 of the South Carolina FOIA. The Order recognizes and rules solely on matters added to "meeting agendas" for action without notice - as did the ruling made on Appellant's Motion for Reconsideration. [2] Respondent's persistent argument that Appellant's cause of action involves adding matters to "executive sessions" rather than unnoticed actions in open sessions is, perhaps, intended to escape this Court's recent decision in Lambries. Lambries v. Saluda County Council, 398 S.C. 501 (Ct. App. 2012).

In Lambries, Saluda County Council appears to have amended its agendas by

parliamentary process, albeit without 24-hour notice as required by FOIA Section 30-4-80. As distinguished from Lambries, and perhaps more egregiously, Respondent acted on matters without notice and without amendment to the meeting agenda. Such is the case at the December 5, 2007 meeting of Town Council the Respondent described. (Respondent's Brief, p.11)

Respondent attempts to have it both ways, taking a convenient position on the notice requirement of FOIA. By focusing its brief on executive session agendas, Respondent enjoys the privilege of unrestricted amendment without notice; then, by taking the position of voting on "actions authorized" by executive session, Respondent improperly claims exemption from the notice requirements of FOIA. (Respondent Brief, p. 3) The Town of Mount Pleasant consistently ignored the notice requirements of Section 30-4-80 - which include agenda, 24 hours in advance of the meeting - by adopting the stratagem of listing a matter for executive session only and then voting on it in the open meeting without notice. This practice is a clear violation of FOIA.

Respondent states, "Appellant contests"..... "actions authorized" by executive sessions. Respondent's theory offered at trial was that a published executive session agenda and/or announcement serves sufficient public notice for action following an executive session based on "implied" notice of action to follow the session (R. 92-102; 370-372). Contrary to the Town's argument, FOIA clearly provides that no actions may be authorized from or by an executive session. S.C. Code Section 30-4-70. As a result, no notice of action can be imputed merely because an item is listed for discussion in executive session.

With regard to the issue of failure to provide the specific purpose of matters for executive session, Respondent uses the terms "purpose" and "specific purpose" interchangeably. Appellant's Complaint cited the failure of Respondent to announce the "specific purpose" of an

executive session, a requirement that came with the 1987 amendment to FOIA, replacing the more general requirement for announcement of "purpose" in the earlier version. Respondent's reliance on Herald is misplaced. Herald Publishing Company, Inc., v. City of Bamwell, 291 S.C. 4, 351, S.E.2d 878, Ct. App 1986). Quality Towing and not Herald is controlling here. Quality Towing v. City of Myrtle Beach, 345 S.C. 156, 547 S.E. 2d 862, 2001. Respondent's argument fails to account for the meeting of Town Council on August 14, 2007 where following executive session, Town Council voted without notice to allow each member of Town Council to hire individual attorneys at Town expense. The matter was not announced as a specific purpose of the executive session as required by Section 30-4-70, nor was it noticed by the meeting agenda as required by Section 30-4-80.

Respondent's claim that executive sessions were scheduled "from time to time" at special meetings "so as not to inconvenience the public" is accompanied by the claim that "it is not unusual for Council meetings to last as late as 11 PM". (Respondent's Brief, p. 3) During the period covered by this action (July 2008 to June 2009) no Town Council meetings lasted until 11 PM. The latest meeting during that period ended at 10:07 PM.

II. RESPONDENT MISCHARACTERIZES THE TRIAL COURT'S RULING ON STANDING AS TO RECORDS RETENTION.

As to the issue of Appellant's standing regarding South Carolina Records Retention Act (RRA), at trial Respondent argued that the RRA allowed no private cause of action, however, the trial court implicitly found standing. Based on testimony and the depositions of the two Council members that e-mail was routinely deleted without restrictions or criteria, Respondent was

enjoined "to assure compliance" with the RRA, preventing further destruction of public records. Respondent did not appeal the injunction or the implicit finding of standing. The protection of public records provided by the Court in this case affirms the failure of Respondent to establish an e-mail public records policy prior to the filing of this case, as well as the beneficial result of Appellant's litigation.

III. RESPONDENT'S ARGUMENTS DO NOT STAND UP TO THE OVERRIDING INTENT AND PURPOSE OF FOIA.

Arguing the events of the December 5 meeting of Town Council, (Respondent's Brief, p. 19), Respondent attempts to resurrect "ratification" as it existed before the 1987 amendments to FOIA. It characterizes FOIA violation as "mistakes" rather than violations of a statute. Absence of a "cure" (ratification), it is alleged, will result in public bodies "powerless to correct mistakes" and "frustrate the ability of public bodies to attend to the to the efficient and effective conduct of the public's business" producing an "anathema to sound public policy". At the December 5 meeting, a contract approved by Respondent was clouded by a FOIA violation. At a subsequent, properly noticed meeting (December 17, 2007) only the defective contract was cured. It does not erase the FOIA violation and a finding of a violation certainly does not leave the Respondent powerless to correct its mistakes. It merely holds the Respondent accountable for the violation.

Respondent has sought to justify its violations of FOIA by various other interpretations of facts and law along with justifications of its action such as "not to inconvenience the public", the "best interests of the public" (R. 322) and for the "good of the public". (R. 369-370).

Modification of this or any statute is a function of the legislature, not the individual municipality. Regardless of the burden the Town perceives is imposed by FOIA, this is simply not the proper venue for it to complain:

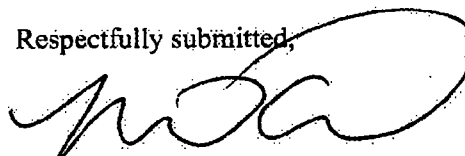
City Council contends that the outcome is unduly burdensome. Even if we agree with City Council's proposition, the General Assembly, based on its findings that public decision-making is vital to the functioning of the democratic process, has chosen to impose this burden on public agencies and City Council should direct that argument to the General Assembly rather than the courts.

Reading Eagle Co. v. Council of Reading, 627 A.2d 305, 307(Pa.Comm.1993).

CONCLUSION

Based on the foregoing, the relevant portions of the lower court's decision should be reversed.

Respectfully submitted,



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December 18, 2013.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

COMMON PLEAS COURT

Appellate Case No.: 2012-208787

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

Trial Court Case No.: 2008CP1003308

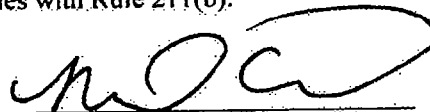
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CERTIFICATE OF COUNSEL

I certify that the Reply Brief of Appellant complies with Rule 211(b).



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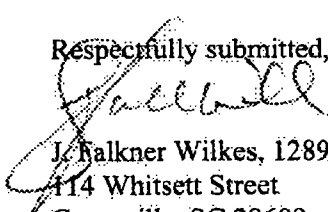
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I certify that I have on the 18th day of December, 2013, served the Final Brief of Appellant and Reply on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as follows:

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT
Appellate Case No.: 2012-208787

J. C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No.: 2008CP1003308

Stephen George Brock, ... Appellant,

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RECORD ON APPEAL
VOLUME I

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

STEPHEN GEORGE BROCK)

Plaintiff,)

vs.)

TOWN OF MOUNT PLEASANT,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2008-CP-10-3308

ORDER

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The Plaintiff, Stephen George Brock, brought this action against the Defendant, Town of Mount Pleasant, a municipality organized and existing under the laws of the State of South Carolina, seeking declaratory and injunctive relief. Mr. Brock's various claims set forth in his Amended Complaint are based on his allegations the Town violated various sections of the South Carolina Freedom of Information Act ("FOIA").¹ Mr. Brock contended the Town's governance procedures, in several respects, violated a number of FOIA's requirements. The Town is a public body as defined by FOIA,² and is subject to the requirements set forth in FOIA as it prescribes the lawful procedures for the governance of public bodies.

The Town is organized and governed by a Mayor and Town Council via the council form of government.³ The evidence shows the Town Council is composed of nine members, one of whom is the Mayor. There is a Town Administrator who acts under the authority of the Mayor and Town Council and performs administrative and executive duties. The Mayor and the members of Town Council are publically elected

¹ See S. C. Code Ann. §§ 30-4-10, *et seq.* (Thomson Reuters West 2009).

² See S. C. Code Ann. §§ 30-4-20(a) (Thomson Reuters West 2009).

³ See S. C. Code Ann. §§ 5-11-10 through 5-11-40 (Thomson West 2004).

officials. The Town Administrator is, on the other hand, appointed by the Mayor and Town Council. Five of the nine members of the Town Council constitute a quorum of Town Council sufficient to conduct official Town business.⁴

In addition to the Town Council, the Town has established a number of standing committees usually composed of three or four members of Town Council.⁵ These standing committees normally meet the week before the regular monthly Town Council meeting⁶ to hear staff reports on issues within their purview and make recommendations thereon to Town Council. The Town publishes public notice of these standing committee meetings in compliance with FOIA.

Mr. Brock originally filed his Complaint on 10 June 2008, but later filed and served his Amended Complaint on 16 July 2009. In his Amended Complaint, Mr. Brock alleged:

- gem
1. The Town violated FOIA⁷ by failing to properly post a Town Council meeting agenda for the 5 December 2007 scheduled Town Council meeting in that Town Council added a new item for consideration to the existing agenda after the meeting notice and agenda had been duly publically posted as required by S. C. Code Ann. § 30-4-80(a). (*Count 1 of the Amended Complaint*).

2. The Town conducted Town Council committee

⁴ See S. C. Code Ann. §§ 30-4-20(e) (Thomson Reuters West 2009).

⁵ The standing committee structure includes, among others, the Annexation Committee, Economic Development Committee, Planning and Development Committee, and the Police, Legal and Judicial Committee. Various Town Council members serve on various committees, but generally not all Town Council members serve on the same committee.

⁶ Town Council's regular monthly meeting is held on the second Tuesday of the month.

⁷ See S. C. Code Ann. §§ 30-4-80(a) (Thomson Reuters West 2009).

meetings which, even though such meetings were attended by a quorum of the Town Council, were not publically noticed as meetings of the Town Council as FOIA⁸ required and that such meetings constituted *de facto* meetings of Town Council (*Counts II and VII of the Amended Complaint*).

3. The Town conducted executive sessions of the Town Council without giving the appropriate descriptive notice required by FOIA regarding the purpose of such executive sessions.⁹ (*Count III of the Amended Complaint*).
4. Town Council members conducted e-mail correspondence between themselves and others concerning official public business and also conducted e-mail correspondence which involved a quorum of Town Council (*i.e.*; the Town Council often effectively conducted *de facto* Town Council meetings via e-mail). Mr. Brock further alleged Town Council members deleted and/or otherwise destroyed such e-mail correspondence from the *de facto* e-mail Town Council meetings in contravention of the South Carolina Public Records Act¹⁰ (*Count IV (mis-designated as County VI) and Count VI of the Amended Complaint*).

This Circuit Court had subject matter jurisdiction over this matter¹¹ and held a trial to determine the issues herein on 25 January 2011. The parties presented extensive live testimony, as well as, numerous exhibits to this Circuit Court all of which have been made a part of the record. In addition, by agreement, the parties also submitted certain designated deposition testimony for this Circuit Court's consideration and such testimony has also been made a part of the record.

⁸ See S. C. Code Ann. §§ 30-4-80(a) (Thomson Reuters West 2009).

⁹ See S. C. Code Ann. §§ 30-4-70 (Thomson Reuters West 2009).

¹⁰ See S. C. Code Ann. §§ 30-1-10, *et seq.* (Thomson Reuters West 2009).

¹¹ See S. C. Code Ann. §§ 30-4-100(a) (Thomson Reuters West 2009); Martin v. Ellisor, 264 S.C. 202, 204-205, 213 S.E.2d 732, 733 (1975).

In considering the evidence, including the testimony of the parties' respective witnesses, the Circuit Court is mindful that (a) the "FOIA is remedial in nature and should be liberally construed to carry out the purpose as mandated by [our State] [L]egislature",¹² and (b) FOIA's basic purpose "is to prevent the government from acting in secret",¹³ making it possible for the public to learn about and report on the activities of public officials.¹⁴ Under FOIA, this Circuit Court is authorized to consider declaratory and injunctive relief when, in its discretion, such relief is appropriate to carry out FOIA's purposes and this Court may consider any other equitable relief which it deems appropriate under the circumstances.¹⁵

Consequently, this Circuit Court, in its deliberations, has considered all the evidence presented to it and has applied the aforementioned standards enunciated by our appellate courts to decide the appropriate declaratory, injunctive, and/or other equitable relief in this matter where warranted by the record.

Based upon the testamentary and documentary evidence, together with the applicable law, this Court makes the following:

¹² Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E. 2d 862, 864-865 (2001) (citing South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978)).

¹³ Campbell v. Marion County Hospital District, 354 S.C. 274, 280-281, 580 S.E. 2d 163, 166 (Ct.App. 2003) (citing Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 163, 547 S.E. 2d 862, 865).

¹⁴ Wiedemann v. Town of Hilton Head, 330 S.C. 532, 535 n.4, 500 S.E.2d 783, 784 n.4 (1998) (citing South Carolina Tax Commission v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994)) ("The purpose of the FOIA is to protect the public from secret government activity."). See also Evening Post Publishing Co. v. Berkeley County School District, 392 S.C. 76, 81-82, 708 S.E.2d 745, 748 (2011) (quoting S. C. Code Ann. § 30-4-15 (Thomson West 2007)).

¹⁵ Eargle v. Horry County, 344 S.C. 449, 545 S.E. 2d 276 (2001); Gibbs v. Kimbrell, 311 S.C. 261, 428 S.C. 2d 725 (Ct.App. 1993); Campbell v. Marion County Hospital District, 354 S.C. 274, 280-281, 580 S.E. 2d 163, 166 (Ct.App. 2003).

FACTUAL AND LEGAL CONCLUSIONS**1. Amended Agenda - Counts I and V of the Amended Complaint**

Regarding Mr. Brock's contentions Town Council violated S. C. Code Ann. § 30-4-80(a) (Notice of meetings of public bodies) on 5 December 2007, when Town Council added an item to the previously posted Town Council meeting agenda, this Circuit Court concludes the Town's actions did not violate FOIA.¹⁶ This Circuit Court bases its decision on the following grounds specific to this case: (1) exigent circumstances sometimes require the late addition of one or more items to a meeting agenda for the proper and expeditious conduct of public business;¹⁷ and (2) Town Council herein subsequently endorsed its prior actions by taking the same action on the same subject matter at a later meeting where the added agenda item had been timely included on the posted meeting agenda.¹⁸

¹⁶ On 5 December 2007, the Town conducted a special Town Council meeting in lieu of its regular monthly meeting. One of the agenda items was an executive session. At the time, the Town, the mayor, and Town Council, in both individual and official capacities, were named defendants in litigation (the "Ok Tire Litigation") regarding certain property located on Shem Creek, commonly known as the Ok Tire property. After regular business hours on 5 December 2007, the Town Attorney received a settlement offer in the Ok Tire Litigation, part of which required its acceptance by the next day. During the 5 December 2007, special meeting, a motion was made and approved in open session to add a new item to the executive session agenda regarding legal advice pertaining to the OK Tire Litigation. Town Council subsequently went into executive session when that item came up on the agenda. When the public session reconvened, Town Council adopted a motion to settle the OK Tire Litigation which included spending \$6 million of public funds to purchase the OK Tire property. At the later 17 December 2007, special Town Council meeting, Town Council ratified the actions it had taken at the 5 December 2007 meeting regarding the Ok Tire Litigation and purchase of the Ok Tire property.

¹⁷ See generally Herald Publishing Company, Inc. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986).

¹⁸ This subsequent Town Council action ratified any defective action on the issue which occurred at the earlier meeting when the agenda item was not timely posted. See Multimedia, Inc. v. Greenville Airport Commission, 287 S.C. 521, 524-525, 339 S.E.2d 884, 886-887 (Ct. App. 1986) (citing Valencia v. Cota, 126 Ariz. 555, 617 P.2d 63 (1980); Cooper v. Arizona

This Circuit Court, therefore, finds and concludes Mr. Brock has failed to present a preponderance of the evidence sufficient to sustain his claims set forth in *Counts I and V of his Amended Complaint* regarding Town Council's allegedly improper addition of a meeting agenda item on 5 December 2007, and, therefore, this Circuit Court denies and dismisses those claims in full.

2. Description of Executive Sessions - Counts III and V of the Amended Complaint. Regarding Mr. Brock's contentions Town Council conducted executive sessions of the Town Council without giving the appropriate descriptive notice required by FOIA¹⁹ concerning the purpose of such executive sessions,²⁰ this Circuit Court concludes the Town's actions did not violate FOIA. This Circuit Court bases its decision on the fact there was insufficient evidence presented to show Town Council's executive sessions have been unlawful held due to the lack of a clear description of the purposes of those sessions.²¹

Western College District Governing Board, 125 Ariz. 463, 610 P.2d 465 (1980)).

19 See S. C. Code Ann. § 30-4-70 (b). The section requires, upon a favorable vote for an executive session, the presiding officer of the entity must announce the purpose of the executive session.

20 Mr. Brock's complaints are primarily directed to Town Council meetings held on (a) 13 November 2007; (b) 16 November 2007; and (c) 5 December 2007.

21 See generally Herald Publishing Company, Inc. v. Barnwell, 291 S.C. 4, 11, 351 S.E.2d 878, 882 (Ct. App. 1986) ("The [FOIA] does not provide any definition of the word 'purpose' ".) The 13 November 2007 Town Council meeting was a special meeting and the agenda included an executive session. The minutes show the executive session's announced purposes were to (a) discuss legal and contractual matters pertaining to properties near Shem Creek; (b) discuss personnel matters regarding board and commission appointments; and (c) to receive legal advice regarding an ordinance and the Attorney General's opinion concerning the planning commission. The Court finds these are appropriate topics for an executive session. See generally S. C. Code Ann. §§ 30-4-70 (a) (1), (2) (Thomson Reuters West 2010); Herald Publishing Company, Inc. v. Barnwell, 291 S.C. 4, 9-10, 351 S.E.2d 878, 882; Georgetown Communications, Inc. v. Williams, 290 S.C. 149, 152, 348 S.E.2d 396, 397 (Ct.App. 1986). Once

This Circuit Court, therefore, finds and concludes that Mr. Brock has failed to present a preponderance of the evidence sufficient to sustain his claims set forth in *Counts III and V of his Amended Complaint* regarding Town Council's alleged improper description of the purposes of its executive sessions, especially the 5 December 2007 special meeting, and, therefore, this Circuit Court denies and dismisses those claims in full.

back into public session, Town Council adopted positions instructing the Town Attorney to move forward with discussions about the property on Shem Creek and authorizing the mayor and Town Council members to retain private attorneys in suits arising from Town business. These motions are consistent with the announced purposes of the executive session regarding legal advice and contractual matters pertaining to Shem Creek properties.

AM The announced purposes of the 16 November 2007 meeting's executive session were to address (a) a personnel matter related the Clerk of Council, (b) a personnel matter related to boards and commissions, and (c) to receive legal advice concerning the Ok Tire Litigation. These are appropriate purposes for an executive session. *See generally S. C. Code Ann.* §§ 30-4-70 (a) (1), (2). Town Council, in public session, subsequently adopted consistent motions to (1) adjust the Clerk of Council's position requirements and compensation, (2) reject the offer tendered concerning the Ok Tire Litigation, and (3) draft a letter addressing personnel matters for boards and commissions.

The purpose of the 5 December 2007 special Town Council meeting agenda change was to receive legal advice concerning the Ok Tire Litigation. When the public session reconvened, Town Council voted to settle the Ok Tire Litigation, including purchasing the Ok Tire Property. Since the receipt of legal advice is an appropriate reason to convene an executive session, Mr. Brock's dispute centers on whether the announced purpose should have indicated a settlement in the Ok Tire Litigation was being proposed. A fair reading of the minutes reveals that Town Council was going into an executive session to receive legal advice pertaining to ongoing litigation and the minutes indicate that occurred.

This Circuit Court does not believe FOIA requires specificity as to the nature of the legal advice to be given since to do so would possibly defeat the purpose of an executive session and potentially compromise legal strategy, especially where litigation is involved. In any case, even if Town Council violated FOIA on 5 December 2007, in relation to settlement of the Ok Tire Litigation and purchase of the Ok Tire Property, Town Council subsequently affirmed and ratified any defects vis-à-vis the Ok Tire Litigation settlement at the properly noticed 17 December 2007 meeting. *See generally Multimedia, Inc. v. Greenville Airport Commission*, 287 S.C. 521, 524-525, 339 S.E. 2d 884, 886-887 (Ct. App. 1986).

3. Standing Committee Meetings Attended by a Quorum of Council – Counts II, V and VII of the Amended Complaint. As previously noted, the Town has established a number of standing committees on which various Town Council members serve. The evidence showed various members of Town Council who were not assigned as official members of a particular Town Council standing committee (the “non-committee member attendees”) often attended the standing committee meetings. Moreover, the evidence showed, while they did not vote on any issues, the non-committee member attendees:

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- (a) actively participated in the discussions conducted during the standing committee meetings,
 - (b) were noted in the minutes as being present,
 - (c) often sat at the table with the regular standing committee members, and
 - (d) were included in any executive sessions.

Consequently, short of voting, the non-committee member attendees have both acted and been treated as “regular” members of the standing committees. Importantly, often during many of these standing committee meetings a quorum of Town Council is present and official public business is discussed, addressed, and recommendations made and approved. Notwithstanding the presence of a quorum of Town Council members, those standing committee meetings have not been posted and/or otherwise announced as meetings of Town Council.

When a quorum of Town Council members attend and actively participate in and/or appear to participate in meetings of a Town Council standing committee, including the executive sessions of a Town Council standing committee, such standing committee meetings have effectively been transformed from a standing committee

meeting into a *de facto* Town Council meeting.²² Furthermore, when notice of such Town Council standing committee meetings has not been previously provided to the public, those standing committee meetings (now Town Council meetings) violate FOIA's public notice provisions.²³

This Circuit Court, therefore, finds and concludes that the actions of Town Council non-member standing committee attendees in attending and actively participating in the meetings of standing committees for which they are not designated official committee members transforms such standing committee meetings into unadvertised *de facto* Town Council meetings in violation of FOIA.

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This Circuit Court, therefore, finds and concludes that Mr. Brock has presented a preponderance of the evidence sufficient to sustain the claims set forth in *Counts II, V, and VII of his Amended Complaint* regarding Town Council's alleged improper holding of *de facto* Town Council meetings through the attendance of a Town Council quorum at standing committee meetings in violation of FOIA.

This Circuit Court, therefore, finds and concludes Mr. Brock is entitled to an Order determining that the Town has committed such FOIA violations in the past.

While no fault is to be attributed to a councilmember wanting to be better informed on the issues, when non-committee members of council attend meetings of

²² Under FOIA, a "meeting" is 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 body has supervision, control, jurisdiction or advisory power. S.C. Code Ann. § 30-4-20(d) (Thomson Reuters West 2009). In turn, FOIA does not permit "chance meetings" as to do so would circumvent the spirit and legislative intent of the law. See S.C. Code Ann. § 30-4-70(d) (Thomson Reuters West 2009).

²³ See S.C. Code Ann. § 30-4-80(a) (Thomson Reuters West 2009).

committees on which they do not sit, resulting in 5 or more members of council being presents, and participate in discussions on matters over which the council as a whole has supervision or control or jurisdiction, a meeting of the council has taken place per the provisions of S.C. Code Ann § 30-4 20(d). Because no public notice of a council meeting has or is published in these instances, violations of the FOIA have occurred. Consequently, Mr. Brock is entitled to an injunction permanently prohibiting the Town from engaging in such conduct, starting from the entry of this Order.

My holding on this issue is limited to instances where non-committee members participate in discussion as if they were members of the committee. My holding on this issue does not preclude a councilmember who is not a member of the committee from participating in the meeting so long as his or her participation, including where he or she physically sits, is the same as that of the general public.

Relief

As Mr. Brock has prevailed on his cause of action pertaining to non-committee members of council participating in committee meetings, as stated, injunctive relief is as to this conduct is appropriate as to this cause of action.

4. E-Mail Correspondence By and Between Town Council Members – Counts IV (mis-designated as VI) V, and VI of the Amended Complaint. The FOIA defines a “public record” as something which “includes all books, papers[,]. . . or other documentary material regardless of physical form or characteristics prepared, owned, raised, in the possession of or retained by a public body.”²⁴ Moreover, FOIA further

²⁴ See S. C. Code Ann. § 30-4-20(c) (Thomson Reuters West 2009).

defines a "meeting" as the convening of a quorum of the membership of a public body, "whether corporal or by means of electronic equipment."²⁵

Records Retention Act and E-mails

Mr. Brock contends the Town does not have a records retention policy, and that the deletion of e-mails related to Town business from personal computers of councilmembers constitutes an unlawful destruction of public documents (Amended Complaint, first Count VI).

As for records retention policy, testimony and evidence produced on this issue reveals the Town does have a policy modeled after S.C. Code Ann. § 30-1-10 et seq., the Records Retention Act.

As for e-mails, the record reveals that at times pertinent to this action, only the mayor had an e-mail account on the Town computer system. Councilmembers using e-mail did so from personal computers. The evidence reveals that councilmembers would receive e-mails pertaining to Town business from the Town system and also from constituents off the Town system. Some councilmembers would delete e-mails from their computers from time to time. The e-mails deleted from personal computers that had passed through the Town systems are retrievable. Those deleted that did not pass through the Town system are not. Plaintiff seeks adjudication that actions of the councilmembers in deleting e-mails pertaining to Town business from their personal computers violate the Act. I decline to render that judgment as to the past actions of the councilmembers. I do so because the law in this area is ever developing. And, since this action was filed, the Town has purchased lap top computers for each member of

²⁵ See S. C. Code Ann. § 30-4-20(d) (Thomson Reuters West 2009).

council, has assigned to each an e-mail account on the Town system and has passed a Resolution governing the use of e-mail by the council that pertains to Town business that requires use of Town computers for such purposes and prohibits any deletions of e-mail not approved by the Clerk of Council, the custodian of council records. While I decline to hold the Town responsible for past actions, as for the future, to assure the proper preservation of all electronic mail pertaining to Town business, the Town and its council are prohibited and restrained from deleting e-mails pertaining to Town business from public or private computers unless in accordance with the Records Retention Act.

E-mails and Meetings

Mr. Brock seeks a declaratory judgment that the FOIA was violated because e-mails exchanged between members of council and staff, copies of which were sent to fellow councilmembers, constitute a meeting per the Act that requires notice. (Amended Complaint, second Count VI). The facts of this case do not warrant that relief.

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The use of e-mails to transmit information is commonplace. Technology has progressed to the point where the receipt and response to e-mail can be essentially instantaneous. There can be little doubt but that the use of e-mail in this manner by a quorum of councilmembers, where they are essentially "chatting" with one another about Town business, would come within the definition of a "meeting" per the FOIA. The evidence on this issue in this case, however, does not rise to that level.

The evidence in this case reveals the exchange of e-mails by and among councilmembers has been passive, more along the lines of letter or facsimile communication. The use of e-mail in this fashion does not constitute a violation of the FOIA. Absent evidence of the simultaneity or instantaneousness associated with a

"chat-room" among a quorum of council, the passive exchange of e-mail does not give rise to a FOIA violation. See *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004).

5. Special Meetings of Town Council and Executive Sessions During Such Meetings – Count VII of the Amended Complaint. The evidence demonstrated Town Council regularly noticed Special Meetings of Town Council which coincidentally occurred immediately prior to a regularly scheduled and noticed public Town Council meeting. The evidence further showed the overriding purpose of these "Special Meeting" was for the Town Council to conduct an executive session prior to the opening the public session of the regular Town Council meeting.

Mr. Brock's Amended Complaint does not contain allegations which specifically claimed the Town violated FOIA and/or any other procedural statute regarding these pre-regular Town Council meeting "special meetings" and, therefore, this Court does not have an evidentiary basis to restrain such conduct in the future. Nevertheless, this Court believes this type of conduct fails to comply with the spirit of FOIA and takes this opportunity to encourage the Town to abandon this procedure in the future.

6. Mr. Brock's Claim for Statutory Attorney's Fees and Litigation Costs – Counts I-IV (mis-designated as VI), VI-VII of the Amended Complaint. Mr. Brock requested an award of reasonable attorneys' fees, pursuant to S.C. Code Ann. § 30-4-100(a) (Thomson West 2008), as a result of bringing this action against the Town. Under S.C. Code Ann. § 30-4-100(b) (Thomson West 2008), a party who prevails in an action for declaratory judgment and/or injunctive relief seeking to enforce the provisions of FOIA may be awarded reasonable attorneys' fees and other litigation costs.²⁶

²⁶ See Campbell v. Marion County Hospital District, 354 S.C. 274, 580 S.E.2d 163

This Circuit Court finds and concludes Mr. Brock has presented sufficient evidence to justify this Circuit Court issuing permanent injunctions against the Town as previously noted herein. Consequently, pursuant to FOIA and the judicial interpretations of FOIA, this Circuit Court concludes Mr. Brock is a prevailing party, in part, in this action²⁷ and is, in turn entitled to an award of litigation costs and attorneys' fees as set forth herein.

It is, therefore,

ORDERED, AJUDGED AND DECREED as follows:

- gcN
1. The Court dismisses Count I of Mr. Brock's Amended Complaint which claimed the Town violated FOIA by amending Town Council meeting agendas;
 2. The Court dismisses Count III of Mr. Brock's Amended Complaint which claimed the Town violated FOIA by failing to properly announce the purpose for Town Council's executive sessions;
 3. The Court concludes the Town violated FOIA by conducting *de facto* Town Council meetings by way of standing committee meetings where a quorum of Town Council was present and when such standing committee meetings had not been noticed as Town Council meetings. This Court considers this conduct as the Town's past violations of FOIA and hereby it is ordered that the participation by members of council at meetings of committees to which they do not belong in a manner different from the participation of members of the general public violates the Freedom

(Ct.App. 2003); Cockrell by Cockrell v. Trustees of District 20 Constituent School District, 299 S.C. 155, 382 S.E.2d 923 (1989); Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984).

²⁷ See generally Sloan v. Friends of Hunley, Inc., ___ S.C. ___, ___ S.E.2d ___ (2011) (2011 WL 2321787 *2, filed 13 June 2011) (quoting S.C. Code Ann. § 30-4-100(b) (Thomson Reuters West 2010) (Alteration in original) ("If a person or entity seeking such [declaratory or injunctive] 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.")).

of Information Act, and that any such participation by non-committee councilmembers be, and hereby is, enjoined;

4. Ordered that as of the entry of this Order, any and all e-mails generated or received by councilmembers that pertain to Town business whether on private and/or Town computers be retained and stored in accordance with the Town's record retention policies;
5. The Court concludes the Town is required to preserve public records as defined and required by FOIA and South Carolina Public Records Act. While this Court does not hold the Town responsible for past conduct for the reasons set forth herein, this Court hereby permanently enjoins and restrains the Town from deleting, destroying, or otherwise eliminating any Town electronic communications concerning public business except to the extent such destruction is accomplished in accordance with a lawfully established records retention policy;
6. This Court, after considering the evidence of the amount and value of the costs and attorneys' fees Mr. Brock incurred in initiating and prosecuting this action, concludes Mr. Brock, as a prevailing party in this action, is entitled to an award of reasonable costs and attorneys' fees in the amount of

JCN *OCZ*
 \$47,000.00. A supplemental shall
 be prepared incorporating the court's
 findings. THE COURT retains
 jurisdiction to sign the
 supplemental order. *OCZ*
 And it is so ORDERED. *Thomas is also a party to this order.*

JCN
 The Honorable J.C. Nicholson
 Presiding Judge
 Ninth Judicial Circuit

Charleston, South Carolina

8/22 2011

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

STEPHEN GEORGE BROCK,
Plaintiff,

vs.

TOWN OF MOUNT PLEASANT,
Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 08-CP-10-3308

SUPPLEMENTAL ORDER FOR
REASONABLENESS OF
ATTORNEY'S FEES

BY
JULY 22 2011
AUG 22 2011
PM 4:25
CLERK OF COURT

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. Baron Data System, Inc. v. Loter, 297 S.C. 382, 377 S.E. 2d 296 (1989); Dedes v. Strickland, 307 S.C. 155, 414 S.E.2d 134 (1992). In this matter, attorney's fees are allowed to the prevailing party in the discretion of the Court because the claims of the Plaintiff are based on alleged violations to the South Carolina Freedom of Information Act ("FOIA").

The award of attorney's fees is made to the party, not his lawyer. Prevatte v. Ansbury Arms, 302 S.C. 413, 396, 396 S.E.2d 642 (Ct. App. 1990). When determining the reasonableness of attorney's fees under a statute allowing the award of attorney's fees, the contract between the client and his counsel does not control the determination of a reasonable hourly rate.

In South Carolina, where a statutory provision ("FOIA") provides that a party is to pay reasonable attorney's fees, the amount is unliquidated and, therefore, requires a finding on the reasonableness of the award. NationsBank v. Scott Farm, *supra*.

In awarding "reasonable" attorney fees, there are six factors to be considered: (1) the nature, extent and difficulty of the legal services rendered, (2) the time and labor necessarily devoted to the case, (3) the professional standing of counsel, (4) the contingency of

compensation, (5) the fee customarily charged in the locality for similar legal services, and (6) the beneficial results obtained. Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961); Blumberg v. Nealco, 310 S.C. 492, 427 S.E.2d 659 (1993); Dedes v. Strickland, *supra*.

REASONABLENESS OF ATTORNEY'S FEES IN THIS CASE

1. **The nature, extent, and difficulty of the legal services rendered.**

This case arose out of a dispute concerning governmental procedures required by the FOIA. The suit resulted in the production of voluminous documents. Considering the volume of documents and the outcome of a partial favorable result on behalf of the Plaintiff, who became the prevailing party, I find that the amount of attorney's fees to be reasonable.

2. **The time and labor necessarily devoted to the case.**

I find persuasive the detailed Attorney Fee Affidavit filed by Thomas S. Tisdale, Esquire, which explained the time and labor devoted to this case – pre-trial, trial and to some extent post-trial, to be reasonable and necessary. I concur and adopt his findings as my own.

3. **The professional standing of counsel.**

 Plaintiff's attorney graduated from the University of South Carolina School of Law in 1964, and has been licensed and practicing law in the State of South Carolina since 1964. He has over 40 years of experience in the area of First Amendment law and commercial litigation law and other disciplines within the legal profession.

4. **The contingency of compensation.**

Plaintiff's counsel informs the court that the fees charged to his client are not contingent upon the outcome of this case, and I find this case is not the type usually associated with a contingency fee agreement.

5. **The fee customarily charged in the locality for similar legal services.**

The hourly rate charged by the Plaintiff's attorney is, according to Mr. Tisdale is

usual and customary rate charged by Nexsen Pruet, LLC to its clients by attorneys of similar experience and expertise in this community in this type of case, and so again, I adopt his finding as my own in this regard.

6. **The beneficial results obtained.**

Due to the efforts of his attorney, the Plaintiff was partially successful in this suit. Thus, the Plaintiff was the prevailing party and succeeded in prosecuting these claims under the Freedom of Information Act.

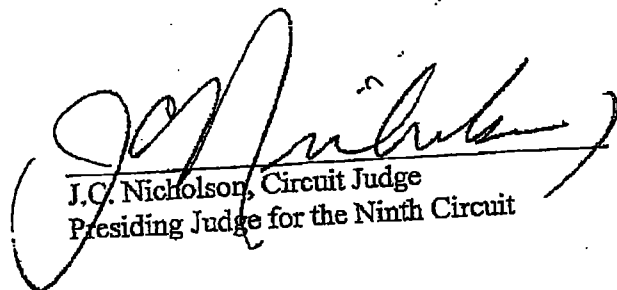
Therefore, I find the Plaintiff is entitled to and should be awarded \$42,000 in attorney's fees resulting from the legal effort expended on his behalf to include costs.

CONCLUSION

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

Plaintiff's Motion to Award attorney's fees is GRANTED, and hereby award the Plaintiff \$42,000 in attorney's fees to include costs.

AND IT IS SO ORDERED.


J.C. Nicholson, Circuit Judge
Presiding Judge for the Ninth Circuit

August 22, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

STEPHEN GEORGE BROCK,)

Plaintiff,)

v.)

TOWN OF MOUNT PLEASANT,)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2008-CP-10-3308

SECOND SUPPLEMENTAL
ORDER2012 FEB - 8 AM 10:36
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

This case concerns alleged violations by the Town of Mount Pleasant of S.C. Code § 30-4-10, et seq., the Freedom of Information Act (herein "FOIA"). On August 22, 2011, an Order on the merits of the case was entered, as well as a Supplemental Order addressing attorney's fees.

The matter is now before the Court on motions of the Plaintiff for a second supplemental order for attorney's fees and litigation costs, and for reconsideration, to amend findings of fact, and to alter or amend the judgment. A hearing was held on January 17, 2012.

Having considered the argument presented, my rulings follow:

I find the issue of attorney's fees was adequately addressed in my prior Orders. The motion for a second supplemental order for attorneys' fees and litigation costs is denied.

As for the motion to reconsider, to amend findings of fact and to alter or amend the judgment, Plaintiff argues the Order on the merits did not address the issue of whether a matter added to an agenda for an executive session may be acted on upon by a public body upon reconvening to open session. Plaintiff argues no action on such a matter may be taken without prior notice to the public. To the extent this issue was not addressed in my prior Order, I find the FOIA does not preclude such action.

Other issues raised by the Plaintiff in his motion for reconsideration, to alter findings or amend the judgment are denied.

NOW, THEREFORE, IT IS

ORDERED that the motion for a supplemental award of attorneys' fees and litigation costs is denied; and it is

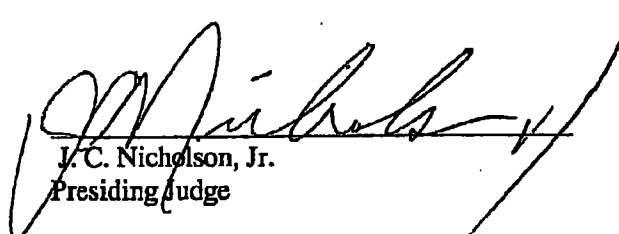
ORDERED that the Order on the merits of this case entered on August 22, 2011 is supplemented to include a holding that FOIA does not preclude a public body from acting on an item added to an agenda for an executive session upon reconvening to open session; and it is

ORDERED that, in all other respects, the motion for reconsideration, alteration of findings of fact and amendment of judgment is denied; and

IT IS SO ORDERED.

Charleston, South Carolina

2/6/, 2012


J. C. Nicholson, Jr.
Presiding Judge

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Stephen George Brock,)
Plaintiff/Appellant,)
v.)
Town of Mount Pleasant,)
Defendant/Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C. A. No.: 2008-CP-10-3308

ORDER TO SETTLE THE RECORD

FILED
2013 FEB - 1 PM 4:11
JULIE H. ARMSTRONG
CLERK OF COURT

901
This matter came before me pursuant to the Order of the South Carolina Court of Appeals and Plaintiff/Appellants motion to settle the record. Both parties appeared represented by counsel. The transcript of the trial at page 130 lines 15 through 19 contains an entry as "inaudible, audio tape reverberates with sound and cannot understand witness." The Plaintiff testified that he recalled the missing testimony to be consistent with the court's recollection of the testimony as set forth below. The Defendant/Respondent's trial counsel testified that she could not recall the testimony.

Following the hearing at this court's direction Plaintiff/Appellant's counsel inquired with Plaintiff/Appellant's trial counsel concerning his recollection of the testimony and advised the court that Plaintiff/Appellant's trial counsel could not recall the testimony.

Based upon the testimony, evidence, arguments of counsel and this court's recollection of the testimony.

IT IS ORDERED ADJUDGED AND DECREED that the record is settled in respect to the trial transcript which shall be as follows on page 130 and according to the lines indicated;

15 My news organization kept "day files" where the published agendas for public

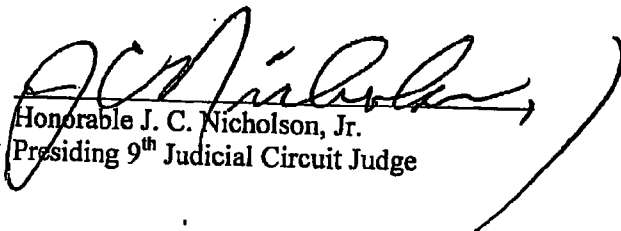
16 meetings on that particular day were kept. Each morning there was a meeting

17 to discuss the news stories to cover that day and the day files were reviewed.

18 The published agendas were considered in determining what meetings were

19 or were not covered that day by the news crews.

IT IS SO ORDERED!


Honorable J. C. Nicholson, Jr.
Presiding 9th Judicial Circuit Judge

Charleston, SC

Date: 1/29/13

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

STEPHEN GEORGE BROCK,

Plaintiff,

vs.

TOWN OF MOUNT PLEASANT,

Defendant.

Case No. 08-CP-10,3308

AMENDED COMPLAINT

JULIE J. ARMSTRONG
CLERK OF COURT

2009 JUL 16 PM 2:47

FILED

Plaintiff, complaining of Defendant, alleges:

JURISDICTION

1. Plaintiff is a citizen and resident of the County of Charleston, State of South Carolina.
2. Defendant is a municipal corporation organized and existing under the laws of South Carolina and is located in Charleston County.
3. This action for declaratory judgment and for injunctive relief is brought pursuant to and under the authority of § 30-4-10, et seq., Code of Laws of South Carolina, as amended, which is known as the "Freedom of Information Act," ("FOIA"), and the matters alleged herein are justicable controversies, and also satisfy the requirement of irreparable harm as provided by the FOIA.
4. All of the matters and things alleged herein occurred in Charleston County where Defendant is located and conducts its business.

5. The relief sought by this Complaint is specifically authorized by § 30-4-100, South Carolina Code of Laws, as amended.

6. This Court has jurisdiction of and over all matters alleged herein upon which relief is sought.

FACTUAL BACKGROUND

7. Defendant, a municipal corporation, is governed by a mayor and town council; and the town council comprises nine (9) members, and five (5) members thereof constitute a quorum for doing business at any meeting, and the members of Town Council with the mayor conduct the business and affairs of the Town of Mount Pleasant, South Carolina in accordance with the laws and statutes of South Carolina, and Defendant is a public body as defined by the FOIA.

ILLEGAL FAILURE TO GIVE NOTICE OF PROPOSED ACTION

8. Town Council scheduled a special meeting for December 5, 2007 for which notice was given and the agenda for such meeting was posted in accordance with the requirements of FOIA (§ 30-4-80(a)).

9. The agenda for the executive session of the December 5, 2007 meeting of Town Council was altered and revised, without notice to the public to add an item to the agenda for Defendant "to receive legal advice pertaining to the OK Tire Store litigation" when, in fact, the purpose of the Executive Session was for another purpose altogether, to wit: for the consideration of a proposal for Defendant to settle litigation by purchasing real estate in the town for \$6,000,000.

10. Following the revision of the executive session agenda, Defendant adjourned to executive session near the end of the December 5, 2007 special meeting where it considered the

added agenda item for the purchase of real estate for \$6,000,000. Upon reconvening to open session, and without discussion or debate or notice to the public, Defendant voted to purchase property for \$6 million.

11. The public was given no notice of the newly added agenda item as required by § 30-4-80(a), FOIA (notice of items to be considered is always required except in cases of emergency, which this was not); and the absence of such notice was a violation of law. Further, Defendant failed to identify the real purpose of the executive session which was to settle a lawsuit and to purchase property for \$6 million.

12. The Town Council later scheduled an additional "special" meeting to attempt to correct its unlawful conduct with respect to the FOIA and as it stated, "to eliminate any possible misconception or an appearance of impropriety" to attempt to legalize their former illegal action.

ILLEGAL MEETINGS OF TOWN COUNCIL

13. The Planning and Development Committee ("the Committee"), a duly constituted committee of Town Council set up under the authority of Defendant in accordance with state and local law, charged with planning and development activities of the Town of Mount Pleasant, met at least 14 times between July 1, 2007 and June 31, 2008.

14. The Committee comprises four appointed members of Town Council.

15. At 13 of the 14 meetings described in the foregoing paragraph, at least five and sometimes seven members of the Town Council met with the Committee; and at the 13 such meetings, the five or more members of Town Council who attended constituted a quorum of Town Council and such meetings became, by law, de facto and de jure meetings of Town Council.

16. Notice as required by the FOIA was given on each such occasion for the meetings of the Committee; but no notice, as required by law, was given for any meeting of Town Council on such occasions as was required by the FOIA.

17. The 13 of the 14 meetings of the Committee that were attended by at least five of the nine members of Town Council, the number five constituting a quorum of Town Council, were in fact, meetings of Town Council for which no public notice required by the FOIA, § 30-4-80(a), S.C. Code, as amended, was given; and that such meetings violated the FOIA, and should not have been permitted to occur without proper and lawful notice. During the period July 2, 2007 to June 31, 2008, 80 of 100 meetings noticed as meetings of committees were, in fact, meetings of Town Council attended by of 5 to 8 members of Town Council.

ILLEGAL EXECUTIVE SESSIONS

18. Defendant conducted an illegal Executive Session on November 16, 2007, and, at the same meeting of Town Council, unlawfully amended the meeting agenda without public notice of such amendment.

19. The November 16, 2007 Executive Session was illegal because the Town Council failed to comply with § 30-4-70, SC Code as amended, that requires an announcement of the specific purpose of the Executive Session.

20. At the November 16, 2007 Town Council meeting, it was announced that there would be an Executive Session to discuss "personnel matters related to boards and commissions" when, in fact, the purpose of the Executive Session was for another purpose altogether, to wit: to consider punitive action concerning the request for an opinion from the state attorney general by the chair of Mount Pleasant Planning Commission who is the Plaintiff herein.

21. At the November 16, 2007 Town Council meeting, it was also announced that there would be an Executive Session to discuss "personnel matters pertaining to Clerk of Council."

22. Such and Executive Session violated § 30-4-70, S.C. Code, as amended because the real purpose of the Executive Session was not announced.

23. The November 16, 2007 action of Town Council to consider what it described a "personnel matters pertaining to the Clerk of Council" and "personnel matters related to boards and commissions" were illegal because these matters, discussed in executive session, added as a last minute addition of such items to the meeting agenda, violated § 30-4-80(a), S.C. Code, as amended, because notice to the public of such proposed action and agenda items, one of which included the expenditure of public money were not given as required by law.

24. Defendant conducted an illegal Executive Session on November 13, 2007 and, at the same meeting of Town Council, unlawfully amended the meeting agenda without public notice of such amendment to provide that members of Mount Pleasant Town Council could retain private counsel for all current and future lawsuits with statements to be reviewed by the Town Attorney.

25. The November 13, 2007 Executive Session was illegal because the Town Council failed to comply with § 30-40-70, S.C. Code as amended, that requires the specific purpose of all items to be discussed in Executive Session and this item was not announced at all as part of the Executive Session agenda.

26. Upon returning to open session, a matter discussed in Executive Session, but not announced for that Executive Session was added as a last-minute addition of such an item to the

meeting agenda violated § 30-4-80 (a), S.C. Code, as amended, because public notice of the proposed action an agenda item was not given as required by law.

27. Members of Town Council routinely, before and since the commencement of this action and, on information and belief, up to the present attended executive sessions of Committees of Council of which they are not members constituting separate and additional violations of FOIA.

ILLEGAL COMMUNICATIONS
CONCERNING PENDING LEGISLATION

28. On February 5, 2007, Town Council, through its Planning and Development Committee initiated a process to enact an ordinance to change the power, authority, and responsibility of the Mount Pleasant Commercial Design and Review Board ("DRB").

29. During the time that the DRB ordinance was being considered, numerous communications by e-mail were exchanged by and between members of Town Council and with the Town Council staff concerning various aspects of the proposed ordinance, including inaccurate and misleading statements about the Mount Pleasant Planning Commission's actions and, further initiating discussion that lead to an ordinance restricting public hearings before the Planning Commission.

30. The illegal communications concerning the pending DRB ordinance is a violation of the FOIA.

31. Members of Town Council routinely, before and since the commencement of this action and, on information and belief, up to the present, as alleged herein, communicate with one another, frequently as a quorum council, by exchanges of e-mail on matters that are public

business of the Town of Mount Pleasant; such e-mail correspondence are public records and documents as defined by the FOIA.

32. The use of electronic communications as a means of discussion and debate concerning a pending ordinance that has been proposed for enactment or for any discussion of matters affecting public business, violates the FOIA, and is a specific violation of § 30-4-70(c), and such behavior is illegal.

33. The Town of Mount Pleasant, on information and belief, does not have a policy to regulate the retention or disposal of e-mail correspondence as required by § 30-1-10, et seq., S.C. Code annotated, which is known as the Public Records Act.

34. Members of Town Council, prior to and since the commencement of this action, and on information and belief, up to the present, using personal e-mail accounts, and, perhaps on occasion, e-mail accounts of the Town, conduct public business of the Town and routinely destroy and delete such correspondence which activity constitutes the unlawful destruction of public records, all of which is done in the absence of a Town policy governing the retention of such correspondence as required by law.

CAUSES OF ACTION

COUNT I (Declaratory Judgment)

35. Plaintiff reallages all the foregoing allegations of the Complaint as if set forth here verbatim.

36. Paragraphs 8-12 describe conduct of Defendant that constitutes a violation of the FOIA because Defendant altered a meeting agenda that was not posted as public notices required by law was in violation of the FOIA.

37. Plaintiff is entitled to a declaration of this Court that the conduct described herein is unlawful; and that Plaintiff is entitled to an award of costs and attorneys' fees from such misconduct.

COUNT II
(Declaratory Judgment)

38. Plaintiff realleges all the foregoing allegations of the Complaint as if set forth here verbatim.

39. The factual allegations set forth in paragraphs 13-17 describe actions of Defendant that constitute illegal meetings of Town Council because notice of such meetings was not given to the public as required by the FOIA.

40. Plaintiff is entitled to a declaration by this Court, under the provisions of the FOIA, that such practice is unlawful and illegal, and Plaintiff is entitled to an award of costs and attorneys fees as allowed and prescribed by the FOIA.

COUNT III
(Declaratory Judgment)

41. Plaintiff realleges all the foregoing allegations of the Complaint as if set forth here verbatim.

42. The factual allegations set forth in paragraphs 18-26 describe acts of Defendant that constitute illegal and unlawful Executive Sessions of Town Council that are prescribed by the FOIA because Town Council failed to announce the reason for the Executive Session as required by the FOIA, and considered matters in the Executive Session that were not announced.

43. Plaintiff is entitled to a declaration by this Court, under the provisions of the FOIA that such conduct is unlawful and illegal; and Plaintiff is entitled to an award of costs and attorneys' fees as allowed by the FOIA.

COUNT VI
(Destruction of Public Document)

44. Plaintiff realleges all of the foregoing allegations of the Complaint as if set forth here verbatim.

45. The deletion and destruction of e-mail correspondence by and between members of Town Council and staff is the unlawful of public records in violation of the FOIA.

46. The failure of the Town to have a policy as required by the Public Records Acts, §30-1-10, et seq., S.C. Code annotated, is a violation of law.

47. Plaintiff is entitled to an order and injunction from this court declaring the unlawfulness of such conduct, and enjoining any such future conduct.

COUNT V
(Injunctive Relief)

48. Plaintiff realleges all of the foregoing allegations of the Complaint as if set forth here verbatim.

49. Should this Court declare that Defendant has violated the FOIA in any respect as requested in Counts I through IV of this Complaint, Plaintiff is then entitled to injunctive relief and any other equitable relief that this Court deems appropriate under the provisions of § 30-4-100, S.C. Code, as amended.

50. Plaintiff, therefore, seeks an injunction against Defendant to enjoin and prevent any future violation of the FOIA by Defendant with particular respect to the violations specified in this Complaint.

COUNT VI**(Declaratory Judgment
(Illegal E-Mail Correspondence))**

51. Plaintiff realleges all of the foregoing allegations of the Complaint as if set forth here verbatim.

52. Paragraphs 27-34 of the Complaint describe unlawful and illegal conduct of Defendant that constitutes illegal communication by and between members of Town Council and its staff about pending proposed ordinances and other public business, by means of electronic communications (e-mails) and such conduct violates the provisions of the FOIA.

53. Plaintiff is entitled to a declaration of this Court that the conduct of Defendant described herein is unlawful and illegal and that Plaintiff is entitled to an award of costs and attorneys' fees.

COUNT VII**(Illegal Committee Executive Sessions)**

54. Plaintiff realleges all of the foregoing allegations of the Complaint as if set forth here verbatim.

55. The attendance by members of the Town Council at executive sessions, alleged in the foregoing factual allegations, of council committees when a quorum of council is present, of which he or she is not a member is a violation of the FOIA and other state law as it constitutes an illegal meeting of Council.

56. Plaintiff is entitled to an order from this Court declaring such conduct unlawful, and to an injunction prohibiting such future unlawful conduct.

57. Plaintiff also seeks an award of costs and attorneys' fees as allowed by law.

WHEREFORE, Plaintiff prays for relief as follows:

- (1) For a declaratory judgment by this Court declaring that Defendant's conduct described in Counts I through IV of this Complaint is unlawful and violates the FOIA § 30-40-10, et seq., S.C. Code of Laws, as amended;
- (2) For an injunction against future unlawful conduct that violates the FOIA, § 30-4-10, et seq., S.C. Code of Laws, as amended;
- (3) For reasonable costs and attorneys fees incurred as provided by § 30-4-100, S.C. Code of Laws, as amended;
- (4) For such other equitable relief as may be just and proper.

Thomas S. Tisdale, Jr.

Thomas S. Tisdale, Jr.
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440
Attorneys for Plaintiff
Stephen G. Brock

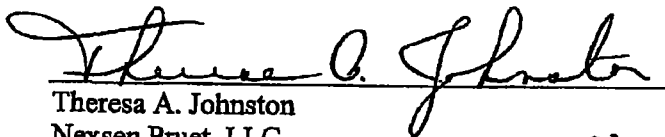
July 9
June 2009
Charleston, South Carolina

CERTIFICATE OF SERVICE 08-CP-10-3308

This is to certify that a copy of the foregoing Amended Complainte has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below Date.

R. Allen Young, Esquire
Town of Mount Pleasant Municipal Complex
100 Ann Edwards Lane
P.O. Box 745
Mount Pleasant, SC 29464

Frances L. Cantwell, Esquire
Regan and Cantwell, LLC
105 Wappoo Creek Drive
Suite 1A
Charleston, SC 29412



Theresa A. Johnston
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401

Dated: July 15, 2009

Stephen G. Brock v. Town of Mount Pleasant

FILED
2009 JUL 16 PM 2:47
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CASE NO.: 2008-CP-10-3308
STEPHEN GEORGE BROCK,	)	
	)	
Plaintiff,	)	
	)	ANSWER TO AMENDED COMPLAINT
v.	)	
TOWN OF MOUNT PLEASANT,	)	
	)	
Defendant.	)	

The Defendant, in answer to the Amended Complaint (herein Complaint), alleges and says:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not admitted, modified or explained is denied, and strict proof thereof is demanded.

AS TO JURISDICTION

2. Paragraphs 1 and 2 of the Complaint are admitted.
3. Paragraph 3 of the Complaint sets forth a legal conclusion which requires no response from the Defendant. To the extent a response is deemed required, strict proof is demanded of every allegation of the paragraph.
4. Paragraph 4 of the Complaint is admitted.
5. Paragraphs 5 and 6 of the Complaint set forth legal conclusions which require no response from the Defendant. To the extent a response is deemed required, strict proof is demanded of all allegations of these paragraphs.

AS TO FACTUAL BACKGROUND

6. Answering Paragraph 7 of the Complaint, it is admitted that the Defendant is a municipal corporation governed by a mayor and town council comprised of nine (9) members. It is admitted that a quorum for a council meeting is five (5). It is admitted that the members of town council and mayor conduct the business and affairs of Mount Pleasant, South Carolina, in accordance with the laws of the State of South Carolina. It is admitted that the town council is a public body pursuant to the Freedom of Information Act (FOIA). To the extent the allegations of Paragraph 7 of the Complaint are inconsistent with these assertions, they are denied and strict proof thereof demanded.

AS TO ILLEGAL FAILURE TO GIVE NOTICE
NOTICE OF PROPOSED ACTION

7. Answering Paragraph 8 of the Complaint, the meeting of Town Council of December 5, 2007 was a special meeting held in lieu of its regular meeting. All other allegations of said paragraph are admitted.

8. Answering Paragraph 9 of the Complaint, it is admitted that an item was added to the executive session agenda concerning legal advice regarding the litigation pertaining to property known as the OK Tire Store. Strict proof is demanded of all other allegations of this paragraph.

9. Answering Paragraph 10 of the Complaint, reference is craved to the proceedings of council as to what occurred at its meeting of December 5, 2007.

10. Paragraph 11 of the Complaint is denied.

11. Answering Paragraph 12 of the Complaint, it is admitted that Town Council scheduled a special meeting for December 17, 2007. Strict proof is demanded of all other allegations of Paragraph 12 of the Complaint.

AS TO ILLEGAL MEETINGS OF TOWN COUNCIL

12. Answering Paragraph 13 of the Complaint, it is admitted that the Town of Mount Pleasant has a Planning and Development Committee, the duties of which are set forth in the Code of Laws of the Town of Mount Pleasant. Strict proof is demanded of all other allegations of Paragraph 13 of the Complaint.
13. Paragraph 14 of the Complaint is admitted.
14. Paragraph 15 of the Complaint is denied.
15. Answering Paragraph 16 of the Complaint, it is admitted that the meetings of the Planning and Development Committee were duly noticed as required by the Freedom of Information Act. Strict proof is demanded of all other allegations of Paragraph 16 of the Complaint.
16. Paragraph 17 of the Complaint is denied.

AS TO ILLEGAL EXECUTIVE SESSIONS

17. Paragraphs 18, 19, and 20 of the Complaint are denied.
18. Paragraph 21 of the Complaint is admitted.
19. Paragraphs 22, 23, 24, 25, 26 and 27 of the Complaint are denied.

AS TO ILLEGAL COMMUNICATIONS
CONCERNING PENDING LEGISLATION

20. Paragraph 28 of the Complaint is admitted.
21. Answering Paragraph 29 of the Complaint, it is admitted that e-mails were exchanged between staff and Council with respect to the status of the ordinance proposing a change to the responsibilities of the Mount Pleasant Commercial Design and Review Board. Strict proof is demanded of all other allegations of said paragraph.
22. Paragraph 30 of the Complaint is denied.

23. Strict proof is demanded of each and every allegation of Paragraphs 31 and 32 of the Complaint.

24. Paragraphs 33 and 34 of the Complaint are denied.

AS TO THE CAUSES OF ACTION

COUNT I
(Declaratory Judgment)

25. Answering Paragraph 35 of the Complaint, the responses to Paragraphs 1 — 34 are reiterated.

26. Paragraphs 36 and 37 of the Complaint are denied.

AS TO COUNT II
(Declaratory Judgment)

27. Answering Paragraph 38 of the Complaint, the responses to Paragraphs 1 — 37 are reiterated.

28. Paragraphs 39 and 40 of the Complaint are denied.

AS TO COUNT III
(Declaratory Judgment)

29. Answering Paragraph 41 of the Complaint, the responses to Paragraphs 1 — 40 are reiterated.

30. Paragraphs 42 and 43 of the Complaint are denied.

AS TO COUNT IV
(Destruction of Public Document)

31. Answering Paragraph 44 of the Complaint, the responses to Paragraphs 1 — 43 are reiterated.

32. Paragraphs 45, 46 and 47 of the Complaint are denied.

AS TO COUNT V
(Injunctive Relief)

33. Answering Paragraph 48 of the Complaint, the responses to Paragraphs 1 – 47 are reiterated.
34. Paragraphs 49 and 50 of the Complaint set forth legal conclusions which require no response from the Defendant. To the extent a response is deemed required, strict proof is demanded of every allegation of said paragraphs.

AS TO COUNT VI
(Declaratory Judgment)
(Illegal E-mail Correspondence)

35. Answering Paragraph 51 of the Complaint, the responses to Paragraphs 1 – 50 are reiterated.
36. Paragraphs 52 and 53 of the Complaint are denied.

AS TO COUNT VII
(Illegal Committee Executive Sessions)

37. Answering Paragraph 54 of the Complaint, the responses to Paragraphs 1 – 53 are reiterated.
38. Paragraphs 55, 56, and 57 of the Complaint are denied.

FOR A SECOND DEFENSE

39. Some or all of the Causes of Action/Counts as set forth in the Complaint fail to state a claim requiring dismissal of some or all of the Complaint, as appropriate.

FOR A THIRD DEFENSE

40. Some or all of the Causes of Action/Counts as set forth in the Complaint are time barred.

FOR A FOURTH DEFENSE

41. To the extent the Defendant failed to strictly comply with requirements of the FOIA, which is not admitted, substantial compliance with those requirements was had.

WHEREFORE, having set forth its answer, the Defendant prays for dismissal of the Complaint, entry of judgment on its behalf, and such other and further relief as the Court may deem appropriate.

Charleston, South Carolina

July 20, 2009



Frances I. Cantwell, Esq.
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel: 843-762-8282
Fax: 843-762-8284

R. Allen Young, Esq.
Town of Mount Pleasant
P.O. Box 745
Mount Pleasant, South Carolina 29465
Tel: 843-849-2020
Fax: 843-388-1078

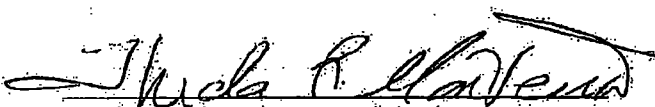
Attorneys for the Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CASE NO.: 2008-CP-10-3308
STEPHEN GEORGE BROCK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
TOWN OF MOUNT PLEASANT,	)	
	)	
Defendant.	)	

The undersigned certifies that on the 20th day of July, 2009, a true and correct copy of the Defendant Town of Mount Pleasant's Answer to Amended Complaint was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following:

Attorney for Plaintiff:
Thomas S. Tisdale, Jr., Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, South Carolina 29402

Charleston, South Carolina
July 20, 2009


Theda R. Monteiro, Legal Assistant
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel: 843-762-8282
Fax: 843-762-8284

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO. 2008-CP-10-3308
STEPHEN GEORGE BROCK	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MOTION FOR
	)	SUPPLEMENTAL
TOWN OF MOUNT PLEASANT,	)	AWARD OF
	)	ATTORNEYS' FEES
Defendant.	)	AND LITIGATION COSTS
	)	

TO: FRANCES I. CANTWELL, ESQUIRE OF Regan & Cantwell, LLC
 And
 R. ALLEN YOUNG, ESQUIRE of the Town of Mount Pleasant
 Attorneys for the Defendant, Town of Mount Pleasant:

Comes now, the Plaintiff, Stephen George Brock ("Mr. Brock"), by and through his undersigned attorneys, pursuant to S.C. Code Ann. § 30-40-100(b) (Thomson Reuters West 2010) and Rules 54(d)-(e) of the South Carolina Rules of Civil Procedure, and hereby respectfully requests this Circuit Court to issue a second supplemental order granting him an additional award of attorneys' fees and litigation costs in this matter.

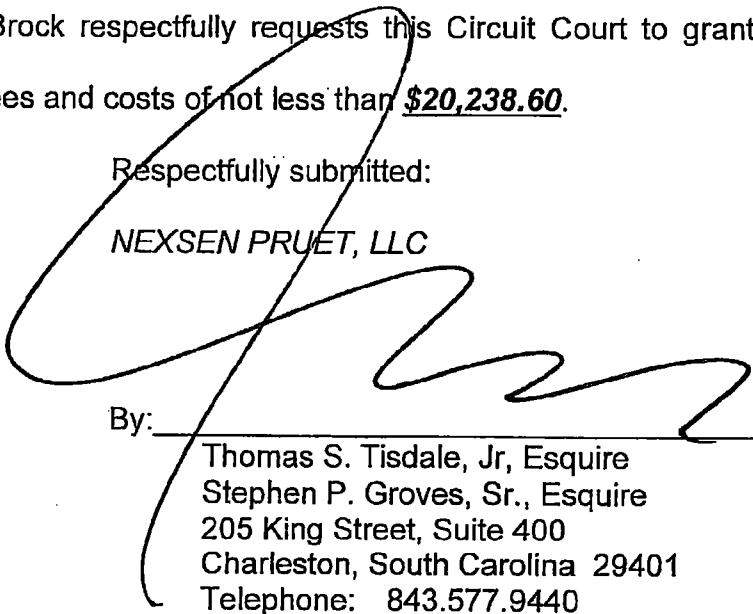
This Circuit Court originally issued its supplemental order dated and filed 22 August 2011, granting Mr. Brock \$42,000.00 in attorneys' fees and litigation costs (the "Attorneys' Fee Order"), based upon the Affidavit of Thomas S. Tisdale, Jr., sworn to on 19 July 2011. As of 18 July 2011, Mr. Brock had incurred attorneys' fees and litigation costs of \$107,517.12. Nevertheless, from 19 July 2011, through 18 August 2011, Mr. Brock incurred an additional

\$10,527.00 in attorneys' fees and \$36.12 in litigation costs, and from 22 August 2011, through 15 September 2011, Mr. Brock incurred an additional \$9,622.00 in attorneys' fees and \$53.48 in litigation costs, for a grand total of \$20,149.00 in additional attorneys' fees and \$89.60 in additional litigation costs. Copies of the relevant attorneys' fees/costs invoices are being provided to the Circuit Court and are available for review by legal counsel for the Town of Mount Pleasant upon request.

Mr. Brock respectfully requests this Circuit Court to grant his additional attorneys' fees and costs of not less than \$20,238.60.

Respectfully submitted:

NEXSEN PRUET, LLC

By: 

Thomas S. Tisdale, Jr, Esquire
Stephen P. Groves, Sr., Esquire
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.577.9440
Telecopier: 843.720.1777
E-Mail: ttisdale@nexsenpruet.com
sgroves@nexsenpruet.com

Attorneys for the Plaintiff

Charleston, South Carolina

4 November 2011

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

STEPHEN GEORGE BROCK)

Plaintiff,)

vs.)

TOWN OF MOUNT PLEASANT,)

Defendant.)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2008-CP-10-3308***Certificate of Service*****MOTION FOR
SUPPLEMENTAL
ASSMENT OF
ATTORNEYS' FEES
AND LITIGATION COSTS**

I, Stephen P. Groves, Sr., Esquire, do hereby certify that a copy of the foregoing **MOTION FOR SUPPLEMENTAL ATTORNEYS' FEES AND COSTS** has been served upon counsel for the Defendant, Town of Mt. Pleasant by e-mail and placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 4th day of November 2011.

Frances I. Cantwell, Esquire
REGAN AND CANTWELL, LLC
105 Wappoo Creek Drive
Suite 1-A
Charleston, South Carolina 29412
E-Mail: fcantwell@birch.net

R. Allen Young, Esquire
Legal Department – Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant, South Carolina 29464
townattorney@townofmountpleasant.com

*Attorneys for the Defendant,
Town of Mount Pleasant*

(see over)

I, Stephen P. Groves, Sr., Esquire, do also hereby certify that a copy of the foregoing **MOTION FOR SUPPLEMENTAL ATTORNEYS' FEES AND COSTS (WITH ATTACHED FEES/COSTS INVOICES)** has been served upon the J. C. Nicholson, Jr., Circuit Court Judge, by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 4th day of November 2011.

The Honorable J.C. Nicholson, Jr.
Circuit Court Judge
Post Office Box 8002
Anderson, South Carolina 29622-8002

Signed: _____

NPCHAR1:743944.1-MO-(SPG) 041906-00000

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
STEPHEN GEORGE BROCK)
Plaintiff,)
vs.)
TOWN OF MOUNT PLEASANT,)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2008-CP-10-3308

AFFIDAVIT OF
THOMAS S. TISDALE, JR.

FILED
2011 AUG 22 PM 4:26
CLERK OF COURT
JUDICIAL CIRCUIT
NINTH

PERSONALLY APPEARED Thomas S. Tisdale, Jr., Esquire, who, after being duly sworn deposes and says:

1. I am an attorney-at-law and am a member of the South Carolina Bar.
2. I have actively engaged in the practice of law since my admission to the South Carolina Bar in 1964.
3. I am a member of the firm of Nexsen Pruet, LLC.
4. My practice has, for many years, included representing individuals and media interests in matters involving issues related to the South Carolina Freedom of Information Act in both appellate courts and in courts of general jurisdiction in South Carolina.
5. In 2007, the Plaintiff, Stephen George Brock ("Mr. Brock"), retained Nexsen Pruet, LLC to represent him in connection with matters pertaining to several procedural aspects of the governance of the Defendant, Town of Mount Pleasant (the "Town"), which Mr. Brock contended violated the South Carolina Freedom of Information Act ("FOIA") as codified in S.C. Code Ann. §§ 30-4-10, et seq. (Thomson Reuters West 2007).

6. Nexsen Pruet, LLC agreed to represent Mr. Brock and, thereafter, instituted an action against the Town in this Circuit Court.

7. The case involved significant novel issues of law involving FOIA, necessitated considerable pre-trial discovery, and was tried before this Circuit Court (non-jury) in January 2011.

8. I am submitting this affidavit in support of Mr. Brock's claim for an award of statutory attorneys' fees against the Town pursuant to S.C. Code Ann. § 30-4-100(b) (Thomson Reuters West 2010).

9. The fee agreement between Nexsen Pruet, LLC and Mr. Brock is that Nexsen Pruet, LLC would provide legal services to Mr. Brock in connection with this matter at the regular hourly rates of the professionals who worked on the matter as established by Nexsen Pruet, LLC's firm management calculated on an hourly basis, plus litigation costs and expenses incurred.

10. Nexsen Pruet, LLC agreed to invoice Mr. Brock on a monthly basis for the legal services provided and costs incurred during the preceding month.

11. Mr. Brock agreed to pay Nexsen Pruet, LLC the amounts of such monthly invoices in the regular course of business.

12. A complete itemization of services performed, the attorneys' fees billed, and litigation costs incurred is shown in the attached exhibit.

13. As reflected by the attached exhibit, Mr. Brock has incurred attorneys' fees and litigation costs in this action as of 18 July 2011 as follows: \$106,331.00 for professional fees and litigation costs/expenses of \$1,186.12 for a total sum of \$107,517.12.

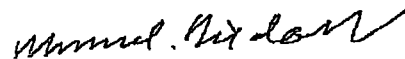
14. Of such amount, Nexsen Pruet, LLC has been paid \$66,142.60 leaving and unpaid balance due of \$41,374.52 for a grand total of \$107,517.12 as of July 18 2011.

15. All of the charges for fees and costs described herein were incurred in the proceeding of this case.

16. I believe the attorneys' fees and litigation expenses noted herein are fair, necessary, and reasonable under the facts and circumstances of this case.

17. I believe Mr. Brock is entitled to a judgment against the Town for the amount of fees and costs incurred.

FURTHER DEPONENT SAYETH NOT.



Thomas S. Tisdale, Jr.

SWORN and subscribed to before me
this 19th day of July, 2011.

Marian R. Paris (L.S.)

Notary Public for South Carolina

My Commission Expires: 4/12/2012

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

STEPHEN GEORGE BROCK)

Plaintiff,)

vs.)

TOWN OF MOUNT PLEASANT,)

Defendant.)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2008-CP-10-3308MOTION FOR
RECONSIDERATION
TO AMEND FINDINGS
OF FACT, AND TO
ALTER OR AMEND
THE JUDGMENTFILED
2011 SEP - 1 PM 4:45
JULIE J. ARMSTRONG
CLERK OF COURT

Comes now, the Plaintiff, Stephen George Brock ("Mr. Brock"), by and through his undersigned attorneys, pursuant to Rule 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, and hereby respectfully requests this Circuit Court to reconsider its order dated and filed 22 August 2011, arising from the 25 January 2011, non-jury trial in this case (the "Trial Order"), as well as, its supplemental order dated and filed 22 August 2011, granting Mr. Brock certain attorneys' fees herein (the "Attorneys' Fee Order"), or, in the alternative, to amend this Circuit Court's Findings of Facts or to alter and/or amend the judgments rendered in both the Trial Order and the Attorneys' Fee Order.

Mr. Brock respectfully submits that both the Trial Order and the Attorneys' Fee Order should be substantially revised in various aspects. Consequently, Mr. Brock makes this Motion for Reconsideration, or to Alter and/or Amend the Judgment, or to Amend Findings of Fact based upon the following grounds:

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- A. This Circuit Court, even though it made an attorneys' fees award, failed to award Mr. Brock an appropriate amount of attorneys' fees under FOIA¹ given the evidence of the attorneys' fees he expended to date in prosecuting this matter.
 - B. This Circuit Court failed to award Mr. Brock any litigation expenses (such as court fees, court costs, and/or fees paid for depositions) due to absence of notice to Mr. Brock when costs and fees were submitted to the Court even though Mr. Brock incurred those expenses and they are recoverable via S. C. Code Ann. § 30-4-100(b) (Thomson Reuters West 2010)
 - C. This Circuit Court failed to address the Town of Mount Pleasant's proclivity to discuss matters in Executive Sessions which had not been announced as an item for the Executive Sessions and then, upon returning to open session, acting on the very same unannounced matters in the regular public meetings. (See Paragraph 26 of the Amended Complaint re: November 13, 2007 Special Meeting).
 - D. This Circuit Court incorrectly determined that the Town of Mount Pleasant did not violate FOIA when Town Council added an item (*i.e.*; the OK Tire Litigation and purchase of the OK Tire Property) to the previously posted 5 December 2007 meeting agenda due to "exigent circumstances" when the trial evidence clearly indicated, through the deposition and testimony of then-Town Administrator Mac Burdette, that there were no emergency circumstances in existence at the time which necessitated addition of the item to the agenda.
 - E. This Circuit Court incorrectly determined that the Town of Mount Pleasant did not violate FOIA when Town Council voted on matters not on the posted agenda and not amended to the meeting agenda (*i.e.*; Settlement of the OK Tire Litigation and purchase of the OK Tire Property) to the previously posted 5 December 2007 meeting agenda due to the fact Town Council subsequently ratified that action during its meeting on 17 December 2010, since the FOIA does not provide for a ratification procedure.

¹ When the term "FOIA" is used herein, it refers to the South Carolina Freedom of Information Act as codified in S. C. Code Ann. §§ 30-4-10, et. seq. (Thomson Reuters West 2010), unless otherwise specifically noted.

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- F. This Circuit Court, relying on Multimedia, Inc. v. Greenville Airport Commission, 287 S.C. 521, 339 S.E.2d 884 (Ct.App. 1986), incorrectly determined that the Town of Mount Pleasant did not violate FOIA when Town Council voted on matters not on the posted agenda and not amended to the meeting agenda (i.e.; Settlement of the OK Tire Litigation and purchase of the OK Tire Property) to the previously posted 5 December 2007 meeting agenda due to the fact Town Council subsequently ratified that action during its meeting on 17 December 2010, since the FOIA does not provide for a ratification procedure and any reference to Multimedia v. Greenville Airport Commission, is incorrect as that case refers to Arizona cases based on the Arizona's FOIA which, unlike South Carolina's FOIA, contains a specific ratification procedure.
- G. This Circuit Court incorrectly concluded that the FOIA did not require the Town Council to be specific as to the nature of the legal advice to be given during an Executive Session since to do so would defeat the purpose of an Executive Session when S.C. Code Ann. § 30-4-70(b) (Thomson Reuters West 2010) provides that it is mandatory for the presiding officer of the meeting to announce the specific purpose for the item or items to be discussed in the Executive Session. See Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C.156, 164, 547 S.E.2d 862, 866 (2001) (Emphasis in original) ("FOIA is clear in its mandate that the 'specific purpose' of the session 'shall be announced.' . . . Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private.").
- H. The Circuit Court improperly concluded that the Town Council's announcements of the Executive Sessions for the 13 November 2007, and 16 November 2007, meetings effectively met the mandatory specificity requirements set forth in S.C. Code Ann. § 30-4-70(b) (Thomson Reuters West 2010) when the evidence clearly demonstrated the "announced" purposes of the respective Executive Sessions differed substantially with the issues addressed during the Executive Sessions and, thereafter, addressed/adopted by Town Council in its public sessions.
- I. This Circuit Court failed to address Count VII of the Amended Complaint which contained Mr. Brock's allegations concerning the Town of Mt. Pleasant's violation of FOIA by a having a quorum of Town Council present during the executive sessions of committee meetings attended by non-members of the committee.

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- J. This Circuit Court improperly relied upon Herald Publishing Company, Inc. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (Ct.App. 1986), as grounds for finding the Town of Mount Pleasant did not violate FOIA during the 5 December 2007, meeting since the "substantial compliance" doctrine used in Herald Publishing Co., 291 S.C. 4, 12, 351 S.E.2d 878, 883 (quoting Multimedia, Inc. v. Greenville Airport Commission, 287 S.C. 521, 525, 339 S.E.2d 884, 887), is inapplicable to FOIA as its violations presuppose "irreparable harm" to the public and there is not requirement that a complaining party seeking relief demonstrate that he or she has sustained a particularized injury.
- K. This Circuit Court improperly concluded the Town of Mount Pleasant did not violate FOIA during the 5 December 2007, meeting effectively on the basis that the allegedly existing "exigent circumstances" justified the "technical violation" of FOIA since the Town Council's failure to announce the "specific purpose" of the Executive Session does not, as a matter of law, constitute a "technical violation of FOIA". See Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C.156, 164-165, 547 S.E.2d 862, 866 ("The City argues, even if there was no "specific purpose" announced, reversal is not warranted because substantial compliance with FOIA should be found when only a technical violation has occurred, and there has been no demonstrated effect on a complaining party. However, given the history and the purpose of FOIA, this was more than a "technical violation." The statute clearly mandates the specific purpose of the session must be announced.").
- L. This Circuit Court improperly concluded that even if Town Council violated FOIA on 5 December 2007, its subsequent ratification on 17 December 2007, of the Town Council's actions taken on 5 December 2007, excused any FOIA violations since a FOIA violation, once committed, cannot be excused and/or undone by ratification.
- M. This Circuit Court improperly excused the Town of Mount Pleasant's violation of FOIA due to the Town Council Members' admitted deletion of official business e-mails from their personal e-mail accounts on the grounds that FOIA "law . . . in this area is ever developing" when the Town knew or reasonably should have known that deletion of e-mails involving official Town business affecting the public violated FOIA as such documents constituted "public records" under FOIA.

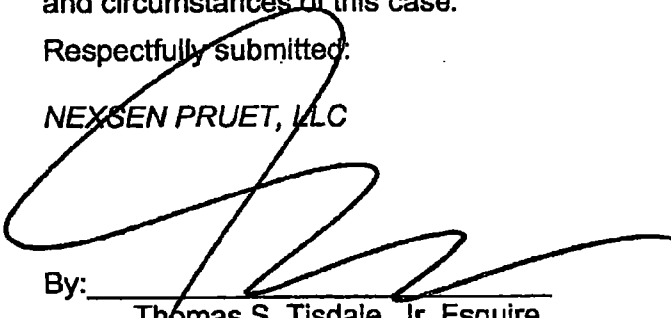
Mr. Brock reserves the right to supplement this motion with a memorandum prior to a hearing on this matter.

Mr. Brock respectfully requests this Circuit Court to undertake one or more of the following actions:

1. modify the Trial Order as noted herein;
2. modify the Attorneys' Fees Order to increase the amount of attorneys' fees awarded;
3. modify the Attorneys' Fees Order to include an award of litigation costs and expenses; and
4. all other relief deemed appropriate under the facts and circumstances of this case.

Respectfully submitted:

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
STEPHEN GEORGE BROCK,)
Plaintiff,)
v.)
TOWN OF MOUNT PLEASANT,)
Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2008-CP-10-3308

RETURN TO MOTION FOR
RECONSIDERATION, TO AMEND
FINDINGS OF FACT, AND TO ALTER
OR AMEND THE JUDGMENT

FILED
2011 SEP 12 PM 2:21
CLERK OF COURT

The Town of Mount Pleasant (herein "Town"), in Return to the Motion for Reconsideration, to Amend Findings of Fact, and to Alter or Amend the Judgment, submits unto the Court:

STANDARD

SCRCP, Rule 59(e) allows for the amendment of a judgment, commonly known as a motion to reconsider. See Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-780 (2004). As noted by the Supreme Court:

... our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review (emphasis original).

Id. at 24.

ARGUMENT

A review of the motion at hand appears to only evidence Plaintiff's disagreement with the construction of the facts of this case and the application of the law to them. The motion does not identify any facts or issues that were misconstrued or overlooked by the Court, and contrary to

his assertions, the Order of this Court addresses each and every issue raised by the Amended Complaint.

I. ATTORNEY'S FEES AND COSTS:

Subparts A and B of the motion concern the award of attorney's fees and costs. Plaintiff's issue with the amount of fees and costs awarded seems to be that they are inadequate and did not include consideration of litigation expenses. Neither is the case. Plaintiff was awarded \$42,000.00, not an insubstantial sum of money. Moreover, per the Freedom of Information Act (herein "FOIA") a party who prevails in part, as here, is entitled to an award of fees and costs, in the discretion of the trial court. This Court awarded the Plaintiff nearly 40% of his fees and costs, when it is arguable that he did not prevail on 40% of the issues he raised. That said, the award is discretionary and within the bounds of reason. And contrary to the contention otherwise, the fees and costs submitted to this Court on behalf of the Plaintiff were duly documented and attested to, and included attorney's fees, paralegal fees and litigation expenses.

II. AGENDA AMENDMENTS:

Subparts D and J of the motion take issue with this Court's holding that no FOIA violation occurred at the December 5, 2007 meeting of Council when a matter was added to the agenda of the executive session. The Plaintiff takes issue with this Court citing exigent circumstances as sometimes requiring an addition to an agenda in order to promote the expeditious conduct of public business. This Court fully explained the circumstances giving rise to this finding in Footnote 16 of its Order. That the Plaintiff would have preferred the Court to disregard this evidence and rely on other evidence is not sufficient cause to amend a ruling that is otherwise fully supported by fact.

The Plaintiff misconstrues the Court's reference to Herald Publishing Company, Inc. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986) on this issue. The case was not referenced to establish "substantial compliance" as the measuring stick of actions taken under the FOIA. The Herald Publishing case affirmatively acknowledged the propriety of amending agendas of executive sessions, as was the case with the December 5, 2007 meeting, due to an issue that arises at the last minute.

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

Id. at 11-12.

III. RATIFICATION:

Subparts E, F and L of the motion challenge this Court's holding with respect to the actions taken by the Town at a meeting held on December 17, 2007, ratifying actions taken at its meeting of December 5, 2007. Plaintiff contends, absent the FOIA statute specifically providing for a ratification procedure, an FOIA violation cannot be ratified. First, there was no finding of any FOIA violation at the December 5, 2007 meeting. Second, the assertion that ratification is precluded absent a statutory authorization is unsupported by any law, and it is directly contrary to binding precedent of this State. Multimedia, Inc. v. Greenwood Airport Commission, 287 S.C. 521, 339 S.E.2d 884 (Ct. App. 1986), acknowledged that an FOIA violation may be ratified at a properly noticed subsequent meeting, when no prejudice has ensued in the interim.

Multimedia also alleged the Commission violated the FOIA by holding its April meeting without notice. The complaint reveals, however, that the decision allegedly taken at the April meeting was reconsidered and ratified at the properly noticed May meeting. No cause of action under the FOIA has been stated where the complaint reveals the prior action was subsequently ratified at a meeting complying with the law. ... Moreover, substantial compliance with the Act will satisfy its requirements where a technical violation has no demonstrated effect on a complaining party... In this case, Multimedia was not prejudiced, since the action at the April meeting was reconsidered at the properly noticed May meeting... Reconsideration of the Commission's decision at the properly held May meeting cured any prior FOIA violation. (citations omitted).

Id. at 525.

Plaintiff does not contend the meeting held on December 17, 2007 was improperly noticed, and there is no evidence of any prejudice inuring to the Plaintiff or any one else by virtue of the actions taken by the Town at the December 17, 2007 meeting. The holding in Multimedia, Inc. is dispositive of this issue.

That the Arizona cases cited in the Multimedia decision were interpreting statutes containing a specific ratification procedure is of no moment. It is the reasoning adopted from those and the other decisions cited in Multimedia that is the law of this State, that being a FOIA violation can be ratified and cured at a properly noticed subsequent meeting when no prejudice in the interim has occurred. Moreover, this Court can take judicial notice that is commonplace for bodies, both public and private, to ratify previous action, particularly when they adhere to Robert's Rules of Order, as is the case with the Town.

IV. ANNOUNCED PURPOSES OF EXECUTIVE SESSIONS:

Subparts C, G, H and K of the motion take issue with this Court's ruling that the reasons for convening the executive sessions identified in the Amended Complaint were properly announced. The law requires the purpose of an executive session to be specifically stated. S.C.

Code § 4-30-70 (b) (2007). As found by this Court, every purpose stated for the contested executive sessions can be traced to specific, statutorily-condoned reasons for convening an executive session. The Plaintiff does not contend otherwise. Instead, the Plaintiff seems to contend that the essence of what is to be discussed must be announced, as opposed to the purpose for the session. Plaintiff's construction of the Act could compromise trial strategy, unduly invade privacy and squelch contractual negotiations. The purpose of specificity in announcing executive session is to advise the public of the subject matters to be discussed, not the specifics of the discussion. Otherwise, there would be no reason for having an executive session.

V. QUORUM OF COUNCIL IN COMMITTEE EXECUTIVE SESSIONS:

In Subpart I of his motion, Plaintiff contends that this Court did not address the issue of non-committee members of council attending executive sessions of committees. Such is not the case. This issue was specifically addressed in Part 3 of this Court's Order, beginning in the last paragraph on page 8. The Court addressed this issue in tandem with its ruling on the propriety of non-committee members of council participating in committee meetings, to include attending executive sessions at those committee meetings.

VI. E-MAIL DELETIONS:

Subpart M of the motion contends this Court erred by not finding that a violation of the FOIA occurred because of evidence that two councilmembers deleted Town related e-mails from their personal computers, contending these councilmembers "should have known" better.

This Court was correct to note that this area of the law is still evolving. This Court was correct to note that the Town had effectively addressed this issue with the adoption of a policy governing councilmembers conducting public business on Town computers. And, this Court did restrain the Town from engaging in future conduct pertaining to the deletion of Town related e-

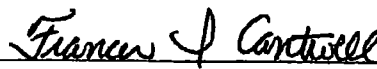
mails from computers, public and private. To the extent the Plaintiff is concerned with such conduct being ended, the Order of this Court cogently accommodates his concern.

CONCLUSION

The Order of this Court addressed and correctly disposed of all issues raised by this motion. There is no evidence of this Court having overlooked or misconstrued any facts or arguments. There is no evidence of this Court not addressing any issue raised. It is respectfully submitted that the Motion for Reconsideration, to Amend Findings of Fact, and to Alter or Amend the Judgment should be denied.

Charleston, South Carolina

September 9, 2011



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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
STEPHEN GEORGE BROCK)
Plaintiff,)
vs.)
TOWN OF MOUNT PLEASANT,)
Defendant.)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2008-CP-10-3308

PLAINTIFF'S REPLY TO
DEFENDANT'S RETURN TO
MOTION FOR
RECONSIDERATION,
TO AMEND FINDINGS
OF FACT, AND TO
ALTER OR AMEND
THE JUDGMENT

FILED
2011 SEP 14 PM 4:29
JULIE J. ARMSTRONG
CLERK OF COURT

Comes now the Plaintiff, Stephen George Brock ("Mr. Brock"), by and through his undersigned attorneys, and hereby respectfully files his response and reply to the Return of the Town of Mount Pleasant to the Motion for Reconsideration (the "Town Return") in the above-captioned matter.

ARGUMENT AND CITATION OF AUTHORITY

The Town Return filed by the Defendant, Town of Mount Pleasant (the "Town"), attempts to recast the Complaint itself, presents arguments addressing non-existent claims, and mischaracterizes other present claims. While entirely irrelevant to FOIA considerations, the Town's broad new claim/justification of simply following Robert's Rules of Order¹ (Town Return, p.4) can only be interpreted as an attempt to legitimize the Town's improper and illegal actions.²

¹ Robert's Rules of Order (Newly Revised) is the parliamentary authority adopted by ordinance by Mt. Pleasant Town Council.

² This Circuit Court should always be mindful that our Supreme Court, in Bellamy v Brown, 305 S.C. 291, 408 S.E.2d 219 (1991), stated that FOIA "is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decisionmaking." Bellamy v Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221

A. Attorneys Fees And Costs

Contrary to its assertions (Town Return, p.2), the Town cannot know whether litigation costs were or were not included in the summary of costs provided to this Circuit Court. Mr. Brock reasserts that certain litigation costs of this action were not included in the statement of fees and costs previously provided to this Circuit Court.³ Further, while acknowledging this Circuit Court's discretion, Mr. Brock respectfully requests this Circuit Court to take particular note of the extraordinary costs of this three-year FOIA action and this Circuit Court's finding that Mr. Brock prevailed on 4 of the 7 counts set forth in the Complaint. Additional attorneys' fees and litigation costs should be awarded over and above this Circuit Court's present award.

B. Agenda Amendments

Contrary to the Town's assertions (Town Return, p.2), there is no "evidence" in Footnote 16 of this Circuit Court's 22 August 2011 Order (the "Final Order") which supports the concept of "exigent circumstances" authorizing the Town to ignore FOIA and violate the law.. Footnote 16 is void of the actual evidence offered by a witness at trial and by the Town in deposition and at trial: The Town did not make any claim of an

(quoting Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979)). Furthermore, it is imperative to consider that the Supreme Court also concluded "FOIA creates an **affirmative duty** on the part of public bodies to disclose information [and] [the purpose of FOIA] is to **protect the public** by providing for the disclosure of information." Bellamy v Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (Emphasis added).

³ This Circuit Court barred Mr. Brock from obtaining the knowledge that a decision had been reached in this case and that attorneys' fees information were being submitted. Consequently, Mr. Brock was, therefore, unable to calculate the litigation costs which were not reflected in the summary provided to this Circuit Court by his legal counsel.

emergency or of "exigent circumstances" during the 5 December 2007, Special Meeting of Mt. Pleasant Town Council nor did the Town claim such during the trial herein. In fact, as previously noted, the evidence was directly to the contrary.

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The "proper and expeditious conduct of public business" standard for allowing additions to Town Council agenda exists in the absence of this Circuit Court's notice that Mr. Brock did not object to amendments to agenda to remove, defer, correct, and/or change the order of matters or to add executive sessions. Every objection to an agenda amendment involved a legislative act by Town Council, without notice to the public of the conduct of its business. In each instance, the acts were also undertaken without an amendment to the meeting agenda as required by Robert's Rules of Order with several of the actions resulting in significant expenditures of public funds and, moreover, for which there was no subsequent "ratification" as claimed for Town Council's 5 December 2007, actions.

As this Circuit Court is aware, FOIA provides for liberal interpretation to effect its purposes. Unfortunately, this Circuit Court has, instead, given license to governmental entities for less disclosure by allowing unnoticed actions under the premise of "exigent circumstances". The Herald Publishing Co.,⁴ decision addressed amendments of executive session agendas for unforeseen matters added to executive session agendas. The "exigent circumstances" is simply an extension of that earlier finding applied for a wholly different outcome – unnoticed action rather than unnoticed discussion. Further, while the "emergency" exemption for notice under FOIA would be

⁴ Herald Publishing Co., Inc. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (Ct.App. 1986).

difficult to parse, "exigent circumstances" opens wide the door to diminish FOIA's effectiveness and purpose. Regarding the Town's discussion of the 5 December 2007, Special Meeting, the Town actually makes the case for Mr. Brock:

[Mr. Brock] was at the [5 December 2007] meeting and heard the amendment to the executive session agenda being approved. He voiced no objection although he had an opportunity to do so during the citizens' input portion of the meeting.

NO
/E

The amendment to the executive session agenda "to receive legal advice pertaining to the OK Tire Store litigation" was an amendment to receive advice. Mr. Brock did not have any objection to the Town Council's receipt of legal advice as an amendment to the executive session agenda. Nevertheless, the "open meeting" agenda did not propose any action on the matter for addition to the executive session agenda nor was there any amendment made for such action in the open meeting agenda. It was impossible for either Mr. Brock or the public to know that the amendment to the executive session agenda would lead to the subsequent expenditure of \$6 million in public funds that same evening for property later appraised at not more than \$3 million. While the Town presumes to propose what actions Mr. Brock might have undertaken, the Town ignores the fact Mr. Brock left the meeting before the executive session was held since the agenda did not contain any indication of any actions for consideration following the executive session. Therefore, Mr. Brock could not have been presumed to voice an objection to an action items which was not disclosed and of which neither he nor the public had any notice whatsoever as FOIA required.

Additionally, this Circuit Court failed to take notice of the evidence demonstrating the Town Council's pattern of frequent and multiple amendments to executive session agendas resulting, in turn, in unnoticed actions.

C. Ratification

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Again regarding the Town's claim it follows Robert's Rules of Order, according to which, Special Meetings are scheduled between regular meetings for business which cannot wait until the next regular meeting. Agendas for Special Meetings may not be amended except for emergencies. In the event of an emergency amendment, any action taken must be ratified at the next regular meeting. The Town, via Mac Burdette, testified there was no emergency at the 5 December 2007 meeting. The Town Council added a matter to the Special Meeting agenda (*i.e.*, the "Ok Tire Litigation") under the auspices for "exigent circumstances" – which this Circuit Court subsequently approved but which does not exist under FOIA. Unfortunately for the Town, the Ok Tire Litigation agenda item was not ratified at the next regular meeting, but, at yet another, special meeting. At that special meeting, the Town disclaimed any previous error during the 5 December 2007, thereby specifically negating a "ratification" of its previous action. The Town Council did not ratify the 5 December 2007 decision, it merely characterized its later vote as reaffirming its 5 December 2007 vote. This action, as noticed and conducted, clearly fails to meet the FOIA standard, the Arizona Open Meetings Act, or Robert's Rules of Order.

D. Announced Purposes Of Executive Sessions

South Carolina law requires that "the presiding officer shall announce the specific purpose of the executive sessions."⁵ Moreover, the law states that the term " 'specific purpose' means a description of the matter to be discussed as identified in items (1) through (5) of [S.C. Code Ann. § 30-4-70(a)]."⁶ Subparagraph (b) refers to items (1) – (5) which identifies "reasons" – the clear equivalent of the "specific purpose" mentioned in subparagraph (b). Mr. Brock has never suggested anything more than the Town's need to comply with FOIA's legal notification requirement.⁷ Mr. Brock did not challenge the 16 November 2007, executive session announcement of "[l]egal advice pertaining to OK Tire Store litigation" as failing to meet the requirement of a statement of specific purpose. Additionally, Mr. Brock did not challenge the 13 November 2007, or 5 December 2007, executive session announcements for legal advice as violations of S. C. Code Ann. §§ 30-4-70(a)(1-5), (b), since legal advice and contract negotiations are "specific purposes" permitted for discussion during executive sessions under FOIA. The "personnel matters" issues for 13 November 2007, and 16 November 2007, were challenged since 'personnel matters' is not designated as a FOIA "specific purpose" and as used at those meetings was legally insufficient.

Conversely, this Circuit Court did, however, choose, without an evidentiary basis, the executive session agenda announcement of "to discuss legal and contractual matters pertaining to properties near Shem Creek" as the specific purpose for the

⁵ See S. C. Code Ann. § 30-4-70(b) (Thomson Reuters West 2010).

⁶ See S. C. Code Ann. § 30-4-70(b).

⁷ See S. C. Code Ann. §§ 30-4-70(a)(1-5), (b) (Thomson Reuters West 2010).

Town's unnoticed action to authorize the provision/retention of private attorneys for each Town Council member sued individually in the Ok Tire Litigation, other potential litigation, and/or other cases "now and in the future".

The Town argues that the purpose of the contested executive sessions "can be *traced* to the specific, statutorily-condoned reasons for convening an executive session". (*Town Return*, p.5) (Emphasis added). The Town ignores the plain fact that the public is not required to either trace, analyze, and/or intuit the Town's undisclosed purpose of an executive session. As noted in *Quality Towing, Inc. v. City of Myrtle Beach*,⁸

[FOIA is quite clear in its mandate that the "specific purpose" of the session "shall be announced". (Emphasis added). Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private. [T]he statute clearly mandates the specific purpose of the session was announced.⁹

It seems eminently reasonable to assert that the Supreme Court, in *Quality Towing*, refutes the Court of Appeals' finding in *Herald Publishing* that FOIA "does not contain any definition of the word 'purpose'".¹⁰

E. Quorum Of Town Council In Executive Sessions Of Committee Meetings

The issue of quorum creation by Town Council members' attendance at the executive sessions of committees for which they were not regular members, although included in the section of the Final Order dealing with Committee Meetings, was a

⁸ *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C.156, 547 S.E.2d 862 (2001).

⁹ *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C.156, 164, 547 S.E.2d 862, 866.

¹⁰ *Herald Publishing Co., Inc. v. Barnwell*, 291 S.C. 4, 11, 351 S.E.2d 878, 882.

separate count in the Complaint. The Town's discussion of this matter (Town Return, p.5) goes to the Town's mischaracterization of the attorneys' fees awarded to Mr. Brock by this Circuit Court.

F. E-mail Deletions

Contrary to the Town's assertions, Mr. Brock has not argued the proposition that the "'councilmembers' should have known better.'" (Town Return, p.5). Mr. Brock has simply asserted that the Town should have known and followed the South Carolina Public Records Act¹¹ from 2005 onward regarding the retention of public records created by the Town. It is not a minor point that the Town's presently-existing public records policy was finally enacted five years later during the pendency of and likely because of this case.

¹¹ S. C. Code Ann. §§ 30-1-10, *et. seq.* (Thomson Reuters West 2010). The Public Records Act creates comprehensive records management programs for South Carolina's public entities and, importantly, imposes criminal liability on persons who unlawfully and/or illegally remove, delete, deface, alter, mutilate, and/or otherwise destroy public records, unless the destruction or deletion is done pursuant to an approved records retention and/or destruction schedule. See S. C. Code Ann. §§ 30-1-30 through 30-1-60, 30-1-80 through 30-1-100 (Thomson Reuters West 2007). See Op. S.C. Atty. Gen., 21 May 2007 (2007 WL 1651338 *6, filed 21 May 2007) (*citing Op. S.C. Atty. Gen.*, 25 August 1997) ("The public policy of this State is 'to preserve, rather than destroy public records.'") (Emphasis added). See also generally Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, 152 (*citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975); Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 192, (1975)). The United States Supreme Court recognized an "agency's failure to [create and maintain public records] deprives the public of information which might have otherwise been available to it." Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, 152. See also State of Hawai'i Organization of Police Officers (SHOPO) v. Soc. of Professional Journalists - University of Hawai'i Chapter, 83 Hawai'i 378, 402, 927 P.2d 386, 393 (1996) (Finding Hawai'i's FOIA "requires agencies to provide access to those records that are actually maintained . . .").

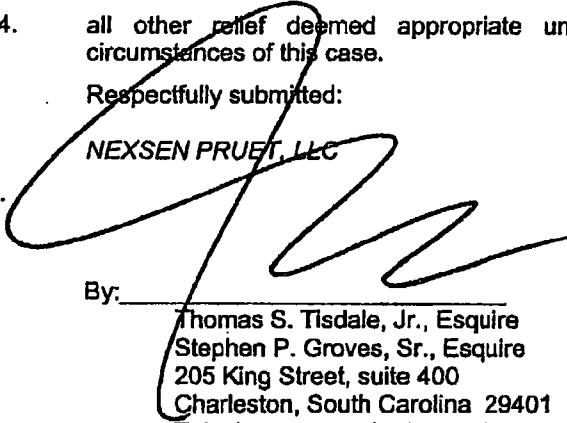
CONCLUSION

Based upon the foregoing arguments and citation of authority, the Plaintiff Stephen G. Brock, respectfully requests this Circuit Court to dismiss the *Town Return* and meritorious and to undertake one or more of the following actions:

1. modify the Trial Order as noted herein;
2. modify the Attorneys' Fees Order to Increase the amount of attorneys' fees awarded;
3. modify the Attorneys' Fees Order to include an award of litigation costs and expenses; and
4. all other relief deemed appropriate under the facts and circumstances of this case.

Respectfully submitted:

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Stephen G. Brock

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF CHARLESTON	)	COURT OF COMMON PLEAS
Stephen George Brock,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 08-CP-10-3308
	)	
Town of Mount Pleasant,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned action was held on January 24, 2011, before The Honorable J.C. Nicholson, Jr. in Courtroom 3E of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Thomas Tisdale, Esq.
 NEXSEN PRUET
 205 King Street, Suite 400
 Charleston, SC 29401
 Appearing for Plaintiff

Frances Cantwell, Esq.
 Allen Young, Esq.
 105 Wappoo Creek Drive
 Charleston, SC 29412
 Appearing for Defendant

DEBORAH GARRISON

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Case No. 08-CP-10-3308

Hearing of January 24, 2011

Before The Honorable J.C. Nicholson, Jr.

1 THE COURT: Please be seated.

2 All right, who is here representing whom?

3 MR. TISDALE: Your Honor, Thomas
4 Tisdale on behalf of the plaintiff, Stephen
5 Brock.

6 THE COURT: Okay.

7 MS. CANTWELL: Your Honor, I am
8 Frances Cantwell. This is Allen Young. We're
9 here on behalf of the Town of Mount Pleasant.

10 THE COURT: Okay. Just give me a
11 chance to -- I know that I read the pretrial
12 brief, which I believe was sent to me yesterday,
13 but give me a chance to just look at the Answer
14 and the Complaint and then we will get started.

15 MR. TISDALE: We sent you a brief
16 also yesterday, Your Honor. Have you got that?

17 THE COURT: No, I didn't. It may
18 have come in late, but I didn't get it.

19 MR. TISDALE: We sent it early in
20 the afternoon. Let's see if we have another
21 copy here. We sent it yesterday.

22 MS. CANTWELL: You got our e-mail?

23 THE COURT: I got yours by e-mail --
24 I got hers by e-mail.

25 MS. CANTWELL: We also have a hard

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1 copy of it.

2 THE COURT: If you have it, I'd be
3 happy to -- I'd love to receive a hard copy.
4 I read your e-mail is what I was saying,
5 yesterday.

6 MS. CANTWELL: (Tendering).

7 MR. TISDALE: Your Honor, we sent
8 it to the clerk's office.

9 THE COURT: Well, it may be down--
10 stairs. I don't know. I don't think it's here
11 in the file, but I will take a look; okay?

12 MR. TISDALE: I don't ---

13 THE COURT: Is this it? Is this what
14 you sent? Okay. Here it is, right here. Is
15 that it?

16 MR. TISDALE: That's what was sent
17 yesterday.

18 THE COURT: Okay. Thank you very
19 much. I apologize for being late. I had to go
20 by the post office and the post office -- I
21 didn't realize that they don't open until 9:00.

22 MR. TISDALE: 11:00 o'clock over
23 at the main post office, 11:30 to 2:00 or
24 something like that.

25 THE COURT: The one at the Isle of

1 Palms opens at 9:30. I stopped at one of those
2 little contracts and they didn't open until 9:00
3 o'clock.

4 MR. TISDALE: Well, this main post
5 office over here where the federal court is
6 doesn't open until 11:00 or 11:30.

7 THE COURT: I am glad that I didn't
8 try to go there. I would have been real late.

9 (OFF RECORD DISCUSSION ABOUT POST OFFICES)

10 MR. TISDALE: Our package, it does
11 have exhibits in it, too.

12 THE COURT: All right, (reviewing).
13 I've read the original Complaint. What did you
14 change in the Amended Complaint that I could
15 look at?

16 MR. TISDALE: I believe that we
17 had -- Frances, do you have a list that we can
18 look at? I believe that we added the aspect of
19 the e-mail issues.

20 MS. CANTWELL: Record retention.

21 MR. TISDALE: Record retention and
22 disposal of public documents.

23 THE COURT: Okay, (reviewing). Thank
24 you.

25 MR. TISDALE: I think that's what

1 we added.

2 THE COURT: Okay. Thank you, sir,
3 (reviewing).

4 MR. TISDALE: This has been hang-
5 ing around since '08.

6 THE COURT: (Upon review), okay.

7 MR. TISDALE: This is what we sent
8 yesterday.

9 THE COURT: I'm not going to have
10 time to read all that before we get started.
11 Okay? So what I think I will do is just allow
12 you all to make some short/brief opening
13 statements to frame the issues.

14 MR. TISDALE: Yes, sir.

15 THE COURT: And we'll get started.

16 MR. TISDALE: Yes, sir.

17 THE COURT: But before we do that,
18 have you all -- apparently just reading the
19 pleadings and having read the pretrial brief
20 from the defendant, have you all stipulated any
21 facts? Is there a major factual dispute
22 involved in this case or is it basically a
23 matter of law?

24 MR. TISDALE: Ms. Cantwell and I,
25 I think, tentatively have agreed -- of course,

1 I can't speak for her, but I think we generally
2 agree that it is a factual dispute. It is
3 simply a matter of our laying out our facts of
4 the method of government in Mount Pleasant for
5 you to apply the law.

6 THE COURT: Okay.

7 MR. TISDALE: And we're trying to
8 do that as expeditiously as we can. I think
9 that is what the case is about.

10 MS. CANTWELL: I agree with that.

11 THE COURT: All right, if you make
12 some very brief opening statements, I'll be glad
13 to hear you and then we will get started.

14 MR. TISDALE: Thank you very much,
15 Your Honor. For the record, Thomas Tisdale on
16 behalf of the plaintiffs.

17 Your Honor, this case was brought in
18 2008 by Stephen George Brock, the plaintiff,
19 and the case, as has been alluded to, really
20 involves many aspects of the method of the
21 government, the procedural method of the
22 government of the Town of Mount Pleasant as it
23 relates to four or five aspects of the Freedom
24 of Information Act and, we believe, the Business
25 Records Act; which follows the Freedom of

1 Information Act, impacts to some lesser degree
2 but it's a Freedom of Information Act case.

3 It's a little bit of unusual for a
4 Freedom of Information Act case because most of
5 them have the production of documents, or most
6 of them that I've been involved in and the cases
7 that I've read. But this is different because
8 it has to do with the behavior and the pattern
9 of how the government conducts its business as
10 required by the Freedom of Information Act.

11 I will acknowledge to you, and I
12 believe that Ms. Cantwell will agree, ---

13 THE COURT: Is this an isolated
14 incident that you're talking about or is it a
15 repetitive ---

16 MR. TISDALE: No, sir. It's a
17 pattern.

18 THE COURT: Okay. All right.

19 MR. TISDALE: And several of the
20 central issues are in the Amended Complaint, but
21 the evidence will show that it is a pattern and
22 that there is nothing isolated about any of it.
23 It's a method of doing business, whether it
24 complies with the law or doesn't comply with the
25 law. That's what is involved.

1 And I know, and I believe that Ms.
2 Cantwell will agree with me, that unfortunately
3 there's not a lot of law on some of these
4 issues. Some of them we have cases that have
5 been cited by our courts; some, there has been
6 no law; some issues have been addressed
7 extensively over a long period of time by the
8 case which we have given you -- that, of course,
9 may be persuasive but certainly is not law.

10 So it is sort of cutting-edge issues
11 on several of these real issues of the
12 government of the Town of Mount Pleasant.

13 THE COURT: Well, are there any
14 cases that -- like I said, I wish I could have
15 received it earlier to where I could have read
16 some. Are there any cases that address the
17 issues of injunctive relief against a muni-
18 cipality based on the FOIA?

19 MR. TISDALE: Your Honor, the FOIA
20 allows -- number one, it is entirely equitable.
21 The relief is clear in the statute. We can cite
22 the section, but it -- it allows -- you have
23 wide discretion for correcting violations of the
24 FOIA and you can call injunctive relief. The
25 law says specifically that injunctive relief

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1 doesn't require a showing of irreparable harm in
2 this case. It's in the law.

3 So the only relief that we are entitled
4 to here is two things: corrective or injunctive
5 relief, whatever you want to call it -- but the
6 law calls it injunctive. But Your Honor under
7 this law clearly has wide discretion in forging
8 a remedy to these problems, and it comes under
9 the heading of injunctive relief.

10 THE COURT: Okay.

11 MR. TISDALE: The other thing is
12 that the law allows that if you find that we
13 prevail in one or more of the aspects of this
14 case that you're entitled to award attorneys
15 fees.

16 So those are the issues -- I mean,
17 those are the matters of relief.

18 Now, the issues vary if I may just
19 touch on them. They are in both of our briefs.
20 There are about four issues, five at the most:

21 The first one is the proper use of
22 agendas for meetings and whether the Town of
23 Mount Pleasant is entitled to amend an agenda,
24 under whatever circumstances exist at the time
25 after forcing an amendment. That's one issue.

1 Another issue is whether or not the
2 Town of Mount Pleasant has violated the Freedom
3 of Information Act in the way that it has a
4 pattern in generally conducting its executive
5 sessions, because the law requires that the
6 specific purpose of an executive session be
7 announced and that it must be specific.

8 Now, there is law in South Carolina on
9 that point. It's the Quality Towing case --
10 T-o-w-I-n-g -- and we have given Your Honor a
11 copy of that. It says that just to say it's for
12 'personnel reasons' or 'conversational reasons'
13 or something like that fails. Unfortunately
14 that's the pattern that they've adopted to use
15 in announcing executive sessions.

16 The third issue would be something that
17 is also a pattern. That is under the system of
18 the Town of Mount Pleasant, which is a mayor
19 administrative system, Your Honor, they have
20 nine council people, including the mayor, and a
21 city administrator. The question is if -- and
22 they have a strong committee system. They have
23 about ten committees, maybe twelve, maybe eight,
24 but in that range. They meet regularly. The
25 question is whether or not the Freedom of

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1 Information Act allows council meetings to take
2 place in the context of committee meetings and,
3 if so, under what circumstances, because
4 meetings must be noticed and agendas posted at
5 Town Council meetings. So the ---

6 THE COURT: Are you saying that they
7 don't post agendas for the committee meetings or
8 they do?

9 MR. TISDALE: Well, they do
10 sometimes, I think. But it doesn't matter in
11 this context.

12 THE COURT: Okay.

13 MR. TISDALE: The question is
14 whether or not they posted meetings for Council
15 meetings, because they ---

16 THE COURT: I'm talking about the
17 committee meetings. What is your objection to
18 the committee meetings setup? I don't really
19 follow you on that.

20 MR. TISDALE: If more -- if a
21 quorum or more of the Council meets in the
22 committee, it becomes a council meeting.

23 THE COURT: I think that I read where
24 it is about five members that would be -- is
25 that a quorum under the rules?

1 MR. TISDALE: Yes, sir. Yes, sir.

2 THE COURT: Okay.

3 MR. TISDALE: And so if five or
4 more, up to nine, meet in the committee, it
5 becomes a council meeting without the public
6 knowing that there is a council meeting.

7 Of course what Your Honor will have
8 to decide, I think, we think, is under what
9 circumstances does it become a council meeting.
10 If council members sit in there as spectators
11 and not participate, just watch, does that
12 create a council meeting; or does it take
13 participation by nonmember of the committee; or
14 sitting as a committee at the front table where
15 the whole Council is ---

16 THE COURT: Are these committees just
17 solely Council members or are they intermingled
18 with other people?

19 MR. TISDALE: Solely Council
20 members.

21 THE COURT: All right.

22 MR. TISDALE: So that is a serious
23 issue. Another issue would be this e-mail
24 situation. It's, can Council meet by e-mail
25 communication? Can Council meetings be

1 conducted by e-mail communication? And is
2 e-mail communications about public issues a
3 Council meeting?

4 But in addition to that, a more serious
5 issue, is the preservation -- is an e-mail from
6 one council person to another council person or
7 from one council person to the entire council a
8 public document? We contend that it is and we
9 believe that the statute says that it is.

10 And does the Public Records Act require
11 preservation of that public document? Because
12 not only do the Town rules but the statute, the
13 Public Records Act, says that you can't destroy
14 public documents -- by in this case, for
15 example, the e-mails -- without a retention
16 policy. That is required, and they have no such
17 retention policy.

18 So the e-mail question comes down to
19 the preservation of public documents and the
20 question of improper use of e-mails for the
21 discussion of public business to the exclusion
22 of the public.

23 THE COURT: Okay.

24 MR. TISDALE: So, you know, all
25 the papers that we have given you say that the

1 Freedom of Information Act, by law, has to be
2 literally construed in favor of the public's
3 ability to get information about the conduct
4 of its business by the people who govern it.

5 We believe that in every case in these
6 circumstances that their pattern and form of
7 doing business violates the Freedom of
8 Information Act in the manner that I have
9 described.

10 THE COURT: Now, when you started you
11 said that there were four, possibly five.
12 You've given me four. What is the possible
13 fifth one or have you combined it in the four?

14 MR. TISDALE: I was ---

15 THE COURT: You talked about the e-
16 mail, is it permitted and should it be
17 preserved. Is that all one ---

18 MR. TISDALE: I think I've covered
19 it.

20 THE COURT: You've covered it?

21 MR. TISDALE: (Affirmative nod).

22 THE COURT: Okay. All right.

23 MR. TISDALE: I think I've covered
24 it by combining the e-mails and the destruction
25 of public records.

1 THE COURT: All right.

2 MR. TISDALE: Because the evidence
3 in the case clearly is that they sent e-mails
4 about public business to each other. They
5 routinely deleted the e-mails, and that's
6 destruction of a public record.

7 THE COURT: Assuming that it is a
8 public record.

9 MR. TISDALE: (Affirmative nod),
10 assuming that it is a public record and assuming
11 that it's entitled to be retained.

12 THE COURT: Well, let me just ask you
13 this question. I mean, if the -- if you get to
14 the e-mails and nondestruction of e-mails, then
15 what are you going to do with phone calls? Are
16 they going to have to start recording phone
17 calls? I mean, how far should it extend? I
18 mean, you can get to the point of almost being
19 absurd with it.

20 MR. TISDALE: Well, Your Honor, it
21 comes down to what's documented and what's not a
22 document.

23 THE COURT: Right.

24 MR. TISDALE: And the statute is
25 very clear that electronic communication is a

1 public document. It doesn't address -- phone
2 calls, I don't know the answer to that. If the
3 phone calls are taped, then it is public.

4 THE COURT: All right. Have -- how
5 do you think that they should be preserved?

6 MR. TISDALE: Your Honor, there's
7 a -- the Public Records Act has promulgated
8 extensive guidelines on how to preserve e-mail
9 correspondence. It's an exhibit in here.

10 THE COURT: Okay.

11 MR. TISDALE: It's subject to the
12 Public Records Act, and in South Carolina it was
13 promulgated in 2003, called the E-mail
14 Management System. Under the Public Records
15 Act, every municipality and every other public
16 body is supposed to have a plan for
17 communicating -- for preserving this e-mail
18 correspondence that affects public business.

19 Now, the Town adopted what they say is
20 an e-mail policy in 2010, several years after
21 this thing was promulgated, but it does not
22 address anything but Town-issued computers. All
23 of our complaint goes to private computers ---

24 THE COURT: Okay.

25 MR. TISDALE: --- and private

1 accounts. There is testimony that you will
2 hear, it will be in the record, from depositions
3 of council members saying, 'We have these public
4 discussions by e-mail and we just delete them as
5 a matter of course.'

6 So we think that -- and all we're
7 asking, we're not seeking to punish anybody
8 here, we just would like an Order of this court
9 suggesting that they obey the law.

10 THE COURT: Okay.

11 MR. TISDALE: That's all.

12 THE COURT: Thank you very much, Mr.
13 Tisdale. Anything else? I'm sorry, I didn't
14 mean to cut you off.

15 MR. TISDALE: No, sir, I think
16 that covers what the case is about. I will say
17 this for Your Honor's benefit, we're going to
18 have certainly one live witness, Mr. Brock, and
19 the possibility of two -- the possibility of two
20 very short witnesses on very confined issues,
21 and then we have three depositions.

22 THE COURT: All right. Okay. Thank
23 you very much. Ms. Cantwell.

24 MS. CANTWELL: Thank you, Your
25 Honor, may it please the court. I am Frances

1 Cantwell, here with Allen Young, representing
2 the Town of Mount Pleasant.

3 Your Honor, housekeeping, we will have
4 one live witness, Mac Burdette, who is the
5 former town administrator, recently retired and
6 then took another job at Patriot's Point.

7 My mayor is here. I don't think that
8 I will be calling him. It just depends on what
9 comes out in the case in chief.

10 Your Honor, we've got two Acts at play
11 here. One which I am calling the Public Records
12 Act, Public Records Retention Act, and the
13 Freedom of Information Act.

14 I want to address the Public Record
15 Retention Act first. You hit on a very key
16 point with your question to Mr. Tisdale, because
17 his primary complaint about public records
18 retention is what do you do with e-mails? The
19 Records Retention Act refers you back to the
20 Freedom of Information Act and says 'define what
21 a public document is.' It's a document produced
22 or maintained by the public governmental body.
23 So I think the first issue is whether an
24 individual councilman who sends an e-mail to
25 somebody else, whether that rises to the level

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1 of a public document. Even if it does, the
2 evidence is going to show that every e-mail that
3 comes into the Town system is saved -- whether
4 it meets the ---

5 THE COURT: Hold on just a second,
6 if you would, please. I just ran out of ink.
7 Excuse me. Go ahead.

8 MS. CANTWELL: Every e-mail that
9 comes through the Town system, whether it's
10 generated by the Town or sent to the Town is
11 saved. Whether it needs to be saved
12 indefinitely or not, it is. That's the evidence
13 on that issue.

14 But more fundamentally, this plaintiff,
15 respectfully, does not have standing to pursue a
16 violation of the Records Retention Act. The Act
17 is very specific setting forth how to enforce it
18 and, by and large, -- it's cited in my
19 memorandum, but by and large the responsibility
20 for promulgating rules and enforcing those rules
21 has evolved to the Department of Archives and
22 History.

23 Unlike the Freedom of Information Act,
24 which says that any individual can bring a suit
25 to enforce provisions of the Act, that same

1 thing does not hold true with the Public Records
2 Act, and it is not to be presumed that a private
3 cause of action is created by virtue of the
4 statute.

5 THE COURT: Who has the right to do
6 it, under the statute?

7 MS. CANTWELL: The records
8 department, Archives and History.

9 THE COURT: That is the only person,
10 in your opinion, that can enforce the Act?

11 MS. CANTWELL: Excuse me?

12 THE COURT: Is that the only person,
13 in your opinion, that can enforce the Act?

14 MS. CANTWELL: And the Attorney
15 General.

16 THE COURT: Or that can bring an
17 action to enforce the Act?

18 MS. CANTWELL: Yes, Your Honor.
19 It's very specifically laid out -- not only
20 civil remedies but also criminal remedies.
21 So I think that the statute -- we can put that
22 aside for the time being.

23 The Freedom of Information Act, Your
24 Honor, there is a question of whether or not
25 agendas can be amended. But what the evidence

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1 here is, is not that an agenda can be amended.
2 The plaintiff is contending that when having an
3 executive session, whether it is a called
4 session or whether it is one that pops up in a
5 meeting, that you can't add anything to that
6 executive session agenda. Now, while I agree
7 that there are some issues in this case that are
8 novel or cutting edge, the court has ---

9 THE COURT: I haven't looked at this
10 statute in quite a while but aren't you supposed
11 to announce specifically what you are going into
12 executive session for, go to executive session,
13 do whatever it is that you intended to, take a
14 vote, and come out and announce the results
15 publicly?

16 MS. CANTWELL: Sorta. You're right
17 that you announce the purpose, you go in, you
18 discuss the purpose. You cannot take action in
19 executive session, you can only discuss while
20 you're there -- receive advice, hear from your
21 staff for whatever the reason is, ---

22 THE COURT: Okay.

23 MS. CANTWELL: --- and then when
24 you come out of executive session, that's when
25 ---

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1 THE COURT: You take a vote publicly.

2 MS. CANTWELL: If in fact you want
3 to take any action, that's correct.

4 THE COURT: Okay.

5 MS. CANTWELL: And the evidence is
6 going to show that that is exactly what the Town
7 of Mount Pleasant does. They announce the
8 purpose, they go into executive session, they
9 come out, they make a Motion or they don't take
10 any action.

11 THE COURT: But Mr. Tisdale said that
12 they're taking things up in executive session
13 that they didn't announce.

14 MS. CANTWELL: No, he's saying that

15 ---

16 THE COURT: Is that correct?

17 MR. TISDALE: Well, the announce-
18 ment is not specific.

19 THE COURT: So you don't know what is
20 taking place in executive session?

21 MR. TISDALE: Precisely.

22 THE COURT: Okay.

23 MR. TISDALE: And you don't know
24 -- excuse me, Frances. And you don't know what
25 they did once they come out and vote, because

1 they don't tell you what they're voting on.

2 THE COURT: Okay. All right. Yes,
3 ma'am?

4 MS. CANTWELL: He has a problem
5 with the announced purpose. You're going to
6 have to make that call.

7 And the clerk has been maintaining that
8 you cannot -- if you have an agenda for
9 executive session that you can't add anything to
10 it, that you have to stick with that agenda.

11 Well, there is a case in South
12 Carolina, Court of Appeals, that directly
13 addresses that issue. It says, number one, you
14 don't need an agenda for an executive session,
15 that you only have to announce why you're going
16 in. Number two, there's no reason why you can't
17 amend the reasons that you're going into
18 executive session during the meeting, so long as
19 you announce you're going in. It's a Barnwell
20 case, cited in my brief. Still good law.

21 So the counterintuitive position that
22 the plaintiff is putting the Town in is, 'well,
23 the Town first of all goes beyond the pale
24 because they will advertise or let you know when
25 they're going to have an executive session, and

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1 give you the items that are going to be
2 included.' But because they do that, they go
3 beyond what the law requires, the position is --
4 well, since you do that, you can't add anything
5 to it, you can't amend it. Well, that just
6 doesn't make -- that doesn't square with what
7 the law is, respectfully.

8 THE COURT: Well, let me ask you
9 this. Let's assume that you're correct, that
10 they've published the agenda and that they've
11 put on the agenda what is going to be discussed
12 in executive session. Executive session comes
13 up and something is added to the discussion in
14 executive session, the item that is added, do
15 you think that after the executive session that
16 the council has the authority to act on that
17 without making it known public what they are
18 going to be voting on prior to taking that
19 action?

20 I am not talking about the items that
21 were published ---

22 MS. CANTWELL: No, I -- the answer
23 is 'yes,' because if they announce the purpose
24 of going -- of why they're going into executive
25 session, that's all that the Freedom of

1 Information Act requires.

2 THE COURT: Okay.

3 MS. CANTWELL: If they announce the
4 purpose, they go into session and they don't
5 take any action in executive session, all the
6 action is taken in public.

7 THE COURT: They can take action on
8 what was on the agenda, plus whatever they
9 announced before going into session?

10 MS. CANTWELL: That's right. So
11 long as it is announced, I believe that ---

12 THE COURT: Let me ask you one more
13 question, to back up, about the e-mails. I may
14 be wrong but from my perspective, the court's
15 perspective, where I think the danger lies is
16 the individuals e-mailing amongst themselves to
17 decide issues before they would walk into the
18 Council meeting. In other words, they're
19 counting their votes by e-mail or they are
20 making their argument by e-mail. That's, in my
21 opinion, the danger of the e-mails -- the public
22 has no input.

23 MS. CANTWELL: And the answer to
24 that is that there is no evidence that that is
25 going on.

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1 THE COURT: I am not saying that
2 there is evidence. I am just saying that's the
3 one concern of the court. I believe that there
4 was an article in the paper not too long ago
5 about some council, some council that was doing
6 exactly that and everything was being decided by
7 e-mail and that the debate by e-mail is taking
8 place.

9 MS. CANTWELL: And we would agree
10 -- I don't think -- I think that is exactly what
11 the Freedom of Information Act is designed to
12 prevent. But the evidence on this issue that
13 they're going to put in is that you have an e-
14 mail generated by a councilman, let's say, and
15 he sends it to the Town administrator, through
16 the Town computer, and he copies his fellow
17 councilman. He might have a question, he might
18 have a beef, he might just want general
19 information. The evidence is that maybe one or
20 two of the people that got copied will respond,
21 nobody else does. There is no simultaneous
22 discussion. There is not even five people who
23 -- they can't even show that five people opened
24 the e-mail, much less read it. It transpires
25 over a significant period of time. This is not

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1 the situation where you've got councilmen going
2 into a chat room or getting on there texting --
3 I don't do that but where you text, you have
4 information coming back and forth. That's not
5 happening. That is not texting.

6 THE COURT: Should it happen?

7 MS. CANTWELL: It should not
8 happen.

9 THE COURT: Should it be allowed?

10 MS. CANTWELL: Should not.

11 THE COURT: Okay.

12 MS. CANTWELL: But that's not the
13 issue that they're pressing today.

14 THE COURT: Okay. All right.

15 MS. CANTWELL: With respect to the
16 committee meetings, ---

17 THE COURT: The five members on the
18 committee?

19 MS. CANTWELL: Four members,
20 usually. Sometimes -- there is one committee
21 that -- and you'll hear testimony on the form of
22 government. They meet once a month with the
23 Council. A lot of business is done -- not done,
24 business is discussed, I would say, where -- the
25 recreation committee, for example, will hear

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1 various projects. They make recommendations to
2 the full Council. The committees meet one day a
3 week or two days a week prior to the meeting
4 with the council members.

5 Some people sit on one committee and
6 they don't have another committee meeting until
7 a third committee comes along, so what happens
8 is -- and I am not -- it is not sporadic, but
9 there are times when you will have in the room
10 a committee meeting going on and there may be
11 other members of Council who are not on the
12 committee but they're in the room. Sometimes
13 they sit at the table with the Council (sic),
14 sometimes they don't. The evidence is going to
15 be that they participate when they're called on
16 by the chair of the committee -- just like the
17 public is allowed to participate and are called
18 on by the chair of the committee. They do not
19 -- they do not debate and they certainly don't
20 vote. So the position that Mr. Brock is before
21 you is that by virtue of the presence in the
22 room it transforms a committee meeting into a
23 council meeting. We just don't believe that
24 this is a practical reading of the ---

25 THE COURT: What is your quorum for

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1 the City Council.

2 MS. CANTWELL: City Council, it's
3 five.

4 THE COURT: What if you've just got
5 five members on the committee, is that -- does
6 that classify as a meeting?

7 MS. CANTWELL: Well, I think that's
8 a good question for the plaintiff, because under
9 their reading of the statute it would. I don't
10 think so. The committee meetings are noticed,
11 the agendas for the committee meetings are
12 posted, the public knows what the committee
13 meeting is going to be about and -- frankly, I
14 think for legislators who want to be better
15 informed, to hear what is going on, to hear it
16 firsthand, the reports of the staff, to hear it
17 firsthand, public comment, I don't think that
18 they should be faulted for wanting to do a
19 better job. I think that's -- when all is said
20 and done, that's all that is happening in these
21 committee meetings. There may be more than five
22 members of council in the room at the same time
23 but when you look at who is conducting the
24 business and more importantly, who is voting on
25 the recommendations, there is no participation -

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1 - there is no participating by anybody, anybody,
2 other than the committee.

3 THE COURT: Whether -- you mis-
4 understood my question. My question was, when
5 you -- you said that at some committees that
6 they have five council members.

7 MS. CANTWELL: (Affirmative nod).

8 THE COURT: I am talking about those
9 committees that have five council members
10 sitting in the council meeting, does that
11 consist of a council meeting -- since we have
12 a quorum of committee members present? Of the
13 council members present at that particular
14 committee?

15 I'm not talking about people just
16 sitting in just to learn about what the issues
17 are and listen to what's going on, to inform
18 themselves. That is not my question.

19 MS. CANTWELL: When all is said and
20 done, that's what is happening at these
21 committee meetings. There may be more than five
22 members of council in the room at the same time,
23 but when you look at who is conducting the
24 business -- and, more importantly, who is voting
25 on the recommendations, there is no

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1 committee meeting to discuss budget issues, even
2 if there are more than five members of council
3 that are there because they are on the
4 committee, that doesn't transform the budget
5 committee meeting into a council meeting.

6 It's like the ways and means committee
7 that is going to meet at 4:30 this afternoon,
8 and in that committee as a whole you're going to
9 have all the sitting Council in the room at the
10 same time, with the Mayor, discussing financial
11 matters. Then they'll convene into a City
12 Council meeting.

13 So I think that ---

14 THE COURT: When are they making the
15 address to the City? Is that after all that or
16 before?

17 MS. CANTWELL: Well, Your Honor, --
18 I'm supposed to be over there tonight and I'm
19 hoping that I can get out of there before the
20 meeting starts.

21 THE COURT: All right.

22 MS. CANTWELL: But we don't know.

23 THE COURT: Okay.

24 MS. CANTWELL: Usually he starts at
25 7:30 and I was hoping that it would be finished

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1 before ---

2 THE COURT: Okay.

3 MS. CANTWELL: But the point that
4 I was making, Your Honor, is that there is --
5 Mount Pleasant is not an administrative form of
6 government. It's not a strong mayor form of
7 government. It is a council form of government.
8 All of the administrative matters are vested in
9 council and Council acts through committees.
10 That's why if you're a member of the council, if
11 you really want to know what is going on, if you
12 go to the committee meetings you hear it, you
13 see the debate, you get a feel for an issue.
14 Seeing something firsthand and reading it cold
15 is different.

16 The plaintiff would have this court
17 believe that all council members just want to be
18 better informed. I don't believe that that is a
19 logical reading of the Act and I don't believe
20 that that is what the Act intended to address.

21 THE COURT: Find out how many
22 committees that they have that have five Council
23 members.

24 MS. CANTWELL: I will.

25 THE COURT: Okay.

1 MS. CANTWELL: I will.

2 MR. TISDALE: Your Honor, I think
3 that every committee has only four members on
4 it.

5 THE COURT: Okay. All right.

6 MR. TISDALE: If that's wrong,
7 it'll come out in ---

8 MS. CANTWELL: There is one
9 committee, I was just corrected, the budget
10 committee, that has all members of Council.

11 MR. TISDALE: That's right. They
12 have -- the committee as a whole, that we'll
13 talk about at some point. But the complaint is
14 that when ---

15 THE COURT: I understand the
16 complaint.

17 MR. TISDALE: Okay. That's the
18 problem.

19 THE COURT: Okay.

20 MS. CANTWELL: So I'm going to sit
21 down but I -- I think when all is said and done,
22 Your Honor, that we can look at how Mount
23 Pleasant conducts its business. They go beyond
24 the pale, it's open. They acted in good faith.
25 They responded to every Freedom of Information

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1 Act request. There has been no prejudice at all
2 by virtue of how they conduct their business.

3 MR. TISDALE: Your Honor, there's
4 a couple of preliminary matters, if I may?

5 THE COURT: Yes, sir.

6 MR. TISDALE: We have -- Ms.
7 Cantwell and I have agreed that we have forty
8 exhibits that we've marked and I would like to
9 have them -- we've agreed, and these documents
10 have either been produced by her -- we've agreed
11 that there is no question that she might have a
12 question of relevancy in the context of
13 testimony. We've agreed that certainly she can
14 take that up as we go along.

15 THE COURT: Okay.

16 MR. TISDALE: But at the same
17 time, we would just like to introduce all forty,
18 with the understanding that if any are
19 inadmissible for particular reasons that you can
20 address that ---

21 THE COURT: Address it at that time.
22 Okay, go ahead and ---

23 MS. CANTWELL: No problem.

24 MR. TISDALE: And you have copies.

25 THE COURT: Okay.

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1 MR. TISDALE: So if they're
2 admitted in evidence, it's with ---

3 THE COURT: Subject to relevance.

4 MR. TISDALE: Yes, of course.
5 Unless you rule them out.

6 THE COURT: Right.

7 MR. TISDALE: They are in unless
8 you rule them out.

9 THE COURT: Okay. Is this -- how
10 many are there?

11 MR. TISDALE: Forty.

12 THE COURT: Is this the book, right
13 here, of them?

14 MR. TISDALE: Trial exhibits.

15 THE COURT: All right. Thank you,
16 sir.

17 MR. TISDALE: And, Your Honor, a
18 couple of things.

19 THE COURT: Have you already marked
20 them one through forty?

21 MR. TISDALE: Yes, sir.

22 THE COURT: Okay.

23 MR. TISDALE: They are tabbed.

24 Now, uh, this might be premature but Exhibit 39
25 are some ordinances of the Town, there's two --

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1 two exhibits that Ms. Cantwell gave us a couple
2 of days ago. They're rules of procedure saying
3 that Roberts Rules of Order govern ---

4 THE COURT: Which -- what are you
5 talking about, on Exhibit 39? Which page?

6 MR. TISDALE: Let me find me.

7 THE COURT: Or which section, I
8 should say. 30.34?

9 MR. TISDALE: Just let me get to
10 it.

11 THE COURT: Robert's Rules of Order?

12 MR. TISDALE: Yes, sir.

13 THE COURT: Okay.

14 MR. TISDALE: Exactly, 30.34. I
15 simply ask the court to take notice of Robert's
16 Rules of Order for that purpose.

17 THE COURT: Any objection?

18 MS. CANTWELL: No, sir.

19 THE COURT: The Court finds -- takes
20 judicial notice of 30.34 Rules of Order governed
21 by Robert's Rules of Order.

22 MR. TISDALE: And I think that
23 those are the only preliminary matters that I
24 have. Frances, do you have ---

25 THE COURT: Anything from the City

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1 before we get started with testimony?

2 MS. CANTWELL: Well, we can get
3 started and I'll address the exhibits as they
4 move them in.

5 THE COURT: Okay. Thank you very
6 much. Call your first witness.

7 MR. TISDALE: If you'll come to
8 the stand. Your Honor, there are documents
9 there -- will that be all right?

10 THE COURT: That's all right.

11 (WITNESS TAKES STAND)

12 STEPHEN GEORGE BROCK, being duly sworn
13 to tell the truth, the whole truth and nothing
14 but the truth, testified, as follows:

15 DIRECT EXAMINATION

16 BY MR. TISDALE:

17 Q. Mr. Brock, you are the plaintiff in this
18 action?

19 A. Yes, sir.

20 Q. And I'm going to be asking you questions
21 now and then Ms. Cantwell will ask you questions
22 later, and then the judge may have questions as
23 we go along. Where do you live?

24 A. I live at 34 Hopetown Road in Mount
25 Pleasant.

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1 Q. How old are you now?

2 A. Sixty-four.

3 Q. And how long have you -- are you a resident
4 of the Town of Mount Pleasant?

5 A. I am.

6 Q. How long have you been a resident of the
7 Town?

8 A. Since 1972.

9 Q. Have you lived in the Town continuously
10 since then?

11 A. Yes.

12 Q. Now I want to ask you just a little bit of
13 background, your education and training and
14 professional life for the record here. Where
15 did you grow up?

16 A. I grew up in Chesterfield County, South
17 Carolina.

18 Q. When did you -- where did you go to high
19 school?

20 A. Graduated high school in 1963 and attended
21 the University of South Carolina that fall,
22 graduated in 1965.

23 Q. Did you -- what sort of study did you
24 engage in at the University?

25 A. I have a bachelor of arts in journalism.

1 Q. Journalism?

2 A. (Affirmative nod).

3 Q. And when you got out of college, what was
4 your -- what did you do, professionally?

5 A. Shortly after college I joined the United
6 State Army, served for four years as a
7 commissioned officer.

8 Q. Where did you serve?

9 A. I served in the United States, in Columbia
10 actually for a period of time. My final year
11 was Vietnam. My final service year.

12 Q. When were you discharged from the Army?

13 A. February 1972.

14 Q. Mr. Brock, with regard to the Town of Mount
15 Pleasant, have you been involved in the conduct
16 of -- have you been involved in the operation of
17 the town, any boards or commissions, so forth?

18 A. I served on the Mount Pleasant Planning
19 Commission and I was chairman, I believe that it
20 was the first Shem Creek Management Committee,
21 which was a fact-gathering body that collected
22 information for the Council.

23 Q. Tell us roughly when you served on the
24 Planning Commission.

25 A. I am not sure but I'd say that was 2002-

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1 2004, somewhere in that range. Then most
2 recently I terminated last year a four-year
3 term.

4 Q. So that would have been 2010 that you
5 stopped serving?

6 A. Don't hold me to 2010, because I'm not
7 sure.

8 Q. But anyway it's been in the last year or
9 two?

10 A. Yes.

11 Q. All right. And when that service expired,
12 had this lawsuit that we're here about already
13 been instituted?

14 A. No, sir.

15 Q. When did you bring the lawsuit?

16 A. June 2008.

17 Q. All right. And you got off of the Planning
18 Commission after the lawsuit started?

19 A. Yes.

20 Q. All right. Now, explain to the court just
21 briefly the structure of the Town -- are you
22 familiar with the structure of town government?

23 A. Yes, sir.

24 Q. Mayor, council, administrative?

25 A. Yes.

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1 Q. Explain to the court and for the record,
2 please, how it works?

3 A. Well, as I understand it's called the
4 strong council system. The town has a mayor
5 and nine council members and a fulltime
6 administrator.

7 Q. All right.

8 A. I believe that the mayor is a part-time
9 job.

10 Q. But as far as council -- is the mayor a
11 voting member of the council?

12 A. Yes, he is.

13 Q. So there's nine council people altogether?

14 A. That's correct.

15 Q. Now explain the committee system and how it
16 works?

17 A. Well, the committees -- the council has a
18 couple committees that meet periodically, like
19 the election committee that meets when
20 necessary. These committees have three to four
21 members, some have four-member committees and
22 some are three. None have five.

23 Q. Okay. And so do the committees, to your
24 knowledge, meet on a regular basis?

25 A. Most meet monthly. Some meet more

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1 sporadically than that.

2 Q. How often does the Town Council meet on a
3 regular -- what are the regular times for the
4 meeting of Town Council?

5 A. Regular meetings, as published, would be
6 twelve a year.

7 Q. Monthly?

8 A. (Affirmative nod), monthly. Yes.

9 Q. And does the Town ever conduct what is
10 called special meetings?

11 A. Yes, sir.

12 Q. And on what occasions are special meetings
13 conducted?

14 A. I don't know how they are scheduled,
15 because some months we have more than others.
16 There are a considerable number of them.

17 Q. Special meetings?

18 A. Special meetings, (affirmative nod).

19 Q. Does it ever happen that special meetings
20 precede regular meetings, on the same day?

21 A. I think that the year that this covers that
22 there was a special meeting every council
23 meeting.

24 Q. A special meeting before every council
25 meeting?

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1 A. (No verbal response).

2 Q. Is that correct?

3 A. I think so.

4 Q. Have you read and studied the minutes of
5 all Council meetings?

6 A. Yes, sir.

7 Q. Do you have -- have you read and studied
8 the minutes of all special Council meetings?

9 A. Yes.

10 Q. All right. Now, with regard to executive
11 sessions which were mentioned earlier when we
12 were addressing the court, how does the Town
13 council handle executive sessions normally? In
14 other words, when are executive sessions held if
15 they are needed?

16 A. Well, the rule of order places them inside
17 the regular meetings but they are more often
18 held at the special meetings.

19 Q. Executive session meetings at the special
20 meetings?

21 A. Yes, sir.

22 Q. Now, I want to turn now to ask you to talk
23 about the issue of what is contained on agendas
24 -- well, first of all, let's talk about agendas.
25 Before any regular meeting of Town Council, does

1 the Town -- and pursuant to the FOIA, Freedom of
2 Information Act, but we call it FOIA just to
3 save time, if that is all right. Do they post
4 the agenda of regular meetings?

5 A. Yes.

6 Q. And in your experience with the Town, has
7 there ever been a time when they haven't posted
8 an agenda before a regular meeting?

9 A. I am not aware of one.

10 Q. With regard to special meetings of the Town
11 Council, do they post the agenda for special
12 meetings?

13 A. Yes, sir, they do.

14 Q. All right. And have you ever known as a
15 case where they haven't posted an agenda for a
16 special meeting?

17 A. No.

18 Q. All right. Now, it's been mentioned
19 earlier this morning that at this meeting of
20 the, uh, committee as a whole -- explain what
21 that is?

22 A. As I understand it, just having read about
23 it, the committee as a whole -- in one way it's
24 something like a, uh, looks like an executive
25 meeting in that the committee as a whole is

1 being convened from. It is often done -- it
2 lacks debate rules because you go into a
3 committee. When a committee as a whole is
4 formed, you step aside and a chairman is
5 appointed.

6 Q. Now, are you familiar with Robert's Rules
7 of Order?

8 A. Generally.

9 Q. Okay. And is the matter of how a committee
10 as a whole is formed and conducted properly
11 described in Robert's Rules of Order; in that
12 you go into it -- is that correct?

13 A. That's correct.

14 Q. Also I want to ask you, for the benefit of
15 the court, do Robert's Rules of Order also
16 address the proper method of invoking a special
17 meeting as opposed to a regular meeting of the
18 body?

19 A. It spells out the purpose.

20 Q. And the requirements?

21 A. Yes, sir.

22 Q. Okay.

23 MR. TISDALE: Now, Your Honor, I
24 -- I can ask him about Robert's Rules of Order
25 and make references to it, but I think that

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1 might be impinging on what you need to decide as
2 far as ---

3 THE COURT: Is there a copy of them
4 in any of this material?

5 MR. TISDALE: There is not. I
6 have a copy of Robert's here, and I'd be glad to
7 ---

8 THE COURT: Why don't we do this, why
9 don't you give me some excerpts if there are any
10 questions rather than the whole book, if you
11 don't mind.

12 MR. TISDALE: I'd be glad to.

13 THE COURT: I don't have a copy of
14 it, to be honest with you.

15 MR. TISDALE: Your Honor, what we
16 will do is that at lunchtime I will Xerox the
17 title page of this book, plus a page of -- the
18 pages that deal with special meetings.

19 THE COURT: I'd appreciate it if you
20 would because I don't have a copy of it.

21 MR. TISDALE: No, we will do that.
22 This is one edition -- there are many editions
23 but I don't think any aspect of what we are
24 dealing with has been revised recently.

25 THE COURT: Okay. All right.

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1 MR. TISDALE: So we will make
2 those copies at lunchtime. We'll have them
3 for you, on the special meetings and what a
4 committee as a whole is.

5 THE COURT: Okay.

6 MR. TISDALE: And how it is
7 invoked.

8 THE COURT: Unless the City has --
9 do you all have a copy of it already? Ms.
10 Cantwell, do you all have ---

11 MR. TISDALE: Do you have a copy
12 of Robert's Rules of Order?

13 THE COURT: Have y'all got a copy of
14 what he's talking about?

15 MS. CANTWELL: We have access to a
16 copy. I don't know what edition that he is
17 using, but ---

18 MR. TISDALE: We will be glad to
19 copy the ---

20 THE COURT: Do y'all have any
21 objection to him submitting to me copies of the
22 rules of order in question?

23 MS. CANTWELL: If he would just let
24 me look at them, we probably won't have ---

25 THE COURT: All right.

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1 MR. TISDALE: We will give them
2 copies, too. If they have something else on the
3 same subject, we can agree ---

4 THE COURT: That's fine. Thank you.

5 MR. TISDALE: And, Your Honor, if
6 you would look at -- this is getting at --
7 Section 30-4-80 of the Freedom of Information
8 Act deals with notice of meetings and, uh, it
9 requires an agenda for special meetings. We
10 contend -- and does not require agenda for
11 regular meetings but it does require certain
12 requirements be met if you have an agenda for
13 regular meetings; that kind of thing.

14 We contend, Your Honor, that the
15 special meeting -- when you look at what we did
16 do -- say that the purpose for the meeting has
17 to be established in advance and cannot be
18 varied. That will be in what we are going to
19 show you.

20 DIRECT EXAMINATION CONTINUED

21 BY MR. TISDALE:

22 Q. Now, Mr. Brock, I would like to ask you to
23 give us an example -- well, first of all, if an
24 agenda is posted, which everybody agrees is
25 always the case here and that Mount Pleasant has

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1 always posted agendas, if an item that is
2 posted, as the law says, twenty-four hours
3 before a scheduled meeting, what is wrong --
4 what is wrong with adding to that agenda after
5 the meeting is convened?

6 A. The harm is that you can't know that it is
7 on the agenda. There is no way to know.

8 Q. All right. Well, let's take as an example
9 of this the meeting that occurred -- there was a
10 meeting of the Town Council for Mount Pleasant
11 occurred on December 5th, 2007?

12 A. Yes, it did.

13 Q. And on that occasion, did -- was there an
14 agenda posted?

15 A. To the best of my knowledge; yes, sir.

16 MR. TISDALE: And, Your Honor, I
17 am referring to Exhibit 2.

18 DIRECT EXAMINATION CONTINUED

19 BY MR. TISDALE:

20 Q. Mr. Brock, look at the -- do you have
21 copies of the exhibits?

22 A. No, sir, I do not.

23 THE COURT: Would you just hand him
24 your whole stack?

25 MR. TISDALE: (Tenders), there you

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1 go.

2 THE COURT: Mr. Brock, there's the
3 whole stack. The label, I believe, is two. If
4 you could find that, please, sir.

5 THE WITNESS: Okay.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. TISDALE:

8 Q. If you would look at Exhibit 2. What is
9 Exhibit 2?

10 A. Mount Pleasant Special Town Council Agenda
11 for Wednesday, December 5th, 2007.

12 Q. All right. Now, is there anything on this
13 agenda that relates to what we have in the
14 course of this litigation, called the Shem Creek
15 issue? Shem Creek issue?

16 A. If I could take a moment, (reviewing). I
17 do not see it on -- it should be, (reviewing).

18 Q. Well, before we get into the details of
19 this, explain to the court what the Shem Creek
20 issue is. What is it about?

21 A. Well, sometime -- I don't know that the
22 dates are terribly important, but sometime in
23 mid-2007, there was -- Mark Mason -- there was a
24 project proposed for Shem Creek that included
25 condominiums on the site that was actually the

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1 O.K. Tire Store site.

2 Q. Is that in the Town of Mount Pleasant?

3 A. Yeah, it's on Shem Creek. And rebuilding a

4 dock, a section of dock that's on the harbor end

5 of Shem Creek, towards the harbor. The

6 condominiums would be sold in conjunction with

7 docks.

8 Q. So a lawyer in Mount Pleasant, Mark Mason,

9 owned this property?

10 A. He did. It was in the county initially and

11 I believe that the Town then annexed the

12 property.

13 Q. Is it correct that Mr. Mason wanted to sell

14 the property to the Town?

15 A. No.

16 Q. Is it correct that the Town wanted to buy

17 the property from Mr. Mason?

18 A. Yes.

19 Q. All right. Was that matter considered, in

20 Exhibit 2, at the meeting on December 5th, 2007

21 in executive session?

22 A. It was.

23 Q. Is there any reference to anything about

24 the Shem Creek property, the O.K. Tire property,

25 on the agenda of the meeting?

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1 A. I don't see it.

2 Q. Including on the agenda for executive
3 session within the agenda?

4 A. No.

5 Q. All right, sir. Now, Mr. Brock, was
6 Exhibit 3, which are minutes of that meeting
7 that we just talked about -- the agenda of,
8 December 5th, do you have that there?

9 A. Yes, sir.

10 Q. Now, if you'll look at page twenty-three,
11 ---

12 A. I have it.

13 Q. Is there any reference in the minutes to
14 the issue that we're talking about, the O.K.
15 Tire property?

16 A. Yes, sir.

17 Q. What is it under?

18 A. It's under the executive session

19 Q. Read the section applying to this ---

20 A. (Reading): "Legal advice regarding the
21 settlement of legal issue and purchase of
22 property known as Shem Creek Tire Store and
23 other properties."

24 Q. Is there any reference to that issue
25 anywhere in the notice of the meeting?

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1 A. Not that I know of.

2 Q. In any place in Exhibit 2?

3 A. That's it.

4 Q. Okay. Now, Mr. Brock, did in fact City
5 Council consider this -- was this matter added
6 to the agenda, according to the minutes, for
7 executive session?

8 A. Yes.

9 Q. Now, did the minutes -- referring to page
10 twenty-four of Exhibit 3, -- did Town Council
11 consider the matter in executive session and
12 then later in open session?

13 A. Yes.

14 Q. What actually did Town Council do as a
15 result of the action that night?

16 A. Well, they approved the settlement --
17 I mentioned earlier that there had been a
18 conversation earlier.

19 Q. Earlier, before this meeting?

20 A. Yes. There was a Motion approved in
21 executive session to obtain the O.K. Tire Store
22 property, the condemnation lawsuit and
23 authorized Mayor the execute the agreement.

24 Q. What did they actually approve? What was
25 the effect of this, that you found out later?

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1 A. Looking at this, you wouldn't know. But as
2 I remember, and I could be wrong but I think the
3 O.K. Tire condemnation didn't include the dock.
4 I think later it did include the dock but that
5 at the time it didn't.

6 Q. Did the Town buy the property?

7 A. It did.

8 Q. As a result of this action?

9 A. It did. There was another Motion setting
10 aside the money for it.

11 Q. How much did the Town pay for the property?

12 A. Six million.

13 Q. Dollars?

14 A. (Affirmative nod), I'm sorry. Six million
15 dollars, yes.

16 Q. And at any time prior to this point --
17 well, at any time -- when was the public
18 informed that they had spent six million dollars
19 for this property?

20 A. Well, if anyone was there they would have
21 learned it sitting there. I do not know when --
22 but the newspaper was following the case and the
23 story actually came out on the 7th.

24 Q. Was any notice given in the notice of this
25 special meeting on December 5th that the Town was

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1 going to consider spending six million dollars
2 to buy this property from Mr. Mason?

3 A. No, sir.

4 Q. Now, how -- from these minutes, uh, right
5 under the motion that you just referred to about
6 making a motion in executive session pertaining
7 to the O.K. Tire Store property, what does the
8 next paragraph relate to?

9 A. Well, the next paragraph establishes the
10 funding for it.

11 Q. What does it say -- does it say ---

12 A. It says how it will be paid for.

13 Q. I know. Does it say that's what that money
14 is for?

15 A. No, not actually.

16 Q. So they voted to appropriate six million
17 dollars coming out of executive session, but
18 does it anywhere in that say what they would
19 spend the money for?

20 A. No, it references a total project budget
21 amount of six million. It doesn't say ---

22 Q. Does it reflect anything about the contents
23 of the settlement agreement that is referred to
24 in the first motion?

25 A. No, sir.

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1 Q. Okay. Did in fact the Town buy the
2 property for six million dollars?

3 A. It did.

4 Q. Looking at Exhibit 1, what is Exhibit 1?

5 A. It's a settlement agreement between the
6 Town of Mount Pleasant and the owners of the
7 Shem Creek Tire Store.

8 Q. Is this the settlement agreement referred
9 to in the -- in the minutes of the meeting?

10 A. Yes, sir.

11 Q. And was this agreement signed and executed
12 by the Town of Mount Pleasant and Mr. Mason?

13 A. Yes, it was.

14 Q. What date did Mr. Mason sign this
15 agreement?

16 A. On the 5th of December.

17 Q. When did the mayor of the Town of Mount
18 Pleasant sign the agreement?

19 A. On the 6th of December.

20 Q. Was there anything left to do concerning
21 this agreement, that you know of?

22 A. I am not aware of any other, other than the
23 closing of the sale.

24 Q. Closing the sale based on the settlement
25 agreement?

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1 A. Right.

2 Q. Is there anything in the minutes that -- or
3 anywhere else in the papers that we have looked
4 at that refers to there being any sort of
5 ratification of this act?

6 A. No, sir.

7 Q. Mr. Brock, let me ask you this, was the
8 public informed of the plan to buy this property
9 for six million dollars at any time prior to the
10 6th of December, 2007? The public at large?

11 A. No, sir.

12 Q. The public, the town of Mount Pleasant?

13 A. Whoever might have been at the meeting
14 might have learned it, but the public at large
15 did not know.

16 Q. Was there anybody in the public, and I mean
17 the citizens of Mount Pleasant, given any notice
18 at any time that this matter would be considered
19 at the meeting?

20 A. No, sir.

21 Q. At the special meeting?

22 A. No, sir.

23 Q. At the executive session?

24 A. No, sir.

25 Q. Until the meeting was underway?

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1 A. No, sir.

2 Q. All right. Now, Mr. Brock, are the only
3 examples that you can give us, and you may refer
4 to your notes or whatever you have there,
5 including the exhibits in evidence, are there
6 any other examples that you're able to give us
7 of when agenda items have been added after the
8 original posting of the agenda?

9 A. Numerous times. Many times.

10 Q. Well, give us examples if you will.

11 MS. CANTWELL: Your Honor, I am
12 going to interpose an objection.

13 THE COURT: What is your legal
14 objection?

15 MS. CANTWELL: The legal objection
16 is that pursuant to the Freedom of Information
17 Act the error that was alleged to have been
18 made, you have to bring a suit on that issue
19 within a year. Mr. Brock, in his Complaint and
20 in his Amended Complaint, which has been pending
21 for three years talks about three meetings. To
22 the extent that this witness is going to try to
23 go beyond what is alleged in his Complaint, I
24 think is irrelevant.

25 THE COURT: Be glad to hear you.

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1 MR. TISDALE: Your Honor, this is
2 simply to show how the conduct, the specific
3 item that was on is -- because that was the only
4 one known at the time, this one on December 5th.
5 I simply want to use examples ---

6 THE COURT: Well, your Complaint
7 lists, I believe, some more -- let me see,
8 (reviewing). The Complaint lists one on
9 November 16th, November the 13th and on December
10 5th.

11 MR. TISDALE: Yes, sir.

12 THE COURT: You list those three.

13 MR. TISDALE: Yes, sir.

14 THE COURT: Are those the three that
15 you are going into now? Or are you going into
16 some others?

17 MR. TISDALE: No, I will go into
18 those and then if there are any other issues
19 that we need to talk about, we can talk about it
20 after that.

21 THE COURT: Well, for right now let's
22 just limit it to the three that are in your
23 Complaint.

24 MR. TISDALE: Okay. Well, the
25 three, Your Honor, that ---

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1 THE COURT: November 13th, the 16th
2 and December the 5th.

3 MR. TISDALE: December 5th was one.
4 What was the other one?

5 THE COURT: The other ones -- there's
6 two more -- it's -- hang on just a second.
7 November 16th, November 13th and December the 5th
8 -- all in '07.

9 MR. TISDALE: That's fine.

10 THE COURT: Those are the three that
11 are listed in your Complaint.

12 MR. TISDALE: We will deal with
13 those and then if there is any other concern(s),
14 we can take that up then.

15 THE COURT: Okay. I am going to
16 limit it to just those at this point in time.
17 Okay?

18 MS. CANTWELL: Thank you, Your
19 Honor.

20 THE COURT: Subject to your
21 objection.

22 MS. CANTWELL: Thank you, Your
23 Honor.

24 DIRECT EXAMINATION CONTINUED

25 BY MR. TISDALE:

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1 Q. Mr. Brock, if you would take a look at
2 Exhibit 16.

3 A. Yes, sir.

4 Q. What is this?

5 A. It's the Town of Mount Pleasant notes for a
6 special Town Council meeting on Friday, November
7 16th, 2007.

8 Q. And is that for a special Town Council
9 meeting?

10 A. Yes.

11 Q. And what does it say that it is going to
12 take up?

13 A. Under executive session there is a single
14 item of "legal advice for O.K. Tire property
15 location."

16 Q. All right. Now, can you give us examples
17 -- was there a meeting of the special -- a
18 special meeting on November 16th?

19 A. Yes, there was.

20 Q. Now, is there anything in there that would
21 relate to the amendment of the agenda?

22 A. Mr. Burdette asked that Council to amend
23 the agenda to include personnel matters
24 pertaining to the clerk of council.

25 Q. Was there any notice given of the intent to

1 consider personnel matters at that meeting?

2 A. No, sir.

3 Q. Was it posted in the agenda of the special
4 meeting that personnel issues would be
5 considered?

6 A. No, sir.

7 Q. All right.

8 A. There was another amendment.

9 Q. What is that?

10 A. A motion to amend the agenda to add
11 personnel matters relating to boards and
12 committees.

13 Q. All right. And was there any specific
14 saying that there was notice of the meeting or
15 the proposal for the executive session, other
16 than what you've read from the exhibit?

17 A. No, sir. Those were the motions that were
18 proposed.

19 MR. TISDALE: Your Honor, this
20 also spills over into another complaint about
21 proper posting for executive committee meetings.

22 THE COURT: Yes, sir.

23 MR. TISDALE: That they are to
24 state the specific purposes, statement of
25 purposes, and that this is insufficient for

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1 those purposes. It also goes to the defective
2 agenda issues.

3 MS. CANTWELL: Your Honor, I know
4 that this is nonjury, but I believe that this is
5 ---

6 THE COURT: Well, he's just reiterat-
7 ing his legal position that he stated at the
8 beginning, and ---

9 MS. CANTWELL: I understand.

10 THE COURT: --- I will let you do the
11 same thing. Okay? He just has to point out to
12 me his legal positions. Okay? I don't take it
13 as testimony. Okay? I take it as argument.
14 Okay? But thank you.

15 DIRECT EXAMINATION CONTINUED

16 BY MR. TISDALE:

17 Q. Now, Mr. Brock, let's look at Exhibit 13.

18 A. Okay.

19 Q. What I am trying to see is if there are any
20 agenda issues. Exhibit 13 has to do with the
21 Town Council meeting on September 11th -- not
22 November. But do we have a meeting of Council
23 on the 13th of November?

24 A. Yes.

25 Q. Where is that recorded in the exhibits, do

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1 you know?

2 MS. CANTWELL: Twenty-two.

3 MR. TISDALE: Twenty-two?

4 DIRECT EXAMINATION CONTINUED

5 BY MR. TISDALE:

6 Q. Exhibit 22?

7 A. Okay.

8 Q. Look at Exhibit 22.

9 A. I got it.

10 Q. Now, is there anything about the meeting on
11 November 13th that relates to agenda items?

12 A. There is an executive session.

13 Q. All right. First of all, is this a special
14 Town Council meeting or a regular meeting?

15 A. It's a special Town Council meeting
16 immediately prior to a regular meeting.

17 Q. And was there any agenda amendments in
18 connection with this meeting?

19 A. Yes, two amendments.

20 Q. Two amendments to the posted agenda?

21 A. (Affirmative nod), to the posted agenda.

22 Q. What were the amendments that were
23 proposed? You're looking in Exhibit 22, I
24 think?

25 A. There was a motion to amend the agenda to

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1 add an item "C", legal advice pertaining to
2 Ordinance 07060, pertaining to the comprehensive
3 plan; and that added, as Item B, legal advice
4 pertaining to the attorney general concerning
5 the planning commission.

6 Q. Was the public given any notice prior to
7 this special Town Council meeting of the
8 addition of -- of the issues that these matters
9 would be considered at the meeting?

10 A. No, sir.

11 Q. And were these matters acted on at the
12 meeting?

13 A. Yes, for this meeting on November ---

14 Q. Now, look at the minutes of that meeting on
15 November 13th, the second page of the exhibit.

16 A. Okay.

17 Q. I think that you said that the motion was
18 made to amend the agenda earlier, as you
19 testified?

20 A. (No verbal response).

21 Q. When they came out of executive session,
22 did they move to approve what had been done in
23 executive session?

24 A. They made -- there was a motion to direct
25 the Town attorney to move forward with the

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1 discussion in the executive session to obtain
2 property on Shem Creek.

3 Q. IS there anything else in the minutes
4 anywhere that would give the public notice of
5 what had been discussed?

6 A. No. It's listed on the agenda -- stated in
7 the minutes, to discuss legal and contractual
8 matters pertaining to property near Shem Creek.

9 Q. All right. With regard to -- what is the
10 second matter that they took up in the meeting?

11 A. A motion to ---

12 Q. About amending the agenda?

13 A. The motion to -- Mr. Bustos made a motion
14 to authorize the Mayor and members of Council to
15 retain their individual attorneys for all
16 lawsuits, now and in the future, to be reviewed
17 by the Town attorney.

18 Q. Was that matter considered in open session
19 after the executive session?

20 A. I have not read the minutes but it's passed
21 here, approved by everyone present.

22 Q. Well, look at -- it says "all present."
23 Is that right?

24 A. Yes.

25 Q. Now, is the public -- is there any evidence

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1 anywhere that the public, that is the residents
2 of the Town of Mount Pleasant, had any notice
3 prior to this action in this special Town
4 Council meeting on November 13th, 2007, that the
5 Council was going to authorize the hiring of
6 private attorneys by all members of the Council?

7 A. No, sir.

8 Q. To your knowledge, and based on evidence
9 that you've seen, is this the first notice of
10 this action?

11 A. The first notice is the action itself.

12 Q. At the meeting?

13 A. (Affirmative nod), at the meeting.

14 Q. All right, sir.

15 MR. TISDALE: Now, Your Honor, ---

16 THE COURT: Which exhibit are you
17 reading from there?

18 MR. TISDALE: The 13th of November.
19 Exhibit 22, page two.

20 THE COURT: Okay.

21 MR. TISDALE: Now, Your Honor, I
22 realize that you have -- I'd like to ask him to
23 talk about any other incidents that he knows
24 about where amendments have been -- where
25 agendas have been amended without prior notice,

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1 in the context of a special meeting. I would
2 like to propose that I be able to ask him, does
3 he know of any such incidents under those
4 circumstances, for the record.

5 THE COURT: I will be glad to hear
6 you on your argument.

7 MS. CANTWELL: My same objection.
8 He is trying to get in evidence that is outside
9 of the -- matters that are outside the relevancy
10 of what he alleged in his Complaint.

11 THE COURT: Well, the relevancy, I
12 think, would go to the overall picture or the
13 overall scheme. I am not going to let him go
14 into specifics but he can talk some about the --
15 I will let him talk about some generalities that
16 I think would go towards the equitable issue
17 before the court as far as whether injunctive
18 relief should be done based on pattern. I am
19 not going to let him go into specifics to where
20 this court would rule on a specific violation.
21 Okay? I will let him go into the general terms
22 of where he's seen Robert's Rules of Order
23 violated or whatever he observed. Okay?

24 MS. CANTWELL: That's fine. And
25 for the record, ---

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1 THE COURT: I am not going to view
2 that information as action to be taken, but I am
3 going to view it as an overall pattern that
4 would go to the equitable part of the court
5 making a decision whether injunctive relief
6 should be granted or not.

7 MS. CANTWELL: Thank you.

8 MR. TISDALE: Your Honor, that is
9 the only reason that we are proposing to ---

10 THE COURT: I think that's the only
11 relevance that it would have. Not that there
12 has been a specific violation of the FOIA.

13 MS. CANTWELL: Well, I -- I guess
14 what I didn't want to do was to clutter up the
15 record with exhibits that relate to meetings
16 that aren't ---

17 THE COURT: I understand and we are
18 not going to do that. Okay?

19 MS. CANTWELL: Yes, sir.

20 THE COURT: Please proceed.

21 MR. TISDALE: Thank you very much,
22 Your Honor.

23 DIRECT EXAMINATION CONTINUED

24 BY MR. TISDALE:

25 Q. Mr. Brock, have you attended meetings on a

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1 regular basis of -- special and regular meetings
2 of the Town Council of Mount Pleasant?

3 A. I have, not so much recently as in the
4 past.

5 Q. And have you also attended, from time to
6 time, committee meetings of the Town?

7 A. Yes, sir.

8 Q. And have you -- other than the specific
9 meetings that we have referred to already in
10 your testimony, have you observed occasions when
11 at special meetings of the Town of Mount
12 Pleasant the Council during the meetings,
13 special meetings, has amended the agenda to add
14 items of consideration -- to be considered by
15 the Council?

16 A. I am aware of times that it was amended,
17 but to tell you a specific meeting from three
18 years ago, it would be hard to be absolutely
19 certain of a date.

20 Q. Well, have they done so?

21 A. They have done it, yes.

22 Q. How do you know that they have done it?

23 A. It's recorded in the minutes.

24 Q. And have you read the minutes?

25 A. I have.

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1 Q. All right. Now, going back to the Shem
2 Creek thing for just a minute, uh, if you would
3 look at ---

4 THE COURT: Let me interrupt and just
5 ask one question, if I may. Can you give me
6 some type of number that you've observed where
7 this -- where you've observed a violation? What
8 you say is a violation? I am not saying that
9 the court is saying that it is a violation.
10 Okay?

11 THE WITNESS: During the period of
12 time of the lawsuit, I counted ten -- I think
13 ten times during that period of time -- that
14 would be in the three instances that we have ---

15 THE COURT: Okay, so in addition to
16 the three that you specifically discussed?

17 THE WITNESS: Yes.

18 THE COURT: Please proceed.

19 DIRECT EXAMINATION CONTINUED

20 BY MR. TISDALE:

21 Q. During what period of time?

22 A. Between July 1, 2007 and June 30th, 2008.

23 Q. So in addition to the three that we've
24 talked about, you observed ten more instances
25 that ---

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1 THE COURT: Or are -- he's saying
2 seven more.

3 MR. TISDALE: Seven, total.

4 THE COURT: Total of ten.

5 MR. TISDALE: All right, sir.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. TISDALE:

8 Q. Is that correct?

9 A. That's correct. Yes, sir.

10 Q. Now going back to the Shem Creek issue just
11 a minute, Mr. Brock, ---

12 A. May I add one quick note?

13 Q. Yes, sir.

14 A. The amendments weren't all at special
15 meetings. I think one or two of them were at
16 regular meetings.

17 Q. All right. So out of the ten, then around
18 nine or ten -- around eight or nine were at
19 special meetings?

20 A. Right.

21 Q. And one or two at regular meetings?

22 A. I think so, best that I recall.

23 Q. And that would be when, when the agendas
24 were amended to add an item for discussion that
25 did not appear on the posted agenda?

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1 A. I am referring to meetings where things
2 were added.

3 Q. All right. Now, take the Shem Creek issue
4 for just a minute. If that thing came up on
5 December 5th, 2007, and there was a requirement
6 to post it twenty-four hours in advance, by law,
7 what would the Town have to do to meet those
8 requirements and not violate the FOIA, if in
9 fact it is a violation?

10 MS. CANTWELL: I object to this
11 witness -- he's not qualified to, he's not a
12 lawyer.

13 THE COURT: I will sustain the
14 objection.

15 MR. TISDALE: Okay.

16 DIRECT EXAMINATION CONTINUED

17 BY MR. TISDALE:

18 Q. Mr. Brock, on the Shem Creek matter, look
19 at Exhibit 27.

20 A. Okay.

21 Q. Does this relate to the Shem Creek issue?

22 A. Just a second. (Upon review), yes, it
23 does.

24 Q. And what is it?

25 A. It is an appraisal of all of the property.

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1 Q. It was purchased at the meeting that was
2 not an agenda item? Is this the same property?

3 A. That's right.

4 Q. December 5th, 2011 (sic)?

5 A. That's correct.

6 Q. Where did this appraisal come from?

7 A. The Charleston County Park & Recreation
8 Commission was ordered by the Director of
9 Planning and Development.

10 Q. Where did -- was this produced by the Town
11 of Mount Pleasant?

12 A. It was produced by the PRC, Parks &
13 Recreation Commission.

14 Q. Where did you get it?

15 A. It might have been through a FOIA request.
16 I am not certain.

17 Q. Okay.

18 A. It's a public document.

19 Q. When was this appraisal conducted? What is
20 the date of it?

21 A. The letter is --

22 Q. It is as-is, ---

23 A. The letter says December 11th, but the
24 actual appraisal is an as-is appraisal as of
25 October 31.

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1 Q. 2000-what?

2 A. 2008.

3 Q. What was the value that this appraisal
4 determined for the property that had already
5 been purchased for six million dollars?

6 A. There were two figures given. The first is
7 that the market value of the property as-is, as
8 of October 31, 2008, is three million three
9 thousand dollars.

10 Q. All right, that was about eleven months
11 after the action was taken to buy it?

12 A. Yes.

13 Q. And about ten months after the closing of
14 the transaction?

15 A. Yes.

16 Q. All right. Now, Mr. Brock, I want to turn
17 our attention for a few minutes to the manner in
18 which the Town conducts committee meetings.

19 Would you explain how committee meetings are
20 conducted by the Town of Mount Pleasant?

21 A. They are generally held about a week before
22 the next Council meeting.

23 Q. Yes, sir.

24 A. Usually on a single day, sometimes two
25 days. There are several committees that are set

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1 to meet every month, pretty much without fail,
2 and then there are some that are more sporadic,
3 meet less often. Membership is either three or
4 four members of the Council.

5 Q. Do you know of any committee that meets --
6 first of all, are you familiar with the
7 committees and how they meet in the Town?

8 A. Yes, sir.

9 Q. Have you attended meetings?

10 A. Yes, sir. Often.

11 Q. Often?

12 A. (Affirmative nod).

13 Q. Have you observed meetings?

14 A. Yes, sir.

15 Q. And I think that you testified, but how
16 many committees are there?

17 A. I believe that it's eleven.

18 Q. Now, uh, on the occasions when you have
19 attended meetings and based on the minutes of
20 committee meetings that you've read, that are
21 in evidence, what is the practice generally of
22 Council members who are not members of a
23 committee attending committee meetings?

24 A. I could speak more clearly during the time
25 of the lawsuit moreso than the last month or so,

1 but they meet in a meeting room of Town Hall.
2 The room is set up in a semi-circle dais, if you
3 will. I believe that there are nine chairs,
4 depending on the number of members of the
5 committee and the Council members. There's a
6 space for a recorder. In front of that is a
7 long table for any staff members that might have
8 presentation for the committee, and behind that
9 is the public speaker desk.

10 Q. Are members of the public allowed to attend
11 these meetings?

12 A. They are all open.

13 Q. All right. Based on your experience, when
14 there are more than four -- more than the
15 committee members present, more members of Town
16 Council at those meetings, where do those
17 Council people sit in the meeting as a general
18 matter?

19 A. In my experience, at the same dais as the
20 committee members.

21 Q. When you say dais, you mean the table?

22 A. The place where they all sit. I called it
23 a "dais". I am not sure what it should be
24 called.

25 Q. And on occasion do committee members who

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1 are not members of -- excuse me, strike -- I
2 will retract that question.

3 On occasions do members of Council attend
4 who are not members of the committee -- who
5 attend the meetings -- who participate in the
6 discussion of the committee?

7 A. They have.

8 Q. And is there any distinction made between
9 the Council -- by observation, any distinction
10 made between members of the committee and other
11 members of Council who are present, sitting at
12 the table?

13 A. Distinction in what sense? I'm sorry.

14 Q. Well, are they separated in any way?

15 A. No, it's -- it's a curved desk with chairs
16 behind it and they all sit there.

17 Q. Would there be any way for a member of the
18 public, unless they knew the people personally,
19 to tell who was a member of the committee and
20 who was a noncommittee member? Council members?

21 A. You might infer from the name plate but,
22 no, there's no way to know.

23 Q. Okay. I'd like to ask you to take a look
24 at Exhibit 10.

25 A. Okay. (Upon review), all right.

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1 Q. This is a long exhibit but I would ask you,
2 if you can, to inform the court as to what in
3 these minutes of Town Council of November 9th,
4 2010, relate to this issue.

5 A. The minutes themselves relate to the
6 consideration of the right to do business, refer
7 to -- they refer to one committee directly and -
8 - in terms of a motion that is being made.

9 Q. Explain the significance of it to this
10 issue of committee meetings containing more
11 members than ---

12 THE COURT: Where are you reading
13 from? Page eight?

14 MR. TISDALE: Page four, Your
15 Honor.

16 THE COURT: Page four?

17 MR. TISDALE: Of Exhibit 10,
18 Council minutes.

19 THE COURT: Thank you, sir.

20 DIRECT EXAMINATION CONTINUED

21 BY MR. TISDALE:

22 Q. Read it and then explain it.

23 A. It is under New Business and there's a
24 motion -- Mr. Gawrych said the first seven items
25 were all approved unanimously by the Annexation

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1 Committee. And, "If there is no objection, we
2 would ask that under New Business, Item A, 1
3 through 7, be approved for the first reading."

4 Q. What is the significance of this on the
5 matter of the make up of the committee and extra
6 Council members being present?

7 A. Well, the committee isn't mentioned but the
8 planning committee met here and it also
9 indicated a quorum present, (inaudible reading).

10 Q. What is the significance of that?

11 A. It has -- let me check and see how many
12 were present.

13 Q. Please.

14 A. (Upon review), it appears in the minutes of
15 the Council meeting itself. There was quorum of
16 the Annexation Committee. I want to say it
17 seven but without -- it's not attached.

18 Q. Do you mean that there were seven people
19 present?

20 A. At the Annexation Committee, that
21 apparently approved this unanimously.

22 Q. And how many are members of that committee?

23 A. (No verbal response).

24 Q. Council members?

25 A. Well, there are no more than four.

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1 Q. That's what I mean.

2 A. No more than four.

3 Q. No more than four but seven participated?

4 A. That's my recollection. I don't have the
5 minutes in front of me.

6 Q. All right. Look at Exhibit 30, if you
7 will.

8 A. All right. There were seven present at the
9 Annexation Committee meeting.

10 Q. Let's be sure that we understand that. At
11 the Annexation meeting that we just referred to,
12 there were how many Council people present?

13 A. Seven.

14 Q. Seven?

15 A. (Affirmative nod).

16 Q. And there were only four on the committee?

17 A. There were actually -- there were three
18 members at that meeting.

19 Q. So three present, four at the meeting?

20 A. Three members present. The Planning
21 Committee members were present at the meeting.

22 Q. All right. Now can we look at Exhibit 31
23 for a minute?

24 A. Okay, (reviewing).

25 Q. Do you have that?

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- 1 A. I do.
- 2 Q. What is Exhibit 31?
- 3 A. It is the April 28th, 2009 minutes of the
- 4 Town of Mount Pleasant Budget Committee.
- 5 Q. And how many were present at that meeting?
- 6 A. All Council were present.
- 7 Q. All the Council members were present?
- 8 A. Yes.
- 9 Q. How many members are on that committee?
- 10 A. All of them.
- 11 Q. All members of Council are members of that
- 12 committee?
- 13 A. All are.
- 14 Q. All right. And what -- how does this
- 15 relate to the -- if it does -- issue of Council
- 16 minutes, members attending committee meetings?
- 17 A. The way that it is organized, it is no
- 18 different from any other committee with a quorum
- 19 present. It shows the committee -- that they
- 20 are all members of the committee, Council. It
- 21 shows nine members present.
- 22 Q. Now, Mr. Brock, what is your complaint
- 23 about why it is inappropriate for nonmembers of
- 24 a committee to attend the committee members
- 25 meetings?

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1 A. I believe -- and I take this from the
2 Attorney General's Public Officials Guide --
3 that a quorum is the majority of the members of
4 a body that meets, whatever that meeting is,
5 what the meeting has being discussed.

6 Q. Now, have you ever observed on occasion
7 that Council members who are not members of a
8 committee attend as spectators? Attend
9 committee meetings as spectators?

10 A. During my time, they've sat with the
11 committee. They weren't spectators.

12 Q. Have you ever seen, on occasion, where a
13 Council person was a mere spectator at a
14 committee meeting, who was not a member of that
15 committee?

16 A. I can't recall.

17 Q. All right.

18 A. I will say -- could I answer that this way,
19 and I could be wrong. Mr. Sanfeld (phonetic),
20 one of the Council members, one time objected to
21 the format of everyone sitting together.

22 Q. Was he a member of Council?

23 A. He was not a council member at the time.
24 There may have been one or two -- but he was
25 sitting with the spectators.

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1 Q. Is this practice of noncommittee Council
2 members attending committee meetings a rare
3 happenstance or a regular occurrence, based on
4 your observations?

5 A. It was a regular occurrence.

6 Q. I would like you to refer to Exhibit 37,
7 please.

8 A. Okay.

9 Q. What is this, Exhibit 37?

10 A. October 31, 2007, Town of Mount Pleasant
11 Finance Committee Meeting.

12 Q. Now, according to the minutes -- is this
13 the minutes of the meeting?

14 A. It does appear to be.

15 Q. According to this, who are members of the
16 committee that was meeting?

17 A. Members are Billy Swails ---

18 Q. He is the mayor now?

19 A. Yes, sir.

20 Q. But he wasn't the mayor then, was he?

21 A. No, sir. Billy Swails, Paul Gawrych, Kirby
22 Smith. Ken Glasson was absent.

23 Q. So the committee members present on October
24 1, 2007 were now-Mayor Swails, Councilman
25 Gawrych and Councilman Smith.

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1 A. Right.

2 Q. And does it list members of Council
3 present, who were not members of the committee.

4 A. Ms. Thomasena Stokes-Marshall and
5 (inaudible due to judge coughing).

6 Q. And they were Council people?

7 A. Council members.

8 Q. So a total of how many Council people were
9 present at this committee meeting?

10 A. Six present.

11 Q. Is that a quorum of Council?

12 A. Yes, sir.

13 Q. All right. And turn to the third page of
14 this exhibit, if you will.

15 A. Okay.

16 Q. Second full para--, -- well, three
17 paragraphs down, do you see where it begins by
18 saying "Ms. Stokes-Marshall..." ---

19 A. Yes, I do.

20 Q. Was Ms. Stokes-Marshall a member of the
21 committee that was meeting?

22 A. No, she was not.

23 Q. No? She was not?

24 A. She was not.

25 Q. What do the minutes reflect on this

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1 occasion?

2 A. It -- do you want me to read it?

3 Q. That's what I want you to do.

4 A. (Reading): "Ms. Stokes-Marshall stated
5 that she would like to put up for consideration
6 since in Mr. Smalls' letter he mentions the
7 \$250,000 to be used for the Senior Center, she
8 would ask the committee to take that into
9 consideration."

10 Q. All right. Looking at Exhibit 34, if you
11 will, Mr. Brock.

12 A. (Upon review), okay, I have it.

13 Q. What is Exhibit 34, for the record?

14 A. Partial minutes for October 31, 2005, for
15 the Judicial and Legal Committee ---

16 THE COURT: What exhibit?

17 MR. TISDALE: Exhibit 34, Your
18 Honor.

19 THE COURT: Thank you, sir.

20 DIRECT EXAMINATION CONTINUED

21 BY MR. TISDALE:

22 Q. You have said, I believe, that this is the
23 minutes of the judicial and legal committee?

24 A. Judicial and Legal Committee.

25 Q. Do the minutes reflect that our friend,

1 Counsel, Counsel Allen Young was present?

2 A. Yes, sir.

3 Q. And on that occasion, referring to number
4 two, absentee vote procedures by telephone, did
5 Mr. Young advise the committee on what
6 constituted a meeting?

7 A. Yes.

8 Q. And looking at the last sentence -- excuse
9 me, the last two sentences of that paragraph,
10 the fourth one down, what did Mr. Young state in
11 the committee meeting as to what was a meeting?

12 A. Mr. Young in the minutes states that "the
13 general rule requires, number one, a quorum of
14 the body, whatever the body is, ..."

15 Q. And we've agreed, I think, that five is a
16 quorum.

17 A. Right.

18 Q. All right. So that's the first requirement
19 of a meeting?

20 A. (Affirmative nod) and, two, discussing Town
21 business.

22 Q. All right.

23 A. Those are the two requirements. He
24 respectfully reminded Council that they should
25 be mindful and careful in the matter, discussing

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1 carefully -- (inaudible).

2 COURT REPORTER: I'm sorry, --
3 discussing carefully what?

4 THE WITNESS: E-mails.

5 DIRECT EXAMINATION CONTINUED

6 BY MR. TISDALE:

7 Q. And look at the top of the next page, if
8 you will.

9 A. Okay.

10 Q. First full sentence, read it please.

11 A. Beginning with "at the same time..."?

12 Q Right.

13 A. (Reading): "At the same time he reminded
14 Council that they could not trump the Freedom of
15 Information Act. He said that was a
16 prescription of the meetings for the purpose of
17 producing documents, notice requirements and the
18 like."

19 Q. Now, Mr. Brock, on any of these occasions
20 that we've talked about so far, has the public
21 at any time been given any notice that Council
22 would be meeting in the context of these
23 committee meetings that you've testified about?

24 A. The Council?

25 Q. Yes, Council.

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1 A. No.

2 Q. They have not been notified?

3 A. No.

4 Q. Now, look at Exhibit 33 for a minute, if
5 you would.

6 A. Yes, sir.

7 Q. It says -- what is this?

8 A. It is a special Town Council meeting for
9 October 22, 2009.

10 Q. And does this relate to the concern of Town
11 Council concerning the issue of illegal Town
12 Council meetings in the context of committee
13 meetings for which the public was given no
14 notice?

15 A. I'm sorry. Say that again?

16 Q. Well, I don't know whether I can or not,
17 but I'll try.

18 A. Okay.

19 Q. Is this Exhibit 33 an example of the
20 concern(s) that the Town, or some people on
21 Council, were having with the issue of whether
22 or not illegal meetings were being conducted by
23 Council in the context of committee meetings
24 about which the public was not receiving notice?

25 A. Yes, it does.

1 Q. All right. Now, to the third paragraph of
2 that, which starts "Mr. Santos..." ---

3 A. Yes.

4 Q. Who is Mr. Santos?

5 A. Santos was a member of Council.

6 Q. And according to this exhibit, what was Mr.
7 Santos' concern about? If you would, read it.

8 A. (Reading): "Mr. Santos stated that he'd
9 asked Council that a specific item be put in
10 there, however that item did not appear there.

11 Mr. Santos read a statement from Mr. Swails that
12 said, quote, ..." -- let me read that again.

13 (Reading): "Mr. Santos read a statement
14 from Mr. Swails that said ..." ---

15 Q. Before you go on, it starts out with the
16 word "she"?

17 A. Yes.

18 Q. Who is "she", do we know?

19 A. She would be Ms. Stokes-Marshall.

20 Q. Ms. Stokes-Marshall?

21 A. Yeah.

22 Q. And was Ms. Stokes-Marshall a member of
23 Council?

24 A. Yes.

25 Q. All right. What did Mr. Santos say?

1 A. Well, Mr. Santos was reading what Mr.

2 Swails had said.

3 Q. All right.

4 A. The quotation is, "She is in violation of
5 most meetings anyhow, but he is too."

6 Ms. Stokes-Marshall asked Swails if he
7 would -- and Mr. Santos said that he would like
8 that put in the minutes.

9 Q. Put in the minutes?

10 A. Right.

11 Q. Now, coming on down three paragraphs, it's
12 Mr. Santos again.

13 A. Right.

14 Q. What does it say that Mr. Santos said?

15 A. Mr. Santos said, "We are always talking
16 about transparent government and this is an
17 opportunity to do that."

18 Q. What is Mr. Santos referring to when he
19 says that this is an opportunity. What was the
20 opportunity that he was referring to?

21 MS. CANTWELL: I object. How would
22 he know what Mr. Santos was thinking?

23 THE COURT: I will sustain the
24 objection.

25 MR. TISDALE: All right.

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1 DIRECT EXAMINATION CONTINUED

2 BY MR. TISDALE:

3 Q. Come down to the next to the last para-
4 graph, that starts out again with the words
5 "Mr. Santos..." ---

6 A. Yes, sir.

7 Q. Read that paragraph if you will.

8 A. (Reading): "Mr. Santos said that he would
9 like to respond by saying that when you're under
10 a lawsuit for FOI and when Council members make
11 light of and laugh about it, it does not appear
12 professional. That if you are going to say
13 things on the record that certainly the public
14 has the right to know what their government is
15 doing."

16 Q. All right. Let me ask you about one more
17 paragraph and highlight for the record that it
18 is in the exhibit, Mr. Brock.

19 A. What is the exhibit number?

20 Q. Thirty-three (33). It is just ---

21 A. I have it.

22 Q. Right about four paragraphs up from the
23 bottom, where it says "Mr. Santos read..." --
24 that quote, please?

25 A. (Reading): "Mr. Santos read, quote, Mr.

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1 Swails said that she was in violation most

2 meetings anyhow, but that he is too." Ms.

3 Stokes-Marshall asked..." ---

4 Q. Okay. Look at Exhibit 31 if you will.

5 A. Okay.

6 Q. It's out of order -- I am calling them out

7 of order. Sorry.

8 THE COURT: Which number?

9 MR. TISDALE: Exhibit 31, Your

10 Honor.

11 DIRECT EXAMINATION CONTINUED

12 BY MR. TISDALE:

13 Q. Exhibit 31 is not -- you don't have Exhibit

14 31?

15 A. I have a couple here with "three" on it but

16 -- is that the first one?

17 Q. I can show you this copy. It's the April

18 28th, 2009, Budget Committee of Council.

19 A. All right.

20 Q. My question about this is very simple, so I

21 don't want to belabor it or waste time on it.

22 Just look at that, (tendering). My only

23 question is, was that -- did a majority of

24 members of Council attend that meeting? Notice

25 of the Budget Committee Meeting?

1 A. Yes, sir.

2 Q. Did the public receive any notice that Town
3 Council was meeting on that occasion?

4 A. I am not aware of any notice that was sent
5 out by the Budget Committee.

6 Q. Other than the Budget Committee?

7 A. Not that I am aware of.

8 Q. All right. Mr. Brock, please refer to
9 Exhibit 6.

10 A. Okay.

11 Q. What is Exhibit 6?

12 A. It's an excerpt from two articles in the
13 *Post & Courier*. One dated ---

14 Q. You are going to have to talk a little
15 louder.

16 A. Excerpt from two newspaper articles, one
17 dated May 3, 2007 and one dated October 9, 2007.

18 Q. Do they relate to the issue that we're
19 talking about, about committee meetings?

20 A. Yes, sir.

21 Q. Attended by a quorum of Council?

22 A. They do.

23 Q. And could you describe what they say?

24 MS. CANTWELL: Your Honor, I am
25 objecting to this exhibit as hearsay.

1 THE COURT: I thought that we weren't
2 talking about the authenticity but only the
3 relevancy of it.

4 MS. CANTWELL: Well, I -- I should
5 have said admissibility, because -- I'm not
6 questioning the fact that he produced it or that
7 I produced it. I am not making him bring
8 somebody in here to say that. But I think
9 what's in this article is hearsay. I don't
10 think it's ---

11 THE COURT: Well, we've been dealing
12 with a lot of it all morning, about what a
13 Council member said.

14 MS. CANTWELL: Well, that's an
15 official record. This a newspaper article.

16 THE COURT: I understand. It may
17 come under the Records exception.

18 MS. CANTWELL: Yes, sir. I would
19 just like to put my objection on the record for
20 what it's worth.

21 THE COURT: Okay. What is your
22 argument?

23 MR. TISDALE: Your Honor, this
24 Exhibit 6 contains an excerpt of Minutes on the
25 bottom. I believe. I will ask him to confirm

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1 that. The top part has to do with an article
2 that appeared in a local newspaper, the *Post &*
3 *Courier*.

4 THE COURT: Right.

5 MR. TISDALE: And the reporter who
6 wrote it is sitting here in the courtroom and
7 can confirm it.

8 THE COURT: Well, that still doesn't
9 mean that it is not hearsay. I mean, what
10 exception do you think that it should come
11 under?

12 MR. TISDALE: Well, these are
13 parties to the lawsuit.

14 THE COURT: Are these quotes made by
15 Council members?

16 MR. TISDALE: Well, it was made by
17 a Council member ---

18 THE COURT: I haven't read it.

19 MR. TISDALE: It was made by
20 Council member Kruger Smith.

21 THE COURT: I haven't read it. The
22 statements says that the newspaper quoted
23 Council members?

24 MR. TISDALE: That's my under-
25 standing.

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1 THE COURT: Okay. I will overrule
2 the objection. Go ahead.

3 MR. TISDALE: Thank you.

4 THE COURT: Only as to the statement
5 that the newspaper published statements made by
6 Council members.

7 MR. TISDALE: Quotes?

8 THE COURT: Right. Quotes. Not the
9 newspaper's opinion about anything.

10 MR. TISDALE: I understand that.
11 I appreciate that and I agree with that.

12 THE COURT: Okay.

13 DIRECT EXAMINATION CONTINUED

14 BY MR. TISDALE:

15 Q. Mr. Brock, look at Exhibit 6.

16 A. I have it.

17 Q. Do you see where it says where Council
18 member Smith made -- in 2007?

19 A. Yes, I do.

20 Q. Do you see where it says "Smith says"?

21 A. Right.

22 Q. Read that.

23 A. (Reading): "Smith said that there is
24 nothing that precludes him from attending a
25 Council committee meeting and participating in

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1 discussions even though he is not a voting
2 member of the committee."

3 Q. Then this next paragraph starts with,
4 quote, ---

5 A. Quote, (reading): "Whether you are
6 participating as if you were a member of that
7 committee depends on how you are conducting the
8 meeting. If it not as if there are six members
9 of the Council there." End quote.

10 Q. Now, then he says, quote, two paragraphs
11 down?

12 A. (Reading): "It behooves every council
13 member to be at every committee meeting."

14 Q. All right. Now, going down to the entry
15 that is dated October 9th, 2007, for the Town
16 Council meeting. Quote beginning with Ms.
17 Stokes-Marshall.

18 A. (Reading): "Ms. Stokes-Marshall stated that
19 the matter of Council members attending council
20 meetings, that her position has been and always
21 will be that the committee will..." ---

22 Q. Read it slow so that we can hear it. Start
23 over, please.

24 A. (Reading): "Ms. Stokes-Marshall stated that
25 the matter of Council members attending council

1 meetings, that her position has been and always
2 will be that the committee is where one finds
3 out what is going on. She stated that if one
4 does not attend committee meetings that they do
5 not get the essence of the subject, the
6 information or the dynamics between who the
7 players are. She stated that she attends all
8 committees because she wants to know what goes
9 on and wants to be informed so that she is
10 capable of making informed, intelligent
11 decisions."

12 Q. Then the last quote on that page?

13 A. (Reading): "Mr. Swails stated that he
14 attends all meetings..." ---

15 Q. All right. Now, Mr. Brock, have you ever
16 known or been aware of an occasion where the
17 residents of the Town of Mount Pleasant have
18 ever been informed that a quorum of Town Council
19 would be meeting in committee meetings?

20 A. I am not aware of that.

21 Q. All right.

22 THE COURT: Mr. Tisdale, we are going
23 to take about a ten-minute break.

24 MR. TISDALE: That would be fine.

25 Thank you.

1 THE COURT: Mr. Brock, don't discuss
2 the case with anybody during the break, please,
3 sir.

4 THE WITNESS: Yes, sir.

5 THE COURT: All right. We will take
6 about a ten-minute break.

7 (BRIEF RECESS)

8 THE COURT: Are the parties ready to
9 proceed?

10 MR. TISDALE: Thank you, Your
11 Honor.

12 DIRECT EXAMINATION RESUMED

13 BY MR. TISDALE:

14 Q. Mr. Brock, before we move on to the next
15 topic, I want to just ask you a couple of final
16 questions about the matter of a quorum of
17 council attending committee meetings. Is there
18 any provision in those meetings for the public
19 to attend and participate?

20 A. The public may attend.

21 Q. Is there any provision made for the members
22 of the public to participate in the discussions?

23 A. No. Like a public comment on the agenda?

24 Q. Yes.

25 A. No.

1 Q. There is not?

2 A. No.

3 Q. So members of the public can attend, it's
4 your understanding, as spectators but not as
5 participants in discussion?

6 A. That's my understanding of the way that it
7 works.

8 Q. And on occasion -- and I think that we
9 might have covered this -- but on occasion, do
10 you know of incidences where nonmembers of a
11 committee, who were Council members, did
12 participate in the discussion?

13 A. Yes.

14 Q. All right.

15 A. Let me clarify. There are people from the
16 public that will stand up and speak, but is
17 basically standing up and speaking not part of
18 the process.

19 Q. It is not part of the procedure, normal
20 procedure?

21 A. No.

22 Q. All right. Now, going back to what you
23 previously said, on what occasions have you
24 observed members of Council who are not members
25 of the committee participating in the committee

1 discussion?

2 A. My opinion is that most often -- on the
3 planning commission, I was most often on the
4 Planning Commission and several times, I
5 frequented it.

6 Q. All right. Do you remember any specific
7 instances of that, that you can tell us about?

8 A. And what were you asking me?

9 Q. Members of Council who were not members of
10 a committee, participating in committee
11 discussions?

12 A. Well, we gave the example of Ms. Stokes-
13 Marshall and Councilman Smith.

14 Q. Yes.

15 A. I would have to rack my brain to come up
16 with some others.

17 Q. All right. Now, have you examined the
18 Minutes of the committees that met between the
19 time -- you know, the period that this lawsuit
20 covers, 2007 to 2008?

21 A. I did.

22 Q. You did?

23 A. Yes.

24 Q. And are you able to inform the court or
25 tell the court during that period of time

1 covered by this lawsuit, 2007 to 2008, how many
2 of the Minutes that you considered were attended
3 by a quorum of Council? Committee meetings
4 attended by a quorum of Council?

5 A. As I recall, I considered a hundred ---

6 Q. So you considered a considerable amount?

7 A. I considered a hundred minutes and there
8 were eighty-some, I think, where there was a
9 quorum present. May I correct one thing? There
10 was actually thirteen committees.

11 Q. Thirteen?

12 A. (Affirmative nod).

13 Q. Say that again, what you just said. Did
14 you say that eighty percent ---

15 A. I looked at a hundred minutes and I think
16 that it was eighty that at least had five
17 members of Council.

18 Q. Now, on those eighty occasions, on any such
19 meeting was the meeting announced for public
20 purposes as a council meeting?

21 A. No.

22 Q. All right. Mr. Brock, now I want to move
23 to another subject and ask you some questions
24 about the conduct of executive sessions,
25 specifically the notice of executive sessions

1 and the method of handling what was discussed in
2 executive sessions in open sessions. Okay?

3 A. Yes.

4 Q. I suppose the best way to approach this is
5 to look at minutes of this meetings that are in
6 the exhibits. So look at Exhibit 2.

7 A. Okay.

8 Q. I think that we considered this before.
9 This is the December 5th, 2007 meeting that had
10 to do with the purchase of the Shem Creek
11 property.

12 A. Right.

13 Q. The six million dollars?

14 A. Yes, sir.

15 Q. How was that meeting announced in executive
16 -- for an executive session, consideration of
17 that issue?

18 A. May I see the motion?

19 Q. Yes.

20 A. (Upon review), ---

21 THE COURT: We pretty well covered
22 that last time, didn't we?

23 MR. TISDALE: We did, but ---

24 THE COURT: Are you going to rehash
25 it again?

1 MR. TISDALE: I want to rehash it
2 because of the program that -- I want to get him
3 to testify that there was nothing ever announced
4 specifically as to what's in those minutes.
5 That's all.

6 THE COURT: I think that was on the
7 last page, wasn't it? Last two pages?

8 MS. CANTWELL: Two of twenty-four
9 is when the Motion was ---

10 THE COURT: Twenty-three and twenty-
11 four.

12 MS. CANTWELL: Page twenty-four is
13 when the motion was made to amend the agenda for
14 executive session.

15 THE COURT: Right.

16 MS. CANTWELL: Then twenty-three is
17 where they ---

18 THE COURT: Council had an executive
19 session and stated the reason.

20 MS. CANTWELL: Right.

21 MR. TISDALE: The only point that
22 I want to make is that that was the only thing
23 said about what it was about.

24 THE COURT: That's fine.

25 DIRECT EXAMINATION CONTINUED

1 BY MR. TISDALE:

2 Q. Mr. Brock, look at Exhibit 8, please.

3 A. Okay, (reviewing). I have it.

4 Q. What is this document and the attached
5 document?

6 A. Town of Mount Pleasant meeting notice for
7 a special Town Council meeting on August 14th,
8 2007.

9 Q. Was there anything considered for this
10 special Town Council meeting other than -- I
11 mean executive session?

12 A. That's all that is on the notice.

13 MS. CANTWELL: Your Honor, I would
14 interpose the same objection. This meeting --
15 it's the same thing that he's alleged in the
16 Amended Complaint, where a violation ---

17 MR. TISDALE: Just showing the
18 pattern, Your Honor.

19 THE COURT: Go ahead. This is --
20 okay, special Town Council meeting. Okay, go
21 ahead.

22 MR. TISDALE: Yeah, Exhibit 8.

23 THE COURT: Go ahead.

24 DIRECT EXAMINATION CONTINUED

25 BY MR. TISDALE:

1 Q. Was there anything ever noticed?

2 THE COURT: For the record, your
3 objection is overruled.

4 MS. CANTWELL: Thank you.

5 THE COURT: Go ahead.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. TISDALE:

8 Q. Mr. Brock, was there anything ever noticed
9 as the purpose of executive session other than
10 what's in this Town Council meeting notice?

11 A. (No verbal response).

12 Q. Is this the only notice that the public got
13 about what they were going to consider?

14 A. The agenda. Yes, sir.

15 Q. Was there anything more specific ever
16 stated as to the purpose for the sessions?

17 A. What was read into the record. Yes.
18 Stated by the chair.

19 Q. Yes. Now, look at the minutes of that
20 meeting if you will.

21 A. Okay.

22 Q. The second page.

23 A. Okay.

24 Q. Down where they take action on the matters
25 in executive session, Mr. Gawrych made a motion.

1 Do you see where I am talking about "direct
2 legal counsel" ---

3 A. Yes.

4 Q. All right, read that paragraph?

5 A. (Reading): "... made a motion to direct
6 legal counsel to negotiate for ... piece of
7 property ..."

8 Q. Now, is there any other information in
9 there that would inform the citizens of Mount
10 Pleasant or the public as to what had been
11 considered in executive session?

12 A. They just set the agenda as property
13 acquisition?

14 Q. That's all?

15 A. A legal contractual matter.

16 Q. But when voting on it, on page two as you
17 just read, was there any other information
18 provided as to what they considered in executive
19 session?

20 A. No, sir.

21 Q. Or what they were going over?

22 A. No.

23 Q. All right, what was the next action that
24 was taken? Ms. Stokes-Marchant?

25 A. (Reading): -- "...made a motion to direct

1 legal counsel to proceed with legal and
2 contractual matters with reference to property
3 discussed in executive session."

4 Q. All right. Is there any reference anywhere
5 in any minutes as to what was discussed in
6 executive session?

7 A. No, sir.

8 Q. Sir?

9 A. No.

10 Q. The next paragraph, Mr. Bustos makes a
11 motion. Do you see that?

12 A. I do.

13 Q. What does he say?

14 A. He makes a motion to authorize legal
15 counsel to proceed with discussion in executive
16 session pertaining to Dunes West Boulevard, Old
17 Park, and to proceed with litigation.

18 Q. Was there anything more specific than what
19 was in the notice of the meeting or in this
20 paragraph as to what was discussed in executive
21 session ever made available to the public, to
22 your knowledge?

23 A. Prior to the meeting, no.

24 Q. How about during the meeting?

25 A. Well, the executive session announcement as

1 to the discussions in executive session, to
2 carry out the action.

3 Q. What I am asking you is this, was there any
4 way for the public, the citizens of the Town, to
5 know any more than what is in this agenda and
6 what they made a motion about as to the
7 specificity of what was going on in executive
8 session?

9 A. No. The executive session mentions the
10 discussion.

11 Q. All right. But it doesn't say what the
12 discussion is, does it?

13 A. Not the -- not with regard to voting, no.

14 Q. Okay. Now, we've covered -- look at
15 Exhibit 16, just for the record.

16 A. Okay.

17 Q. This is the November 16th meeting, special
18 Town Council.

19 A. Yes.

20 Q. The only item on this agenda is what?

21 A. Legal advice pertaining to the O.K. Tire
22 Store property.

23 Q. That is what came to be known as Shem
24 Creek?

25 A. That is part of Shem Creek, yes.

1. Q. Now, look at page two of this exhibit if
2 you will.

3 A. All right.

4 Q. We have already covered this before but was
5 this agenda amended to add items?

6 A. It was asked that council amend the agenda
7 to include personnel matters.

8 Q. Were those two items, was any public notice
9 given prior to the special Town Council meeting?

10 A. No, sir.

11 Q. Now look down at the bottom of that page,
12 the second page of Exhibit 16.

13 A. Okay.

14 Q. Mr. Glasson made a motion, do you see that?

15 A. Yes, I do.

16 Q. Mr. Glasson was a member of council?

17 A. Yes.

18 Q. What does it say?

19 A. That, (reading): "Mr. Glasson made a motion
20 to adjust the decision requirements of
21 compensation for the clerk of council as
22 discussed in executive session."

23 Q. Any way for the public or members of the
24 Town to know anything more about the
25 arrangements for compensation for Council, other

1 than through ---

2 A. No, sir.

3 Q. What is the second thing, that Mr. Bustos'

4 ---

5 A. Mr. Bustos made a Motion to reject the
6 offer that was tendered in reference to the Shem
7 Creek property and the O.K. Tire property
8 litigation.

9 Q. Any way to tell from this information what
10 sort of offer was made for the property by the
11 Town?

12 A. No, sir.

13 Q. And do we have any information now as to
14 what kind of offer was made by the Town?

15 A. On this particular point, no, sir.

16 Q. But are there any records anywhere else, in
17 any document that we have, that the public was
18 informed anything about the nature of the offer
19 that was made for the property?

20 A. No, sir.

21 Q. And was this item listed on the agenda for
22 the special meeting?

23 A. It was listed as legal advice, it's not
24 listed as a settlement offer.

25 Q. All right. Now, what is the third thing

1 there that we see that Mr. Bustos made a Motion
2 about?

3 A. Mr. Bustos made a motion to authorize the
4 attorney to prepare a letter as discussed in
5 executive session in reference to the personnel
6 action.

7 Q. Was that listed on the agenda of the
8 special meeting as an item that would be
9 considered?

10 A. On the agenda, no.

11 Q. Now, based on these minutes, is there any
12 way for anyone to tell by reading this what it
13 was that they were voting on?

14 A. No, sir.

15 Q. Do you now know what that was about?

16 A. Yes, sir.

17 Q. What?

18 A. The letter was written asking me if I would
19 -- asking me to consider resigning from the
20 planning commission.

21 Q. All right. Did they suggest -- did they
22 write you such a letter?

23 A. They did.

24 Q. And is that Exhibit 19?

25 A. (Upon review), yes.

1 Q. Now, is there any way for you or anybody
2 else to know from that action taken at the
3 special meeting in executive session that this
4 action would be considered by Council?

5 A. No way.

6 Q. No way to know?

7 A. (No verbal response).

8 Q. When did you find out this letter, that was
9 sent to you?

10 A. When I received a call from the *Post &*
11 *Courier* the following week asking me about a
12 letter asking me to resign. I knew nothing.

13 Q. Did you know anything about it?

14 A. No, sir.

15 Q. In fact, you -- you were not reappointed
16 when your term expired in 2010, is that correct?

17 A. 2009 or 2010. I am not certain of ---

18 Q. Whenever that was?

19 A. Yes.

20 Q. Okay. Mr. Brock, there came a time that
21 you yourself asked the Attorney General for an
22 opinion on a matter while you were chairman of
23 the planning commission; did you not?

24 A. I did, in October of 2007.

25 Q. Did you get such an opinion?

1 A. Yes, I did.

2 Q. Just real, real briefly, what did that
3 opinion involve? What was the issue?

4 A. The issue had to do with the competence of
5 the plan required by State statute, the ten-year
6 plan that is the primary obligation of the
7 planning commission to produce this document.

8 The question was whether changes in the
9 competency plan as to the amendments to it could
10 be made without a positive recommendation from
11 the planning commission. That's the way that I
12 read the law. That was my question. County
13 council had, three times that year, changed the
14 competency plan despite the committee's
15 recommendation.

16 Q. All right.

17 A. I asked the question of the AG, does the
18 statute require that the planning commission
19 recommend changes to the plan before it could be
20 enacted.

21 Q. Right. And you did get that opinion?

22 A. I did.

23 Q. And gave it to whoever ---

24 A. I gave it to Mr. Young, I think either the
25 25th or the 26th of October.

1 Q. All right. Look at Exhibit 26 for a
2 minute, if you will.

3 THE COURT: Which one?

4 MR. TISDALE: Twenty-six, Your
5 Honor.

6 THE COURT: Thank you, sir.

7 MR. TISDALE: Just to complete the
8 record.

9 DIRECT EXAMINATION CONTINUED

10 BY MR. TISDALE:

11 Q. What is Exhibit 26?

12 A. My Exhibit 26 is three documents. The
13 first is a letter to administrative service
14 requesting funds in the amount of Two Million
15 Two Hundred Eighty-five Thousand Dollars for the
16 O.K. Tire property.

17 Q. All right, and this was when?

18 A. It's dated October 3, ---

19 Q. What is the second document?

20 A. The second is the check that was drawn and
21 it's dated October 5th, payable to the Charleston
22 County Clerk of Court for Two Million Two
23 Hundred Eighty-five Thousand Dollars.

24 Q. Is there anything in any of the minutes of
25 the Town Council meetings that this matter was

1 considered before this action was taken?

2 A. Not to my knowledge.

3 Q. Was this a part of the Shem Creek or O.K.

4 Tire Company litigation issue?

5 A. Yes, it was part of that ongoing issue.

6 Q. So we can tell by this, can we not, that at

7 least as of October 7th, roughly two months

8 before the December 5th meeting, the members of

9 the staff were aware that this issue was in the

10 process of being decided?

11 A. (No verbal response).

12 Q. Is that right or wrong?

13 A. Yes -- I'm sorry.

14 Q. All right. Mr. Brock, I want to move now

15 to ask you some questions about the e-mail issue

16 that we informed the judge earlier that we would

17 be talking about today.

18 If you would look at Exhibit 12, what is

19 Exhibit 12?

20 A. A series of e-mails -- (inaudible tape).

21 Q. Now, in this group of e-mails, first of all

22 do these e-mails, or not, the content of these

23 e-mails, the message content of these e-mails,

24 involve public business, public issues?

25 A. They involve the subject matter of the ARB

1 and later the planning commission.

2 Q. What is DRB?

3 A. I beg your pardon, the commercial design
4 review board for Mount Pleasant. They call it
5 the DRB. These are early conversations on the
6 subject.

7 Q. Do all of these e-mails relate to subject
8 matter of public interest that -- I think that
9 I understood you to say that led to ordinances
10 of the Town?

11 A. Yes.

12 Q. Are all of these e-mails to and from
13 members of Town Council and staff?

14 A. Yes.

15 Q. Do some of these e-mails include
16 correspondence by and between a majority --
17 excuse me -- a quorum of Council?

18 A. Most of them. There are a couple that are
19 not, but most of them are addressed to all of
20 the council members.

21 Q. All of the Council?

22 A. Right. Some staff is included.

23 Q. Okay.

24 A. There is one document from the staff that
25 I am not certain is an e-mail.

1 Q. Might be what?

2 A. One of them doesn't have a heading. It
3 was from -- sorry. One is a letter from the
4 chairman of the design review board. An e-mail
5 was sent out. I am assuming that it was
6 attached. It's a letter.

7 Q. All right. So we discussed it. What
8 number is it?

9 A. Exhibit 12.

10 Q. Exhibit 12 is a group of e-mails to/from,
11 by and between members of Town Council and
12 staff; right?

13 A. That's correct.

14 Q. The content of each one involves some issue
15 that the Town was considering concerning the
16 adoption of ordinances. Is that right?

17 A. Yes.

18 Q. And obviously no -- or was any notice ever
19 given to the public that this e-mail
20 correspondence was transpiring?

21 A. No, sir.

22 Q. Okay. Look at Exhibit 15.

23 A. Okay.

24 Q. What is it?

25 A. This is an e-mail from (inaudible), who was

1 a member of council at the time, dated December
2 3rd, 2007, to a constituent in Mount Pleasant,
3 members of Council, to the clerk of Council,
4 about me.

5 Q. About you?

6 A. Yes.

7 Q. What is the nature of it, just briefly?

8 A. The nature of it just briefly is to allege
9 that I had misused my office for gain, that a
10 man who at that point was alleged to have tried
11 to bribe a public official, that he and I had
12 done many things in the past, that the *Post &*
13 *Courier* made reference to that, that my dislike
14 for a certain project only started after this
15 individual ---

16 Q. Now, this was sent to constituents in the
17 Town of Mount Pleasant?

18 A. That's correct.

19 Q. Council?

20 A. Yes.

21 Q. Was it sent to you?

22 A. It wasn't sent to me, no.

23 Q. All right. How did you find out about
24 this?

25 A. Two ways. I received an anonymous copy

1 through the mail. I don't know who sent it to
2 me. I also got a copy from Mr. Schrer
3 (phonetic), the constituent that I mentioned.

4 Q. Okay.

5 A. I made a FOIA request in early January
6 concerning it but when I got the e-mails back,
7 this e-mail was not among those..

8 Subsequent I sent a letter to Mr. Young,
9 naming the e-mail and the date, and I was
10 provided it a few days later.

11 Q. Now, was the public given any notice at any
12 time to your knowledge that Council was
13 communicating with other members of Council
14 concerning this issue? Was any notice to the
15 public given at any time?

16 A. No, sir.

17 Q. All right. Look at Exhibit 21.

18 A. Okay.

19 Q. Now, it looks like this Exhibit 21 has a
20 lot of redacted information; is that right?

21 A. That's right.

22 Q. And Mr. Brock, where did the document come
23 from? How did you acquire it?

24 A. I acquired it off the *Post & Courier*
25 website, their comments section.

1 Q. From -- and do we now know who wrote these
2 e-mails or these posts, I guess that we could
3 call them.

4 A. Council member Joe Bustos admitted that in
5 deposition.

6 Q. Okay.

7 A. May I clarify my answer? There was one
8 post by the Most Avid Reader.

9 Q. Well, let me ask you this. In this
10 exhibit, Exhibit 21, how did -- is there any way
11 to tell from this exhibit by itself who wrote
12 these e-mails?

13 A. No, sir.

14 Q. And what did you just say?

15 A. That they were written by Joe Bustos using
16 the name of "Most Avid Reader".

17 Q. Does he ever identify himself as ---

18 A. No.

19 Q. --- the person called Most Avid Reader in
20 this exhibit?

21 A. He does not.

22 Q. Does not?

23 A. No.

24 THE COURT: What does this have to do
25 with ---

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Case No. 08-CP-10-3308

Hearing of January 24, 2011

Before The Honorable J.C. Nicholson, Jr.

1 MR. TISDALE: It ---

2 THE COURT: This may be involved in
3 the lawsuit for Mason and Miller, but I don't
4 know what it has to do with this?

5 MR. TISDALE: Your Honor, it is in here
6 simply to show the general conduct and pattern.

7 THE COURT: This is just one council
8 member. I don't think that this is a pattern of
9 council as a whole.

10 MR. TISDALE: Well, acting
11 anonymous -- a public official writing
12 anonymously ---

13 THE COURT: I just don't see the
14 relevance here.

15 MR. TISDALE: I agree that it's
16 nonspecific to this ---

17 THE COURT: I know that she hasn't
18 made an objection but I'm just curious what the
19 relevancy of it is.

20 MS. CANTWELL: I will make it now.

21 MR. TISDALE: Well, Your Honor,
22 the relevancy is quite thin.

23 THE COURT: Pardon?

24 MR. TISDALE: Attenuated.

25 THE COURT: I agree with you. Okay.

1 Please proceed.

2 DIRECT EXAMINATION CONTINUED

3 BY MR. TISDALE:

4 Q. Exhibit 29, Mr. Brock.

5 A. Okay.

6 Q. What is it?

7 A. Planning commission meeting minutes of
8 April 18th, 2007.

9 Q. And does it contain -- what does it contain
10 concerning the issue of e-mail correspondence
11 policies of the Town of Mount Pleasant?

12 A. That discussion be had with Mr. Young,
13 attorney for the Town Council.

14 Q. What was Mr. Young doing in this document?

15 A. Generally talking about e-mails, use of e-
16 mails.

17 Q. Is that beginning on page two?

18 A. Yes, sir.

19 Q. All right. Now, what is Exhibit 35?

20 A. This is the October -- sorry. It's ---

21 Q. March 2005?

22 A. Did you say 35?

23 Q. Thirty-five.

24 A. Okay. That's the e-mail management ---

25 Q. E-mail management guidelines from the ---

Stephen George Brock v Town of Mount Pleasant

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Case No. 08-CP-10-3308

Hearing of January 24, 2011

Before The Honorable J.C. Nicholson, Jr.

1 A. Yes, e-mail management guidelines.

2 MR. TISDALE: Your Honor, he is
3 not going to comment on this because that would
4 be up to you, but we put it in as an exhibit.

5 THE COURT: Okay.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. TISDALE:

8 Q. Take a look at Exhibit 38, please.

9 A. Okay.

10 Q. What is Exhibit 38?

11 A. Another e-mail.

12 Q. Was this e-mail from the Town?

13 A. Yes.

14 Q. Describe the ---

15 A. Could I ---

16 Q. Well, for our purposes -- so, anyway, you
17 made a Freedom of Information Act request for
18 these e-mails?

19 A. Yes.

20 Q. All right. What do they represent?

21 A. Communication among Council.

22 Q. And how many e-mails are there?

23 A. (No verbal response).

24 Q. Do you know?

25 A. In the eighties, as I recall.

1 Q. And do each of these e-mails -- are they
2 communications by and between members of Council
3 concerning public issues for the Town of Mount
4 Pleasant?

5 A. Yes.

6 Q. And are all members of Council included in
7 these e-mails or are some more restricted?

8 A. Some of more restricted but I think most of
9 them are all.

10 Q. Are all of these eighty-something e-mails
11 by and between at least a quorum of Council,
12 four or more, five or more?

13 A. There are some individual e-mails among
14 them but most of them are five or more.

15 Q. All right.

16 MR. TISDALE: The other side of
17 this issue involves the destruction of what we
18 contend were public documents, in the form of e-
19 mails, by members of Council. That's handled in
20 other testimony, by deposition.

21 THE COURT: Okay.

22 DIRECT EXAMINATION CONTINUED

23 BY MR. TISDALE:

24 Q. Now, Mr. Brock, I think that we have
25 covered the issues that you've alleged in this

1 Complaint but I would just like, in conclusion,
2 to ask you to explain to the court what led you
3 to bring -- to get involved in this lawsuit,
4 bring this action on these particular issues.

5 A. My background in broadcasting put me in
6 contact with ---

7 Q. In fact, I don't think we brought that out
8 in your earlier testimony. Were you involved in
9 the broadcasting business?

10 A. Thirty years.

11 Q. Where?

12 A. Channel 4.

13 Q. Mount Pleasant?

14 A. Yes.

15 Q. What was your position there?

16 A. My position initially -- well, for the last
17 fifteen years I was president and general
18 manager.

19 Q. Of WCIB?

20 A. Yeah.

21 Q. That's Channel 4?

22 A. Channel 4.

23 Q. Okay, go ahead and just tell the court what
24 led you to where we are today?

25 A. It led me to the perception of --

1 (inaudible). It starts small and then it got
2 larger, it seems to increase -- or seemed to
3 accelerate in the year of 2007. There came a
4 time when -- in late 2007 or into 2008 -- when
5 I made a FOIA request. I did reach the point
6 where from what I saw that it became harder to
7 walk away from it, I wanted to try to do
8 something about it. My respect for FOIA,
9 despite the government entity -- (inaudible).

10 Q. And did that lead to this lawsuit, in 2008?

11 A. I came to see you, and we went from there.

12 MR. TISDALE: Your Honor, could I
13 have just a minute to confer with my colleague
14 back there?

15 THE COURT: Yes, sir.

16 MR. TISDALE: Your Honor, if you
17 want to continue now, I am ready for her to
18 cross-examine the ---

19 THE COURT: Yes, sir, we are going to
20 -- we are going to do about fifteen minutes of
21 cross.

22 MR. TISDALE: That's fine. In
23 that case, that is the conclusion of my direct
24 testimony.

25 THE COURT: Or if you would rather

1 wait.

2 MR. TISDALE: Yeah.

3 THE COURT: I mean, we can break for
4 lunch now. It's a quarter of 1:00 and I
5 normally stop at 1:00, but we can stop now if
6 you'd rather wait until after lunch to do cross.
7 We are can start now, finish up later or ---

8 MS. CANTWELL: I don't mind
9 starting.

10 THE COURT: Well, ---

11 MR. TISDALE: He said that he
12 wanted to do one more quick note ---

13 THE WITNESS: There was a
14 requirement of FOIA that they notify --
15 (inaudible, audio tape reverberates with sound
16 and cannot understand witness).

17 *NOTE: This record is being prepared from the*
18 *audio notes of Brenda Cooley, assigned court*
19 *reporter.*

20 MR. TISDALE: Thank you very much.
21 That will conclude our direct examination, Your
22 Honor.

23 THE COURT: Thank you, sir. Cross-
24 examination?

25 MS. CANTWELL: Thank you, Your

1 Honor.

2 CROSS EXAMINATION

3 BY MS. CANTWELL:

4 Q. Mr. Brock, I am Frances Cantwell. It's
5 good to see you this morning. Let me start out
6 briefly asking you about what has been marked as
7 Defendant's Exhibit 8.

8 A. Eight?

9 Q. Exhibit 8.

10 THE COURT: Is it in here? Do you
11 have a copy of it?

12 MS. CANTWELL: Yes, sir.

13 MR. TISDALE: We've got it. It's one
14 of our exhibits.

15 THE COURT: What number?

16 MR. TISDALE: Huh?

17 MS. CANTWELL: (Tenders).

18 MR. TISDALE: It is Exhibit 30-
19 something. We'll get it.

20 THE COURT: All right.

21 MR. TISDALE: Exhibit 39.

22 CROSS EXAMINATION CONTINUED

23 BY MS. CANTWELL:

24 Q. Mr. Brock, earlier in your testimony you
25 were describing how special meetings were called

1 and how rules of Council were governed by
2 Robert's Rules of Order. Do you recall that?

3 A. Yes.

4 Q. And I can direct your attention to 34-22 of
5 Exhibit 8. That addresses how special meetings
6 were handled?

7 A. Yes.

8 Q. Turn to page -- the bottom of the first
9 page, Section 30.29, which sets forth the order
10 of meetings of Council; is that correct?

11 A. Yes.

12 Q. That's how items are usually presented on
13 the agenda?

14 A. Yes.

15 Q. So someone who reads this ordinance would
16 know the order of business of the Council and
17 how meetings are called, whether they are
18 special or sessions adjourned; is that right?

19 A. They would only know that it was special,
20 not a session.

21 Q. Doesn't Section 34-22 address special
22 meetings held and called?

23 A. It does but ---

24 Q. The order applies to regular meetings?

25 A. Yes.

1 Q. All right. But this -- these ordinances
2 address how special meetings are called and how
3 meetings are adjourned, Section 34-22, first
4 page. Then Section 34-29 on the second page
5 addresses the order of business at its regular
6 meetings?

7 A. Right.

8 Q. All right. And subsection "C" of 34-29
9 says meetings are conducted according to
10 Robert's Rules of Order unless otherwise adopted
11 by Council. Correct?

12 A. It does.

13 Q. If you would, turn to the third page of
14 Exhibit 8, Section 34-34. Rules of Order, do
15 you see that?

16 A. Um-humm.

17 Q. And it says that Robert's Rules of Order
18 shall govern all proceedings except as provided
19 by law?

20 A. Correct.

21 Q. Then subsection "B" of the Rules of Order
22 talks about agendas. See that?

23 A. Yes, I do.

24 Q. And the last sentence, will you read that
25 to the Court please.

1 A. (Reading): "Additional items may be added
2 by Council..." -- (inaudible).

3 Q. So the rules of procedure of Council allow
4 for agenda amendment, do they not?

5 A. They do.

6 Q. And the public is on notice of that, are
7 they not?

8 A. Yes, I'd say they are.

9 Q. These ordinances are readily available to
10 the public. Correct?

11 A. Yes, ma'am.

12 Q. In fact, they're published on the internet;
13 aren't they?

14 A. Yes.

15 Q. And through the publication, various legal
16 publications in the Town of Mount Pleasant; are
17 you familiar with that?

18 A. (No verbal response).

19 Q. Okay.

20 MS. CANTWELL: Just bear with me
21 for a second. We're almost at 1:00 and I don't
22 want to break in the middle of my stride.

23 CROSS EXAMINATION CONTINUED

24 BY MS. CANTWELL:

25 Q. Committee meeting schedules are published,

1 are they not?

2 A. Yes, they are.

3 Q. And the public is welcome to attend?

4 A. They are welcome.

5 Q. And the chairman of the committee

6 ordinarily runs the order of the business

7 meeting, doesn't he -- he or she?

8 A. Right.

9 Q. And if people come to the public hearings,
10 the public has the opportunity to ask questions,
11 don't they?

12 A. They have an opportunity, yes.

13 Q. Have you ever seen anybody turned down?

14 A. I've never seen anyone turned down.

15 Q. So as a general rule or the "pattern", if
16 you will, is for committee meetings to be open
17 to the public so that the general public will
18 have an opportunity to be heard if they want to
19 be?

20 A. They would have an opportunity.

21 Q. But you haven't seen anyone turned down --
22 you are not telling this court that you have
23 seen people denied the ability to ---

24 A. No. Absolutely not.

25 Q. Okay. The committee -- I am not going to

1 belabor this but the format group that the
2 committee meets in is that there's a table where
3 committee members sit -- and I believe that you
4 said there's a -- how many, four, five, three or
5 four members of the Council to sit?

6 A. Yes.

7 Q. And you said that there were more than four
8 chairs around the table where the committee
9 sits?

10 A. I've never counted them but, yes, there are
11 -- there are more than four.

12 Q. And when the committee is convening, don't
13 they sit -- don't they have nameplates
14 designating the members of that committee?

15 A. They have nameplates.

16 Q. So if you were sitting there looking up at
17 this table where the committee is sitting, the
18 members would be identified because they have a
19 nameplate in front of them; wouldn't they?

20 A. Yes.

21 Q. All right. So you know who the committee
22 members are?

23 A. I would say so.

24 Q. So the general public would know who the
25 committee members are just by looking at where

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1 the nameplates are?

2 A. I assume so.

3 Q. The -- when the Council members who are not
4 on this committee are present in the room, is it
5 your position that their mere presence when the
6 -- Council members in the room, times five --

7 that that transforms the committee meetings to a
8 Council meeting? Is that what your position is?

9 A. My position would be that it is a committee
10 meeting but if the four council members are
11 present when discussion takes place that the
12 number of people there, the majority are ---

13 Q. Just their mere presence transforms the
14 meeting into a Council meeting?

15 A. Depending on what is being discussed.

16 Q. That is your position?

17 A. Yes.

18 THE COURT: He's saying present and
19 participating in the discussion, is that what
20 you're saying?

21 THE WITNESS: As long as a
22 discussion is taking place.

23 THE COURT: Oh, okay.

24 THE WITNESS: If they are just
25 sitting there, no. But once there is a public

1 discussion of business taking place, they're ---

2 CROSS EXAMINATION CONTINUED

3 BY MS. CANTWELL:

4 Q. Well, suppose that they are not discussing
5 it. Suppose that they are sitting out in the
6 audience or suppose that they are sitting at the
7 head of the table and they are not paying
8 attention, not listening.

9 A. I sat in my chair and I was not always a
10 part of the discussion.

11 Q. So you're saying that mere presence in and
12 of itself would constitute -- would transform an
13 otherwise duly-advertised committee meeting into
14 a meeting of Town Council?

15 A. Yes, provided the public is involved in the
16 discussion.

17 Q. Would it matter to you whether the non-
18 members of the committee, members of the
19 Council, participated or not?

20 A. (No verbal response).

21 Q. What I am saying is that your view is that
22 the committee becomes something else if a
23 Council member walks into the room and the
24 committee is discussing some business.

25 A. Walks into the room, that wouldn't --

1 Q. So they've got to walk in, they've got to
2 sit, uh, how about vote?

3 A. I don't know that I've ever seen a Council
4 member vote.

5 Q. You've never seen a noncommittee member
6 vote on any issue that is before the committee
7 for their ---

8 A. No. Let me add that there are times when
9 the committee doesn't vote. Without a
10 recommendation, there isn't a vote.

11 Q. Well, that is another point that I wanted
12 to talk with you about. The committee doesn't
13 make a decision on any issue, do they?

14 A. One does, the budget committee.

15 Q. And that's only because those have already
16 been approved as far as the budget process,
17 which the entire Council has voted on; correct?

18 A. They do -- the funds have been approved.

19 Q. Okay. But the planning committee, that you
20 were actively involved in, the recreation
21 committee, the legal committee, the purpose of
22 those meetings was to gather information.

23 Correct?

24 A. Right.

25 Q. That is where it lays out the details of

1 what is going on. Correct?

2 A. Right.

3 Q. And the committee, their purpose is simply
4 to make a recommendation to Council; isn't that
5 correct?

6 A. Yes.

7 Q. And so there is nothing binding on the
8 Council that comes out of any committee meeting,
9 is there, ---

10 A. Right.

11 Q. Your position, as I understand it, is that
12 the mere presence of noncommittee members of
13 Council changes the meeting of the committee to
14 a meeting of the Council.

15 A. Yes.

16 Q. And so I guess what the -- I am just trying
17 to understand your issue here. Is it your beef
18 that the meeting of the Council wasn't
19 advertised?

20 A. (Inaudible - static on audio recording.)

21 Q. But haven't you had committee
22 recommendations turned down by Council?

23 A. (Inaudible - static on audio recording).

24 *NOTE: This record is being prepared from the*
25 *audio notes of Brenda Cooley, assigned court*

1 reporter.)

2 Q. (Static)

3 A. I think Council -- (static)

4 Q. (Static)

5 A. I don't agree with that.

6 Q. But don't you agree that any member of the
7 public should have an opportunity -- (static).

8 A. (Static) -- public comment.

9 Q. But we are talking about meetings. I am
10 talking about committee meetings.

11 A. (Static)

12 Q. No, I'm saying that you expressed the
13 concern that -- (static)

14 A. (Static).

15 Q. ... you expressed a concern that if Council
16 members attended committee meetings ...
17 (static).

18 (DISCUSSION ABOUT LUNCH SCHEDULE)

19 THE COURT: Let's proceed.

20 MS. CANTWELL: Thank you, Your
21 Honor.

22 CROSS EXAMINATION CONTINUED

23 BY MS. CANTWELL:

24 Q. Mr. Brock, before we broke for lunch we
25 were talking about committee meetings, but I

1 want to move on to a different subject -- that
2 being probably a blend about the meeting agendas
3 and also announcing the purpose for executive
4 sessions. I just want to clarify for the record
5 that in your Amended Complaint, you mentioned
6 three specific meetings: those being the meeting
7 of December 5, 2007, which is Plaintiff's
8 Exhibits 2, 3; November the 13th, 2007, which is
9 Plaintiff's Exhibits 1 and 2.

10 A. Right.

11 Q. And November the 16th of 2007, which is
12 Plaintiff's Exhibit 16.

13 Now, all of those -- all of the amendments
14 made at those meetings were to agendas of
15 executive sessions. Isn't that correct?

16 A. Yes.

17 Q. Now, let's talk about the meeting of
18 December 5th, '07. That meeting was billed as a
19 special meeting that was really held in lieu of
20 the Council's regular meeting, was it not?

21 A. They decided during the meeting that it
22 would be in lieu of.

23 Q. And you had a full agenda, as if it were a
24 regular meeting of Council?

25 A. As I recall.

1 Q. You have the exhibits in front of you?

2 A. Yes.

3 Q. Take a look at Exhibit 2.

4 A. Okay.

5 Q. And the agenda pretty much tracks the order
6 of business to be discussed earlier as to how
7 Council proceeds?

8 A. Yes.

9 Q. Okay. Now, you have not made any
10 allegations, you don't claim that this special
11 meeting held on Wednesday, December 5th, 2007,
12 there is no problem with the notice of that
13 meeting. Correct?

14 A. None.

15 Q. No problem with the agenda being posted?

16 A. No.

17 Q. And this agenda put the public on notice
18 that there was an executive session scheduled
19 under Item H; correct?

20 A. (Upon review), yes. Executive session.

21 Q. All right. Now, -- and the Motion that was
22 made by Mr. Bustos -- and I am referring to
23 Plaintiff's Exhibit 3, page two of twenty-four,
24 what he actually moved to amend was the agenda
25 of the executive session. Correct?

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- 1 A. Two of twenty-four?
- 2 Q. Yes, sir, at the top of the page?
- 3 A. (Upon review), yes.
- 4 Q. So the executive session agenda is what was
- 5 amended?
- 6 A. Yes.
- 7 Q. Now, you were at that meeting; correct?
- 8 A. For part of the meeting.
- 9 Q. You didn't stay for the whole thing?
- 10 A. No.
- 11 Q. Okay. But you heard that the executive
- 12 session agenda had been amended?
- 13 A. Yes, I heard that it had been amended.
- 14 That's what it says here.
- 15 Q. All right. And you did not protest either
- 16 public participation or that agenda, matters on
- 17 the agenda, allowing the public to address. You
- 18 were aware of it and you didn't object to it.
- 19 A. I did not object to it. No.
- 20 Q. Okay. Now, the amended agenda for the
- 21 executive session was admin matters pertaining
- 22 to the O.K. Tire Store litigation. Correct?
- 23 A. Yes.
- 24 Q. And we've talked about it here today, but
- 25 would you say that it was common knowledge -- or

1 could we agree that the O.K. Tire Store and the
2 Shem Creek property litigation are essentially
3 one and the same?

4 A. I have no way of knowing that. I think
5 that there are two parcels and I don't know if
6 they were the same.

7 Q. Okay. Well, let's talk about the O.K. Tire
8 litigation. The purpose was to receive legal
9 advice and the litigation that that advice was
10 going to be about, that was going to be
11 received, was identified; was it not?

12 A. Yes, it pertained to the O.K. Tire Store
13 litigation.

14 Q. So we know what litigation that they were
15 going to discuss and we know that they were
16 going into executive session.

17 A. Yes.

18 Q. And you don't disagree, do you, that legal
19 advice is a proper reason to convene executive
20 session?

21 A. I would not disagree with you if the legal
22 advice is limited to a specific issue.

23 Q. It is related to claims and pending claims,
24 is it not? Contractual matters, is it not?

25 Negotiations of contractual matters, is it not?

1 A. I guess. I am not reading that.

2 Q. My point is that there is nothing improper
3 about going into executive session to receive
4 legal advice about ongoing litigation?

5 A. As a reason for executive session, there is
6 not.

7 Q. All right. Now, -- so you were sitting in
8 the audience, you would have known that when
9 they get to Item H that they were -- that they
10 had already added that to the agenda, that they
11 were going to take up the O.K. Tire litigation
12 and receive some sort of advice about it.

13 Correct?

14 A. Yes.

15 Q. Okay. When they came out of executive
16 session later on that evening, it was probably a
17 pretty long meeting or at least it looks like
18 it, -- let's go to page twenty-four of twenty-
19 four, Exhibit 3.

20 A. Okay.

21 Q. All right, Mr. Bustos -- I'm reading -- you
22 see the third paragraph down?

23 A. Yeah.

24 Q. (Reading): "Mr. Bustos made a motion to
25 approve the settlement agreement discussed in

1 executive session pertaining to the O.K. Tire
2 Store property condemnation lawsuit." Correct?

3 A. That's correct.

4 Q. So the action taken was to approve the
5 settlement agreement. Okay? Got it?

6 A. Yeah.

7 Q. Then it goes on from there "to execute the
8 settlement agreement." Correct?

9 A. Yes.

10 Q. Now, in your Complaint you implied that
11 settling litigation is not legal advice. Do
12 you think that whether or not to accept a
13 settlement, or to point out the pros and cons
14 of settlement that that is a job that a lawyer
15 should provide to his client?

16 A. Certainly, if the settlement agreement is
17 announced.

18 Q. Well, suppose that -- you know, it's
19 interesting that you said that because what
20 I'm hearing you say is that they should have
21 announced 'we are going to take up a settlement
22 agreement', correct?

23 A. I don't want to put words in your mouth but
24 it's something that would have indicated that
25 there was a possibility, a reasonable

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1 possibility, that was an option.

2 Q. Well, they were talking about litigation,
3 receiving advice on litigation. A settlement of
4 litigation can take all forms. It could be the
5 payment of money, there could be agreements.

6 Correct?

7 A. Yes.

8 Q. It could include purchases of property?

9 A. (No verbal response).

10 Q. And isn't that what happened here? They
11 went into executive session to receive legal
12 advice? They came ---

13 A. They went into executive session to receive
14 legal advice, yes..

15 Q. And they came out and, as a result of that
16 advice, moved to settle the case. Correct?

17 A. They moved to accept the settlement
18 agreement, which is accepting the advice.

19 Q. Let's move to the settlement agreement for
20 a minute. That is Plaintiff's Exhibit 1. The
21 last page was signed on December 5th, 2007;
22 correct?

23 A. (No verbal response).

24 Q. The meeting where Council did this -- it
25 requires that the agreement be executed on or

1 before December 6th, 2007, by 5:00 o'clock. Do
2 you see that?

3 A. I do.

4 Q. So it was a take-it-or-leave-it situation
5 that was proposed by counsel, correct?

6 A. As far as the agreement.

7 Q. Okay. So if Mr. Mason signed it on the 5th
8 -- correct?

9 A. Yes.

10 Q. So Council got it that very day. Correct?
11 With one day to act on it, if they were
12 interested in pursuing the settlement.

13 A. I presume that they got it on that day,
14 yes.

15 Q. Okay. Now, let's fast forward a couple of
16 weeks and I am going to show you what has been
17 marked as Defendant's Exhibit 3, which everybody
18 has got a copy of, I believe.

19 A. Okay.

20 Q. Defendant's Exhibit 3, the first page is
21 a special Town Council meeting to be held on
22 December 17th, 2007. Do you see that?

23 A. Yes.

24 Q. It has an agenda, to "confirm settlement
25 agreement." Correct?

1 A. Right.

2 Q. And to "amend the budget pertaining to
3 property acquisition on Shem Creek", correct?

4 A. That's correct.

5 Q. Then the next two pages -- and you can
6 challenge me if you like, but the next two pages
7 a Motion was made to confirm the settlement
8 agreement and to amend the budget accordingly,
9 as set forth. Correct?

10 A. That's correct.

11 Q. And you have not raised any issue with
12 respect to the notice of this meeting. Correct?

13 A. No.

14 Q. And there have been no additions to this
15 meeting at all?

16 A. No.

17 Q. So in effect what happened on December 17th
18 was that the Council ratified the action that it
19 had taken on December 5th. Correct?

20 A. In my limited knowledge, a real estate
21 ratification has a different meaning. If you're
22 saying 'did they go in and vote on the same
23 thing again', yes.

24 Q. Well, doesn't it say that -- let's say
25 confirmation, that they confirmed what they had

1 previously done? That's the word that they used
2 in the agenda. Okay?

3 A. That is the word that they used, yes.

4 Q. All right. And so even if there had been a
5 problem with the December 5th, 2007, meeting, not
6 saying that there was, it was corrected on
7 December 17th, 2007?

8 A. You mean a problem with the contract and
9 I'm not competent to answer that.

10 Q. Okay. But you don't have any problems with
11 -- you're not raising any issues of propriety
12 with respect to the meeting on December 17th,
13 2007?

14 A. I can't say one way or the other.

15 Q. All right, let's move to the meeting of
16 November the 13th, 2007. That's Plaintiff's
17 Exhibit 22.

18 A. Okay.

19 Q. And, again the agenda consists of an
20 executive session; right?

21 THE COURT: Which exhibit are you
22 referring to?

23 MS. CANTWELL: Exhibit 22.

24 THE COURT: Thank you, ma'am.

25 THE WITNESS: Yes, executive

1 session.

2 CROSS EXAMINATION CONTINUED

3 BY MS. CANTWELL:

4 Q. And the minutes of that meeting, which
5 follow the first page, indicate that a motion
6 was made and accepted to amend the agenda, to
7 get legal advice pertaining to the Attorney
8 General's opinion, and an ordinance. Do you see
9 that?

10 A. Right.

11 Q. I think you testified earlier that you had
12 requested the Attorney General's opinion a month
13 prior or during October of that year.

14 A. About two weeks prior to this.

15 Q. Okay. So something that came up between
16 the last time that council met and this time?

17 A. (No verbal response).

18 Q. If you know.

19 A. (No verbal response).

20 Q. Well, I'll just scratch that. For the
21 Attorney General's opinion to surface and Mr.
22 Gawrych was asking his lawyer to advise him
23 on the consequences of it. Correct?

24 A. I don't know what he was asking. He had
25 consulted the Attorney General concerning the

1 planning commission. He did not ---

2 Q. But he ---

3 A. I do not know what he was asking.

4 Q. Of course not. And the public is not privy
5 to the advice ---

6 A. I'm sorry?

7 Q. I said the public is not privy to the
8 advice, are they?

9 A. No.

10 Q. So he was asking his lawyer for legal
11 advice pertaining to the -- he classified it as
12 pertaining to the planning commission, which you
13 acknowledge that it pertained to the Town
14 Council and the planning commission.

15 A. Yeah.

16 Q. And we know the Attorney General's opinion
17 that he is talking about is the one that you
18 asked for?

19 A. Yes.

20 Q. Let's get back to this, was there any
21 reason why you didn't notify anybody with the
22 Town that you were asking for that opinion?

23 A. I wasn't required to.

24 Q. I know you weren't required to but -- don't
25 you think that it's a matter of common courtesy

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1 to sort of let ---

2 A. No.

3 Q. --- the lawyer know or the mayor know that
4 you made an inquiry.

5 A. No, and I can tell you why.

6 Q. Well, I'd ---

7 A. I took this problem concerning the issue to
8 a member of Council in May and then sometime in
9 September -- and I got no response from the May
10 inquiry. In September I got the response, 'we
11 don't read this plan, only you read this plan.'
12 To say that I did not get any help from them
13 would be an understatement. There was -- it
14 basically said that three positions of Council
15 earlier in the year had been ---

16 Q. I'm not ---

17 A. I only ---

18 MR. TISDALE: Your Honor, I would
19 suggest that he be allowed to answer the
20 question.

21 MS. CANTWELL: That is not
22 responsive to ---

23 THE COURT: Well, let him finish his
24 answer and then you may follow up with questions
25 later.

1 THE WITNESS: At this point I
2 didn't believe that much positive could
3 transpire from -- I did not publish it, I did
4 not provide it because I did not expect any
5 help. I didn't believe that it would go forward
6 by bringing it to the attention of the Town, to
7 go forward in the manner that I thought that it
8 should. I didn't need ---

9 CROSS EXAMINATION CONTINUED

10 BY MS. CANTWELL:

11 Q. I am not asking you whether you needed
12 their permission. Everybody acknowledges that
13 you had every right to do that. I don't think
14 that's an issue. I think every person on
15 Council, I think Mr. Young, me, everybody would
16 say that you had the -- I'm just asking why --
17 and you told me that you just didn't feel that
18 you should inform them that that is what you
19 were going to do?

20 A. I didn't, and that's the reason that I
21 didn't publish it when I got it back. Here is
22 the opinion, here is what happened.

23 Q. Well, anyway, we were talking about this
24 meeting of November 13th. This opinion somehow
25 got out. Correct?

1 A. Yeah.

2 Q. All right. And it is what it is, and
3 Council wanted advice about it. Correct?

4 A. Council wanted what?

5 Q. They wanted legal advice about that
6 Attorney General's opinion, isn't that the
7 motion that Mr. Gawrych made at the November 13th
8 meeting?

9 A. That was the motion.

10 Q. Okay. Now, when you go to the minutes,
11 they went in executive session. As I'm reading,
12 Mr. Santos moved to go into executive session,
13 seconded by Mr. Gawrych. Do you see that, the
14 second page of Exhibit 22?

15 A. (Upon review), yes.

16 Q. Now, Mr. Gawrych made a Motion, a public
17 motion to direct the County attorney to go
18 forward with the discussions pertaining to a
19 piece of property on Shem Creek. Correct?

20 A. That's correct.

21 Q. And that matter had already been published
22 on the agenda?

23 A. That was on the agenda.

24 Q. That next -- excuse me?

25 A. Item H.

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1 Q. It was on the agenda?

2 A. Yes.

3 Q. Then Mr. Bustos then made a motion to
4 authorize the major and Council members to
5 obtain individual attorneys for lawsuits now and
6 in the future with fee statements to be reviewed
7 by the Town attorney. Do you see that?

8 A. I do.

9 Q. Okay. Was there any -- and it was
10 qualified that this would be related to Town
11 business, obviously?

12 A. (No verbal response).

13 Q. Did Council at this meeting on November 13th
14 take any action(s) on the matters that had been
15 added to the agenda by Mr. Gawrych?

16 A. There was no further business discussed
17 before the meeting was adjourned.

18 Q. But they went into executive session to
19 receive legal action.

20 A. Right.

21 Q. They came out of executive and they took no
22 action?

23 A. Right.

24 Q. Or on the opinion pertaining to the
25 Attorney General. Correct?

1 A. I have no way of knowing whether there was
2 any action taken as a result of that session or
3 not.

4 Q. But you don't -- I want this to be clear.

5 A. I can say that there were no motions
6 relating to the Attorney General's opinion made
7 after that session.

8 Q. And there is no motion made relating to any
9 of the matters that were included in the motions
10 in the agenda?

11 A. I can't say that. The motion about the
12 opinion of the Attorney General doesn't appear
13 on the agenda.

14 Q. Well, ---

15 A. Yet there was a motion for it -- where it
16 came from, I have no idea. Or what it's related
17 to. It could be -- I don't know.

18 Q. The meeting of -- whatever they considered
19 in the executive session meeting, they didn't
20 take any action on it?

21 A. No. I'm saying that they took action on
22 something but the motion made is not in the --
23 it's not recognizable. I'm not saying that it's
24 not one of those two things. I am saying that
25 it isn't recognizable.

1 Q. Let me ask this, were you familiar with
2 when the Town was involved in litigation with
3 the owner of the O.K. Tire Store property?

4 A. At this point?

5 Q. Yes.

6 A. Yes.

7 Q. You knew that Council members were being
8 sued in their individual capacities?

9 A. No, I didn't.

10 Q. Did you know that they were being sued for
11 fraud?

12 A. I didn't read the suit until a long time
13 after that.

14 Q. All right. So they -- they asked for
15 advice from your counsel concerning this
16 litigation? That's what the agenda reflects,
17 doesn't it?

18 A. They -- yes, and they received advice.

19 Q. And the advice that came out of that
20 meeting was to move forward with discussions and
21 that they could retain their own attorneys, to
22 be reviewed by the Town attorney with regard to
23 fees.

24 A. That's what it says.

25 Q. Now, let's move on to the November 16th,

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1 2007 meeting of Council. That's Exhibit 16,
2 Plaintiff's Exhibit 16.

3 A. Sixteen?

4 Q. Yes. The only thing on the agenda is
5 executive session, correct?

6 A. Legal advice pertaining to the O.K. Tire
7 Store property.

8 Q. Then when you -- when they got into the
9 meeting, executive session, there was a motion
10 that it be amended to add personnel matters
11 relating to the clerk of council and personnel
12 matters relating to boards and commissions.
13 Correct?

14 A. Yes.

15 COURT REPORTER: Excuse me. Your
16 Honor, is it okay for him to mark on the
17 exhibit?

18 THE COURT: You want to mark them?

19 COURT REPORTER: No, he is marking on
20 the exhibit.

21 THE COURT: No, don't write on them.
22 Okay?

23 THE WITNESS: Okay.

24 THE COURT: If you want to take some
25 notes, I'll be glad to get you a notepad. Okay?

1 THE WITNESS: I was just under-
2 lining this.

3 THE COURT: Well, don't underline
4 and don't mark on the exhibits. If you want a
5 notepad, I will get the clerk to give you a
6 notepad. Okay?

7 THE WITNESS: Yes, sir.

8 MR. TISDALE: We can give him
9 copies of the exhibit if that will help.

10 THE COURT: Pardon?

11 MR. TISDALE: We can give him
12 copies of the exhibits, if that will help.

13 THE COURT: That's okay.

14 THE WITNESS: I am okay with this,
15 Your Honor. I just lost my place.

16 MS. CANTWELL: I'm sorry.

17 CROSS EXAMINATION CONTINUED

18 BY MS. CANTWELL:

19 Q. Where we were just talking about is that
20 the agenda for the special (sic) session had
21 been amended. Then when they came out of
22 executive session, they moved to adjust the
23 requirements pertaining to the clerk of Council;
24 correct?

25 A. Correct.

1 Q. And that was consistent with what they had
2 added to the agenda, taking up matters
3 pertaining to the clerk of Council; correct?

4 A. I'm sorry, I'm lost. I see the motion
5 where they asked to amend the agenda and -- and
6 then?

7 Q. When they came out of executive session,
8 they made a motion consistent with that reason
9 for going into executive session. They were
10 adjusting the requirements pertaining to the
11 position of clerk of Council?

12 A. (No verbal response).

13 Q. Do you see that?

14 A. Well, the amended agenda included, as I
15 said, personnel matters pertaining to the clerk
16 of Council.

17 Q. Well, exactly -- and personnel matters are
18 matters that are discussed in private, aren't
19 they? Or that can be discussed in private?

20 A. They may be discussed in private.

21 Q. And there's nothing wrong with discussing
22 personnel matters in private?

23 A. Provided there is notice, right.

24 Q. And when it comes to salaries, you do not
25 have to disclose the salary of a public employee

1 unless he's making more than fifty thousand
2 dollars; correct?

3 A. That's what I understand.

4 Q. All right.

5 A. But we don't normally discuss salaries.

6 Q. You know, I'm just -- just asking you the
7 questions. Then Mr. Bustos made a motion to
8 reject the offer that was pending in relation to
9 the O.K. -- the Shem Creek property and O.K.
10 Tire Store property litigation. Do you see
11 that?

12 A. Um-humm.

13 Q. That's consistent with the legal advice
14 that was posted on the agenda. Correct?

15 A. Yes.

16 Q. All right.

17 A. Settlement offer.

18 Q. Then there was a motion coming out of the
19 amendment to add personnel matters relating to
20 boards and commissions, was the letter which was
21 to be written -- which ultimately came to you.
22 Correct?

23 A. Um-humm.

24 Q. Now, that also was consistent with matters
25 pertaining to personnel of boards and

1 commissions?

2 A. No.

3 Q. You disagree with that?

4 A. Yes, it was specific to boards.

5 Q. Well, Mr. Brock, I ---

6 A. There are dozens of boards and commissions.

7 Q. Well, I mean, you -- you think it was
8 within Council's prerogative, perhaps to avoid
9 embarrassment to somebody, that they don't
10 publish names of employees that they are going
11 to disciplined, fired, adjust their ---

12 A. I would have to say that it is depends on
13 -- it is a prerogative that they can exercise.
14 Disciplinary matters involving an individual, no
15 I don't think that they have a right to do that.
16 I think that they have the right to go into
17 executive session by saying 'we are going to
18 talk about' -- concerning whatever it is. There
19 is no way of knowing actually what this was.
20 The right way to do it would be to call that
21 person in and discuss ---

22 Q. So if the Freedom of Information Act says
23 that it is appropriate to go into executive
24 session to consider personnel matters, matters
25 pertaining to privacy, it's your position that

1 the counsel should not exercise that prerogative
2 but that you go ahead and call somebody down on
3 it publicly.

4 A. You're adding a new component to the
5 question by adding something generally. You
6 have to do it on a case by case basis. But if
7 you're going to give me an award honoring me or
8 doing something positive and you want to keep
9 that a secret, I don't have a problem with it.
10 But I think, on the other hand, if you're going
11 to do something that involves some disciplinary
12 action, I think that the person who is the
13 target of that has the right or should have the
14 right, that Counsel should certainly grant that
15 person the right to be heard.

16 Q. And the law does provide -- but, you know
17 what? It's the option of the person who is the
18 subject of the action, not the Council's. You
19 think so?

20 A. It depends on how they couched it. I just
21 -- for instance, as a person who was targeted on
22 the planning commission, I had a pretty darn
23 good clue what that was about.

24 Q. You in fact asked to -- asked the Council
25 to call a special meeting to consider your

1 issues with the Council, didn't you?

2 A. I did.

3 Q. So you were entitled ---

4 A. Well, there are parts of that that were
5 important.

6 Q. Well, you can get back to that in a second,
7 but the point that I was making is that there is
8 nothing wrong with Council discussing private
9 personnel matters in executive session. If the
10 person who is the subject of it wants a public
11 hearing, they're entitled to have it. Correct?

12 A. Yes. I apologize. I was assuming that you
13 were asking if I felt that way myself when you
14 said they have that prerogative.

15 Q. I'm asking -- not asking you what you would
16 have done, but as a general rule they didn't
17 step out of bounds by doing that?

18 A. I can't tell you that.

19 Q. Okay.. All right. Exhibit 8 is a meeting
20 held by Council on August 14th, 2007.

21 A. Yes.

22 Q. It was an executive session?

23 A. A special Town Council meeting with
24 executive session.

25 Q. That is the only thing on the agenda?

1 A. Yes.

2 Q. Nothing else.

3 A. (No verbal response).

4 Q. If you would turn to the second page of the
5 minutes, Mr. Burdette -- and I'm reading the
6 first paragraph, "...called the Council into
7 executive session." He indicated that Council
8 would be discussing legal and contractual
9 matters associated with property acquisition
10 associated with Shem Creek and other areas as
11 well as SCE&G right-of-way. Do you see that?

12 A. Um-humm.

13 Q. He added that "Council will also receive
14 legal advice regarding pending cases." Okay?

15 A. Yes.

16 Q. That is consistent with what is on the
17 agenda; correct?

18 A. Yes.

19 Q. All right. Then he goes on to describe the
20 third matter which is under executive session,
21 "relating to personnel matters."

22 A. Well, this ---

23 Q. Going to the bottom of that. Lastly, the
24 third paragraph down, last sentence, he added
25 "Staff would also like to suggest that Council

1 add to the executive session agenda legal
2 counsel with reference to legal representation
3 regarding possible pending legal cases." Do you
4 see that?

5 A. I do.

6 Q. And that motion was made by Mr. Santos to
7 go into executive session for those specific
8 items that Mr. Burdette announced and that were
9 approved. Correct?

10 A. Mr. Santos made the motion. Yeah.

11 Q. And then go down to the bottom where when
12 they convened back in session, every Motion that
13 Council made was consistent with each of the
14 specific purposes -- each of the specific
15 announced purposes of the executive session?

16 A. I'm sorry, I don't agree with one of them.

17 Q. Well, I think you're going ---

18 MR. TISDALE: Your Honor, I would
19 suggest that he be allowed to answer the
20 question before she asks another.

21 THE COURT: Yes, sir. Let him --
22 before you fire another question, let him answer
23 the first one. Please proceed.

24 THE WITNESS: I disagree that
25 there was discussion with legal counsel with

1 reference to legal representation. I assumed
2 that to be who was going to represent us, legal
3 representation. I did not perceive that as
4 personal litigation.

5 CROSS EXAMINATION CONTINUED

6 BY MS. CANTWELL:

7 Q. But it certainly doesn't preclude it, does
8 it?

9 A. I guess not.

10 Q. So when they made the motion in accordance
11 with the recommendation made by Mr. Young, it's
12 encompassed within that specific purpose?

13 A. I don't agree with that.

14 Q. Okay. Well, let's talk about e-mails. I
15 am going to be referencing the e-mails which you
16 identified -- first of all, would you describe
17 for me what your problem is or what's your
18 contention is in this lawsuit with respect to
19 the e-mails that you identified on direct
20 examination?

21 A. I think the e-mails that we are talking --
22 well, which ones are ---

23 Q. I am going to go through each batch.

24 A. Okay. Let's talk about the ones you ---

25 Q. I want to know in general -- you think that

1 these e-mails that you testified to today
2 constitute meetings, is an illegal -- what is
3 it? I mean, I -- I'm trying to find out what
4 your position is.

5 A. The first issue is a discussion of business
6 that is not ---

7 Q. So you think that it's incorrect for
8 members of Council to discuss some council
9 business with another member of Council?

10 A. It depends on how many members of Council,
11 how it is discussed. Generally speaking, in
12 this case I think the discussion was making law
13 by these e-mails and that's totally
14 inappropriate.

15 Q. But does it -- does it just have to be an
16 e-mail by one councilman, does it have to go --
17 does it have to be responded to? Does it have
18 be received by one or more? What's your ---

19 A. I think I'd have to go back to the Freedom
20 of Information Act that talks about that which
21 is a public matter. If what the council member
22 is talking about is not relevant to the public,
23 if it does not involve the public interest, ---

24 Q. What I am trying to understand is that you
25 think it's inappropriate or illegal, pursuant to

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1 the Freedom of Information Act, for a councilman
2 to discuss public business privately with
3 another councilman?

4 A. It depends on the public business, but if
5 the idea behind it is to get a consensus on
6 motions ---

7 Q. That's one on one?

8 A. One on one.

9 Q. So when does it rise to the level in your
10 mind of being inappropriate?

11 A. Well, it would be if that same council
12 member, just one on one, met with nine people
13 just one on one instead of nine people at the
14 same time.

15 The purpose -- as I said earlier, I think
16 if it is a communication with other council
17 members that would be of public interests, ---

18 Q. Let's look at Plaintiff's Exhibit 12.
19 The first three pages of that exhibit, and you
20 can follow along with me, the subject is the
21 DRB; is that correct?

22 A. It is.

23 Q. Then I believe that the correspondence
24 starts on January 17th, 2007, at 9:02. Look
25 at page one.

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1 A. January 18th.

2 Q. Look at January 17th.

3 A. Where it starts on the bottom?

4 Q. Yeah, "e-mail".

5 A. Okay.

6 Q. So that's an e-mail that Mr. Bustos -- and
7 he's a member of Council?

8 A. He is.

9 Q. That he sent to the mayor?

10 A. Right.

11 Q. And I will concede that all the people that
12 were copied on this were -- that all who it was
13 sent to were fellow council members, and that he
14 copied the Town administrator; correct?

15 A. Correct.

16 Q. That was send at 9:02. At 1:29, later on
17 that day, a response came from Mac Burdette;
18 correct?

19 A. Yes.

20 Q. He's responding telling the mayor and
21 Council, responding to Mr. Bustos' e-mail, ---

22 A. That's right.

23 Q. Then the next day, the next day Mr. Swails,
24 Mayor Swails, then-Council member Swails, he
25 responds; correct?

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1 A. Right.

2 Q. Then turn the page, look at the top of the
3 page, then thirty minutes later -- and this is
4 still a day after the original e-mail was
5 generated, Mr. Bustos chimes in. Correct?

6 A. Yes, 9:50 a.m.

7 Q. Yes. So on this -- on this one e-mail, the
8 only people who responded that were on the
9 Council were Mr. Bustos, Mr. Swails, and --
10 that's all, correct?

11 A. Appears to be.

12 Q. So there was no -- certainly no quorum of
13 Council participated in this e-mail chain?

14 A. It was sent to a quorum of the Council.

15 Q. It was sent to them but you don't have any
16 way of knowing if they opened it, do you?

17 A. No.

18 Q. You don't know if they read them, do you?

19 A. No.

20 Q. Okay. The one thing that you do know is
21 that they didn't do anything -- they didn't
22 respond?

23 A. They didn't respond.

24 Q. So there was no ---

25 A. They did not respond by e-mail through the

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1 Town service.

2 Q. So there was not ---

3 A. They may have through private accounts.

4 Q. The question that I am asking you is, the
5 exhibit that you produced as being inappropriate
6 concerns communication, at best, between three
7 members of Council over a period of more than
8 twenty-four hours.

9 A. Yes.

10 Q. Now, let's go to the remainder of that
11 exhibit, and this fast-forwards to March, two
12 months later. This time is it proposed changes
13 to the CDRB, and that's the commercial design
14 review board.

15 A. Right.

16 Q. All right. As I understand it, and you
17 tell me if I am wrong, it was a Council
18 initiative to amend the regulations pertaining
19 to the commercial design review board. Do you
20 recall that?

21 A. It was initiated according to Mr. Bustos by
22 him.

23 Q. But it came to your commission, did it not?

24 A. Yes. I don't recall how though. The
25 commission did -- it came to our attention.

1 Q. And there is nothing wrong with Council
2 initiating a change, is there?

3 A. Anything wrong with Council --- ?

4 Q. Anything illegal about it, that you know
5 of?

6 A. To initiate an ordinance?

7 Q. Right.

8 A. No.

9 Q. All right. So let's go back to these e-
10 mails. The first one on the first page is Mr.
11 Gawrych is passing along a letter received from
12 -- I guess a member if not the chairman of the
13 commercial design review board. If you would
14 look at the bottom of the ---

15 A. It's an e-mail at the top of the page.

16 Q. The e-mail at the top of the page is to Joe
17 Santos on March 2nd, 2007; do you see that?

18 A. Right.

19 Q. Why don't you start on page four of Exhibit
20 12?

21 A. Okay, (reviewing). It starts on the
22 bottom.

23 Q. All right. So the Gawrych e-mail on the
24 bottom, he's sending on a letter that he got
25 from David ---

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1 A. (Inaudible).

2 Q. And he was on the CDRB, correct?

3 A. Correct.

4 Q. Mr. Gawrych had every right to correspond
5 with his councilmen and to send on a
6 constituent's/city officer's opinion about what
7 was transpiring. Correct?

8 A. Yes.

9 Q. All right. So Mr. Gawrych sends it
10 forward. Mac Burdette later on that afternoon
11 sends it to Mayor and Council and he tells
12 Council that no decision has been made, we've
13 instructed staff to put together something,
14 everything is in the formative stages. Do you
15 see that?

16 A. Um-humm.

17 Q. All right. Then you get a response from
18 Mr. Bustos, about an hour later, and this says
19 'I was the one behind this. I think it is the
20 right thing to do.' Correct?

21 A. Essentially, yes.

22 Q. The fourth page of the exhibit, top of the
23 page, Bustos responds about Mr. Gawrych's
24 comment.

25 A. Um-humm.

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1 Q. And there is no further correspondence
2 regarding this until July, correct?

3 A. (No verbal response).

4 Q. On the sixth page.

5 A. Okay.

6 Q. All right. Well, let's go back to the
7 fourth and fifth pages that we were discussing
8 before.

9 Mr. Gawrych sends the letter to his fellow
10 councilmen.

11 Mr. Burdette advises Council what the
12 status of the ordinance is. In fact, he says
13 that it will go to the planning commission and
14 the planning committee before any changes are
15 made. He's setting up procedure. Correct?

16 A. (No verbal response).

17 Q. Mr. Bustos chimes in about his initiative
18 and what he feels about the proposal. Correct?

19 A. Well, Bustos chimes in but he says ---

20 Q. But my point -- whatever he said, he said.
21 These two documents where there was e-mail
22 discussion over the course of a day, if not
23 more, the only discussion, if any, was between
24 Mr. Gawrych, because he sent it; Mr. Burdette,
25 because he responded to it, -- and he is not a

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1 member of Council, right?

2 A. (No verbal response).

3 Q. And Mr. Bustos. So you didn't have -- and
4 the responses weren't spontaneous, were they?
5 There were gaps between them.

6 A. That's correct.

7 Q. So there was not a quorum of Council who
8 responded, correct? Either spontaneously or
9 over a period of time.

10 A. No.

11 Q. Okay. And there was no action taken by
12 anybody as a result of -- no action taken at
13 this time as a result of these e-mails by
14 Council as a body?

15 A. There was an action taken, it's wasn't a
16 council action because it wasn't on the agenda.

17 Q. I asked -- okay. Now let's go to the three
18 pages of Exhibit 12.

19 A. Okay.

20 Q. At the top of the page is Mr. Bustos' --
21 see that?

22 A. Yes.

23 Q. Go down to the bottom of the page, Mr.
24 Brock, where -- it says the original message
25 was generated by Mac Burdette. Correct?

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1 A. Yes.

2 Q. And he is forwarding to Council the results
3 of a planning commission action on the proposed
4 amendments, see that?

5 A. I can't see the attachment. I see that he
6 sent something.

7 Q. Well, he's reporting to Council that the
8 planning commission has referred ---

9 A. Yes.

10 Q. He sends that out to the mayor and Council,
11 not the staff?

12 A. (No verbal response).

13 Q. Later on that day, about thirty minutes
14 later, Mr. Bustos asks -- by e-mail -- his Town
15 administrator what he thinks. Correct?

16 A. I see a statement, not a question. Is that
17 the one?

18 Q. I'm reading where it says, "Mac, again I
19 ask how long?" -- question mark.

20 A. Yes.

21 Q. You see that?

22 A. Yes, I see it.

23 Q. Keep on that same page. Mac Burdette
24 responds, correct?

25 A. Um-humm.

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1 Q. Keeping on that same page, Mr. Bustos
2 responds; correct?

3 A. Mr. Swails?

4 Q. All right, Mr. Swails responds. I see
5 where you are. Okay. So Mr. Swails responds?

6 A. Yes.

7 Q. So in the course of these e-mails what they
8 reflect is the Town administrator sending to the
9 mayor and council a report on what the planning
10 commission decided with respect to the proposed
11 ordinance; correct?

12 A. As described in the e-mail.

13 Q. And those e-mails -- and the only people
14 that responded to these e-mails were Mr. Bustos
15 and Mr. Swails?

16 A. Yes. Correct.

17 Q. And you have no way of knowing whether or
18 not any other member of Council even read this
19 e-mails or not?

20 A. No, I do not.

21 Q. Certainly they did not respond to them, did
22 they?

23 A. Not here.

24 Q. And there is no evidence of any clandestine
25 discussions going on with these e-mails among

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1 five members of Council?

2 A. No.

3 Q. Let's go to Exhibit 29. Well, before we
4 do that, let's go to Exhibit 30. Same subject
5 matter. Correct?

6 A. Yes.

7 Q. Nobody else responded, did they?

8 A. No.

9 Q. A quorum didn't respond, did they?

10 A. A quorum did not respond.

11 Q. A quorum did not participate in this e-mail
12 communication?

13 A. No.

14 Q. Next batch of e-mails pertain to -- on the
15 bottom is TLCF-39 and TLCF-40. Do you see those
16 two?

17 A. Yes.

18 Q. At the bottom of page TLCF039, there is an
19 original message from Barbara Ashe to Billy
20 Swails, et al -- actually it is from Barbara
21 Ashe to Council. The mayor is not included in
22 that communication. Do you see that?

23 A. That's correct.

24 Q. Now, Barbara Ashe worked with the mayor,
25 didn't she?

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1 A. Yeah, for a period of time.

2 Q. So she is sending out a letter for an e-
3 mail from Emily Schear; do you see that?

4 A. (No verbal response).

5 Q. And Mr. Bustos gets it and he writes his
6 councilman -- actually he copies his councilman.
7 He writes a letter to Mr. Schear. Do you see
8 those e-mails directed to her?

9 A. Right.

10 Q. Then he copies his fellow council members
11 on it. Correct?

12 A. What I see, from what you described, the
13 e-mail from Emily Schear to Mr. Bustos.

14 Q. I think that was next, but inbetween those
15 two -- my copies looks like there is a
16 parentheses.

17 A. Yeah. Yes.

18 Q. So Emily -- so Joe Bustos responds to Ms.
19 Shear directly? He send a copy to the Council,
20 do you see that?

21 A. Yes.

22 Q. Then she responds to him. Okay.

23 A. Okay.

24 Q. Got that?

25 A. (No verbal response).

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1 Q. And continuing on to the next page, it is
2 now down to Mr. Bustos and Ms. Schear talking
3 amongst themselves, if you will. The e-mail at
4 the bottom of page that was sent at ---

5 A. The e-mail at the bottom of the page is
6 from Bustos to Schear.

7 Q. Right. Then at the top of the page it's
8 from Ms. Schear to all the Council?

9 A. Correct.

10 Q. All right. Now, the only people doing any
11 talking in these e-mails, if you will, are Mr.
12 Bustos and Ms. Shear. Right?

13 A. Correct.

14 Q. We don't have a quorum of Council respond-
15 ing to these e-mails?

16 A. No, there is not.

17 Q. We have no evidence of a quorum of Council
18 even opening these e-mails, much less who read
19 them; do we?

20 A. We do not.

21 Q. Okay. And certainly there is no action
22 that counsel -- these two e-mails -- these e-
23 mails do not reflect any action being taken by
24 Council?

25 A. No.

1 Q. The next page is 043.

2 A. Okay.

3 Q. And this seems to be a repeat of an earlier
4 e-mail.

5 A. It looks like they're the same.

6 Q. But, very quickly, it's an e-mail that
7 Burdette sends to the mayor and Council, Mr.
8 Gawrych responds, and nobody else does.

9 A. That's right.

10 Q. So the same questions would apply to this,
11 there was a quorum of Council responding or
12 acting on this e-mail?

13 A. No.

14 Q. We don't even know if they read it, do we?

15 A. No.

16 Q. Let's go to the next page, TLFC044, the
17 original message is from Mr. Finley, the
18 reporter, to Mr. Bustos; do you see that?

19 A. I do.

20 Q. Re: FOIA?

21 A. Right.

22 Q. And it says what it says.

23 A. (No verbal response).

24 Q. Joe responded and said, 'I am the last one
25 to follow you.' Do you see that?

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1 A. Yes.

2 Q. No participation by any member of Council
3 other than Mr. Bustos?

4 A. No.

5 Q. They may have received this e-mail but we
6 don't know if they read it. Correct?

7 A. No.

8 Q. We don't know if they opened it?

9 A. No.

10 Q. They certainly didn't act on it.

11 A. (No verbal response).

12 Q. Correct?

13 A. No, they didn't.

14 Q. And that was on Friday, the 7th. And over
15 the weekend, the next batch of e-mail starts at
16 048, 049 050, and 51, and this is correspondence
17 between Mr. Finley and Joe Bustos?

18 A. It is.

19 Q. And at the bottom of the page, 048, Mac
20 Burdette sends the Mayor and Council an FOI.
21 Do you see that?

22 A. FOIA.

23 Q. Earlier that day the top e-mail reflects
24 that he, Mr. Burdette, and Mr. Finely had
25 exchanged e-mails about what the FOI says and

1 what it doesn't say. Correct?

2 A. They have.

3 Q. And that is there -- that certainly doesn't
4 involve Council. They weren't copied on this.
5 Right?

6 A. They were copied in the third one, on the
7 same page.

8 Q. But they weren't part of the initial e-mail
9 between Mr. Finley and ---

10 A. No.

11 Q. --- Mr. Burdette. Mr. Burdette sends them
12 on, correct?

13 A. Correct.

14 Q. Then the discussion continues on the next
15 page with Mac Burdette corresponding directly
16 with Mr. Finley; do you see that?

17 A. That's a repeat of the previous page.

18 Q. Oh, okay. I think you're right. The next
19 page, which starts on Plaintiff's 050, Mr.
20 Bustos writes back Burdette, the Mayor and
21 Council. Correct?

22 A. Correct.

23 Q. Then later on that day, Mr. Bustos and Mr.
24 Finley exchange correspondence. Do you see that
25 on the bottom of the page?

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1 A. Yes.

2 Q. Moving over to page 050, at the top of the
3 page, Mr. Gawrych then weighs in on December the
4 11, a day later, with a respond that I, frankly,
5 don't quite understand but -- it says what it
6 says. Correct?

7 A. Yes.

8 Q. So over the course of these three days when
9 the subject matter is FOIA, the people who
10 participated in this e-mail were Mac Burdette,
11 -- who is not a City Council member; correct?

12 A. Yes, that's correct.

13 Q. Mr. Finley, who is a reporter? Correct?

14 A. That's correct.

15 Q. Mr. Bustos and Mr. Gawrych?

16 A. That's correct.

17 Q. So we don't have a quorum involved with
18 these e-mails, do we?

19 A. I think we decided that we did on one of
20 them.

21 Q. Excuse me?

22 A. I thought we decided that we did on one.

23 Q. Well, let me rephrase the question. A
24 quorum of Council did not subscribe to these
25 e-mails. Correct?

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1 A. That's correct.

2 Q. A quorum of Council did not weigh into the
3 discussion with respect to these e-mails,
4 correct?

5 A. That's correct.

6 Q. A quorum of Council did not take any action
7 by ---

8 A. Did not.

9 Q. --- way of these e-mails?

10 A. Did not.

11 Q. Okay. We're getting there. The next pages
12 are 052, 053, 054 and 055.

13 A. I gotcha.

14 Q. All right. And just to speed things on a
15 little bit, if you'd turn to the second page,
16 page 053, that's an e-mail from Mr. Gawrych to
17 Mr. Finley, correct?

18 A. Yes.

19 Q. Copied Council?

20 A. Yes.

21 Q. And again he's giving Mr. Finley a piece of
22 his mind a little bit?

23 A. Yes.

24 Q. Okay.

25 A. And advice.

1 Q. And advice. If you turn back to page 052,
2 Mr. Finley writes him directly -- Mr. Gawrych --
3 and that's, "Why is the Shem Creek purchase
4 being approved again today?" Do you see that?

5 A. (No verbal response).

6 Q. Then he responds to -- Paul Gawrych
7 responds to Mr. Finley. Do you see that?

8 A. Yes.

9 Q. Now, these e-mails are similar, if not
10 identical, to the ones we previously discussed,
11 do not reflect a quorum of Council weighing in
12 on the discussion?

13 A. Not weighing in on the discussion, no.

14 Q. They do not reflect that a quorum of
15 Council opened the e-mails, do they?

16 A. No.

17 Q. They do not reflect that a quorum of
18 Council read the e-mails?

19 A. No.

20 Q. They do not reflect any simultaneous
21 discussion amongst a quorum of Council?

22 A. No.

23 Q. Then 057 and 058, January of '07, Mr.
24 Bustos writes Mayor and Council about DRB;
25 do you see that?

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1 A. Yes. I think that you showed me those
2 before, I think that these are the ones that
3 we went over.

4 Q. We went over these before?

5 A. We did.

6 Q. So these e-mails are repeats of earlier
7 ones. So they would also reflect no
8 simultaneous discussion among a quorum of
9 Council; correct?

10 A. No, there is no sign of a quorum of
11 Council.

12 Q. And no evidence or indication that a quorum
13 of Council opened these e-mails or read them.
14 Correct?

15 A. Correct.

16 Q. The next batch is 062 and 065. Again, I
17 believe that we have been over these, but this
18 appears to be ---

19 THE COURT: 62 and 65? The tabs?

20 MS. CANTWELL: Plaintiff's numbers
21 on the bottom of the page.

22 THE COURT: I gotcha.

23 MS. CANTWELL: Of Exhibit 38.

24 CROSS EXAMINATION CONTINUED

25 BY MS. CANTWELL:

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1 Q. Again, I think that we've been over these
2 before. There are repeats, where ---

3 A. Right.

4 Q. --- Paul Gawrych is sending Mr. (inaudible)
5 comment's regarding the closed chamber to the
6 DRB and Council with reference to March of 2007?

7 A. Right.

8 Q. And that would have been March 2nd and later
9 on that day, Mr. Mac Burdette sends his report
10 to Council saying where the ordinance is headed
11 -- 065, at the bottom of the page.

12 These are previous e-mails that you've
13 already testified to and they do not indicate
14 a quorum of Council reading these e-mails, do
15 they?

16 A. No.

17 Q. Opening these e-mails, do they?

18 A. No.

19 Q. Responding to these e-mails, do they?

20 A. No.

21 Q. There is no simultaneous discussion of
22 Council at all, quorum of Council?

23 A. No.

24 Q. The next batch, Mr. Brock, will be PLTF
25 083, 084, 85 and 86.

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1 A. Okay.

2 Q. Again they are talking about design of new
3 changes, but now we're in July, three months
4 ahead; correct?

5 A. Yes.

6 Q. At the bottom of page 083, Mac Burdette is
7 forwarding on to Council a memo that he received
8 from Christie Ann Fowler. Do you know who she
9 is?

10 A. She -- she's -- I am not sure of her title,
11 I think she's the assistant manager of -- or --
12 I'm sorry.

13 Q. She worked for the planning department?

14 A. She worked for the planning department.

15 Q. She is an employee?

16 A. Right.

17 Q. She is sending on to Mac -- or Mac is
18 sending on to Council her memo regarding the
19 proposed changed to the Design Review Board.

20 This is an ordinance that Council had been
21 asking for, for at least two months; correct?

22 A. Asking for?

23 Q. Well, the previous e-mails that we
24 discussed happened in March, where they were
25 talking about proposed changes to the DRB.

1 A. It's the same but now it's before the
2 planning commission, that ordinance is in now
3 in front of the planning commission.

4 Q. Okay. But it's July, the planning
5 commission is just getting it?

6 A. (No verbal response).

7 Q. Then at the top of page 083, Mr. Bustos
8 asked Mac how long they can keep delaying
9 action. Do you see that?

10 A. How long.

11 Q. And then if you turn to the next page,
12 you'll see -- these are exhibits that we have
13 already been through, where Mr. Burdette
14 responds to Bustos.

15 A. Yes.

16 Q. Then Mr. Swails, at the top of the page,
17 responds?

18 A. Yes.

19 Q. And on the next page you have Mr. Bustos
20 responding to the e-mails?

21 A. Yes.

22 Q. And on the following page, the only other
23 e-mail that is different is one from Joe Fuller;
24 do you see that?

25 A. Which page?

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1 Q. Page 086.

2 A. Okay. Yes.

3 Q. Joe Fuller has a message, second from the
4 top?

5 A. Yes.

6 Q. So over the course of two days, there are
7 e-mails involving the Planning Commission's
8 actions with respect to the design review
9 changes and these e-mail -- correct me if I'm
10 wrong -- reflect that the only council person/
11 people that responded in any way to these e-
12 mails were Mr. Bustos and Mr. Swails. Is that
13 correct?

14 A. Mr. Bustos and Mr. Swails, yes. Perceived
15 actions.

16 Q. Perceived actions, but -- they did confer,
17 did they not?

18 A. Yes.

19 Q. So, again, these e-mails do not reflect a
20 quorum of Council discussing an issue
21 simultaneously, do they?

22 A. No.

23 Q. And they don't reflect whether a quorum of
24 Council even opened or read these e-mails, do
25 they?

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1 A. No.

2 Q. And they do not show any action taken by
3 Council, do they?

4 A. No, they do not.

5 Q. The next batch is Plaintiff's 4 and that
6 leads into 292, 293, 294 and 295. Again, -- and
7 the reason that I am doing this is because there
8 are some eighty-odd e-mails but this appears to
9 be another repeat of e-mails produced in March
10 with respect to the design review board. Do you
11 see that?

12 A. Yes.

13 Q. And these e-mails don't reflect any action
14 by a quorum of Council, do they?

15 A. No, they don't.

16 Q. All right. There is an e-mail, down at the
17 bottom of the page that says 310. I am not sure
18 -- it's an e-mail from Nancy Schzensa (phonetic)
19 to the Mayor attaching an agenda?

20 A. Right.

21 Q. In your opinion, does this constitute any
22 type of meeting or unlawful communication?

23 A. Not that I am aware of.

24 Q. Okay. Let's look at the next page, page
25 341. 341-343, Design Review Board. Do you see

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1 that, June of '07?

2 A. Yes.

3 Q. Joel Ford sends Mr. Bustos and Mr. Burdette
4 what he perceives to be the action that the
5 planning commission took? Second e-mail on the
6 page?

7 A. It's on the subject.

8 Q. Is that correct?

9 A. It's on the subject.

10 Q. It's on that subject. This is June. The
11 other ones that we were talking about were
12 March, and we had some in July. This is June,
13 Joel Ford sends on the planning commission's
14 report to Mr. Bustos and Mac Burdette. Do you
15 see that?

16 A. Yes.

17 Q. And Mac sends it on to the Town Council.
18 Do you see that?

19 A. Correct.

20 Q. And then on the next page, the e-mail is
21 between Mac and staff with copies to council?

22 A. Okay.

23 Q. Again, in your opinion does this constitute
24 any action by a quorum of Council?

25 A. (No verbal response).

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1 Q. Is that correct?

2 A. Yeah.

3 Q. No discussion amongst a quorum of Council?

4 A. No.

5 Q. All right. Let's move forward. This is a
6 bigger batch, starts at 344 and goes to 361.

7 This is July of 2007.

8 A. Yes.

9 Q. And it's a letter from Council talking
10 about where they were with respect to commercial
11 buildings. Do you see that?

12 A. (No verbal response).

13 Q. The subject is design standards for
14 commercial building?

15 A. Says at the top proposal.

16 Q. Right.

17 A. Okay. Yes.

18 Q. Okay. If you turn to page 355, Mr. Bustos
19 is again asking -- the same e-mail that we had
20 before, how long can the Council hold the
21 ordinance. Do you see that? Page 355, top of
22 the page, Bustos to Burdette.

23 A. Yeah, but I don't think that is the same
24 e-mail. It's July the 11th. The other one was
25 -- I thought that it ---

1 Q. But it's the same question, correct?

2 A. Same issue.

3 Q. If you turn to page 357, Mac Burdette
4 responds and says, "I don't know the answer to
5 your question, but I'll ask." Do you see that?

6 A. I do.

7 Q. And then the subsequent pages, 359, the
8 zoning administrator -- Ms. Farrell, she
9 responds to Mr. Burdette. Do you see that?

10 A. I do.

11 Q. So this batch of e-mails, Mr. Brock, again
12 do not reflect any simultaneous discussion(s)
13 between a quorum of Council, do they?

14 A. No.

15 Q. And certainly no action by a quorum of
16 Council?

17 A. Right.

18 Q. The next batch starts on page 375 and,
19 again, it's July of '07. We are still talking
20 about -- July 19th is days later and we are still
21 talking about, the subject is the proposed
22 design and review changes. Are you with me?

23 A. The subject is the DRB.

24 Q. I am looking at page 375, do you see that
25 at the bottom? At the top there's an e-mail

1 from Mac Burdette to Council and he attached a
2 memo from Christiane Farrell that sets out what
3 happens to the planning commission.

4 A. Yes.

5 Q. All right. The next page, Mr. Bustos asks
6 the question again 'how long can the committee
7 delay?' You see that?

8 A. Yes.

9 Q. The next pages, or two pages over, Max
10 responds -- again, this is the same e-mails that
11 we've had before, correct?

12 A. These looks like the same. I can't tell
13 you without comparing them but they look like
14 the same.

15 Q. Just go to page 380 with me for a second.

16 Okay?

17 A. Okay.

18 Q. Now you've got Billy Swails, now-Mayor
19 Swails, chiming in a day or two days later, at
20 the top of the page? July 20th.

21 A. July 20th.

22 Q. So Mr. Brock, my question would be is the
23 e-mail subject, which is the proposed design
24 review that spans pages 375 through 388 of
25 Exhibit 38 -- if it reflects a quorum of Council

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1 discussing any matter pertaining to Town

2 business simultaneously. Do they?

3 A. Just receiving information.

4 Q. Just receiving information, not acting on
5 it. We don't know, we have no proof, certainly
6 no indication that a quorum of Council opened or
7 read these e-mails.

8 A. No.

9 Q. Starting at page 418 we're now into
10 November of 2008 and Mayor Hallman writes
11 Council, talking about litigation and -- the
12 public and litigation. Do you see that?

13 A. Um-humm. Yes.

14 Q. Okay. Now, he gets a response. He writes
15 at 3:18 and he gets a response, a little over an
16 hour later, from Mr. Bustos. Correct?

17 A. Yes.

18 Q. Then on page 420, this is later in the day,
19 Mr. Gawrych responds and then later in the day,
20 at the top of the page, Mr. Glasson responds.
21 Correct?

22 A. Yes.

23 Q. So with respect to these e-mails that span
24 pages 418 through 421, like the other e-mails
25 that we've discussed earlier, there is no

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1 simultaneous discussion among a quorum of
2 Council, is there?

3 A. No, there is not.

4 Q. And there is no action being taken by a
5 quorum of Council, is there?

6 A. No, there is not.

7 Q. And there is no proof or any evidence that
8 a quorum of Council in any way acted on what is
9 reflected in these e-mails?

10 A. No.

11 Q. I want to talk to you a minute about
12 Exhibit 29. Well, let's go to Exhibit 35.

13 A. Thirty-five. Yes.

14 Q. This is an e-mail management guidelines
15 published by the South Carolina Department of
16 Archives and History.

17 A. Um-humm.

18 Q. Do you agree with that?

19 A. Yes.

20 Q. On the first page under summary the second
21 paragraph starts out with, "E-mail documents..."
22 -- and I am quoting -- "...that hold information
23 about the day-to-day operation of state and
24 local government must be easy to locate." Do
25 you see that?

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1 A. Yes.

2 Q. (Reading): "Those that hold information of
3 long-term or permanent value must be adequately
4 protected." Do you see that?

5 A. Yes.

6 Q. (Reading): "And those of transitory value
7 must be deleted when no longer needed."

8 A. I see that.

9 Q. So an e-mail document, in or of itself, is
10 not sacrosanct, pursuant to this management
11 policy; is it?

12 A. Can you rephrase that, please? We are
13 talking about core policies.

14 Q. I am talking about -- I heard that we
15 illegally delete e-mail and the management
16 policy itself contemplates that some e-mails are
17 appropriate for deletion; are they not?

18 A. After they are categorized and selected,
19 yes.

20 Q. Okay. Not every e-mail is retained for
21 ever and a day, correct?

22 A. No, it -- for correspondence, it would be
23 up to the plan to determine which are to be
24 archived.

25 Q. Just bear with me for a second. An extreme

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1 of those guidelines, in the second column, --

2 are you with me?

3 A. I am.

4 Q. Under "convenience copies", it says

5 "Convenience copies are duplicates of a record

6 copy and only have temporary value."

7 A. Yes.

8 Q. Do you see that?

9 A. (No verbal response).

10 Q. They can be disposed of at any time without

11 authorization, is that correct?

12 A. That's right.

13 Q. And should never be kept longer than the

14 record copies?

15 A. That's right.

16 Q. And the record copies go up to official

17 copies, right above that paragraph, as a

18 "document that constitutes the record of a

19 business transaction." Correct?

20 A. Yes.

21 Q. Okay.

22 MS. CANTWELL: Thank you, Mr.

23 Brock. I have nothing further.

24 MR. TISDALE: Your Honor, may I

25 redirect?

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1 THE COURT: Yes, sir. Are you
2 through with cross?

3 MS. CANTWELL: Yes, sir.

4 THE COURT: Redirect.

5 MR. TISDALE: I will be very
6 brief, I think, Your Honor.

7 THE COURT: Okay.

8 REDIRECT EXAMINATION

9 BY MR. TISDALE:

10 Q. Mr. Brock, the first thing that I would
11 like to ask you to do is to turn to Exhibit 16,
12 please.

13 A. Okay.

14 Q. This has to do with the November 16th, 2007,
15 special Town Council meeting?

16 A. Yes, sir.

17 Q. And an executive session is the only item
18 on agenda, says "Legal advice pertaining to O.K.
19 Tire property litigation."

20 A. Yes, sir.

21 Q. And do you see the Minutes behind that?

22 A. (Upon review), yes.

23 THE COURT: Which number are you on?

24 MR. TISDALE: Your Honor, I am on
25 number sixteen.

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1 THE COURT: Okay. Thank you, sir.

2 REDIRECT EXAMINATION CONTINUED

3 BY MR. TISDALE:

4 Q. And this was a special meeting of Council,
5 was it not?

6 A. It was.

7 Q. Now, does the agenda include the
8 possibility of any action to be taken on any
9 matter following the end of the executive
10 session?

11 A. The agenda shows item one, executive
12 sessions; two item, adjournment.

13 Q. Does it list an item pertaining to action
14 on any matter?

15 A. No, sir.

16 Q. Was any action taken on any matter at that
17 particular meeting, according to the minutes,
18 which are included as the second page of that
19 exhibit?

20 A. Three actions.

21 Q. Three actions were taken?

22 A. Yes.

23 Q. Was there ever an agenda item on any notice
24 to the public that any action was planned on any
25 matter on that occasion?

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1 A. Not that I recall.

2 Q. Are any reflected in the Minutes?

3 A. Any notice?

4 Q. No, any action requested in the meetings?

5 A. Yes.

6 Q. All right, sir. Now, Mr. Brock, I just
7 want to talk to you just a couple of minutes
8 about the e-mail policy that Ms. Cantwell just
9 asked you about and the guidelines promulgated
10 by the, uh, pursuant to the Public Records Act.

11 A. Yes, sir.

12 Q. Do you know, just from your experience with
13 the Town government, since those e-mail
14 guidelines were promulgated in 2003, I believe,

15 ---

16 A. 2005.

17 Q. Okay, in 2005. Has the Town, to your
18 knowledge, promulgated any guidelines concerning
19 the use of e-mails? Retention? Use? Treatment
20 of e-mails? Guidelines?

21 A. Retention and treatment of guidelines, no.

22 Q. And in fact, in 2010, just recently they
23 did adopt a policy concerning the Town e-mail
24 system, did they not?

25 A. Laptops and, you know, -- yes.

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1 Q. The Town system?

2 A. Council.

3 Q. And is there any policy, to your knowledge,
4 at all in place concerning the use of private e-
5 mails?

6 A. It does not prohibit, no.

7 Q. And does it regulate it ---

8 A. No.

9 Q. --- or set guidelines for it in any way?

10 A. The Town computers are governed but nothing
11 else is, private use is not.

12 Q. Private use is not governed by the
13 guidelines?

14 A. No.

15 Q. Okay. Thank you. With respect to Ms.
16 Cantwell's questions to you concerning Exhibit
17 38, the multipage exhibit of e-mail
18 correspondence by and between members of
19 Council, do you remember that?

20 A. I have it.

21 Q. Except for e-mails sent by staff, do those
22 e-mails reflect they're private e-mail
23 addresses?

24 A. Yes.

25 Q. From which and to which correspondence was

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1 sent?

2 A. I believe the mayor had a Town of Mount
3 Pleasant e-mail address, and staff members.

4 Q. Excuse me? What did you say?

5 A. Staff members would have a Mount Pleasant
6 e-mail address.

7 Q. And the major?

8 A. Yes.

9 Q. Now, is there any way for the public to
10 know at any time that those e-mail exchanges
11 were taking place?

12 A. No.

13 Q. Is there any way for the public to have
14 known at any time, absent the FOIA request, that
15 public issues were being dismissed in private by
16 and between members of City Council?

17 A. No.

18 MS. CANTWELL: I object to the
19 question. I don't believe that there has been
20 a foundation laid for that.

21 THE COURT: Overruled.

22 REDIRECT EXAMINATION CONTINUED

23 BY MR. TISDALE:

24 Q. Is there any way for the public to know
25 whether or not the recipients of those e-mails

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1 opened and read e-mails?

2 A. No.

3 Q. Is there any way for the public to know at
4 any time what consideration and weight the
5 members of Town Council gave to any of their e-
6 mail correspondence?

7 A. No.

8 Q. And of course -- and we would -- it would
9 go without saying that in the event that these
10 e-mails were -- that similar e-mails were
11 deleted, there would be no way of anybody
12 knowing what the conversation was between those
13 on Council, would there?

14 A. That's correct.

15 MR. TISDALE: Thank you, Your
16 Honor.

17 THE COURT: Any recross?

18 MS. CANTWELL: Nothing further,
19 Your Honor.

20 THE COURT: Thank you very much. You
21 may step down.

22 (WITNESS STEPS DOWN)

23 MR. TISDALE: Your Honor, we've
24 got a witness who is here, coming in, but in the
25 meantime what I will do is introduce these

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1 deposition exhibits, if I may.

2 THE COURT: Yes, sir, that's fine.

3 MR. TISDALE: For the record, --

4 Ms. Cantwell's designation of deposition.

5 THE COURT: Okay.

6 MR. TISDALE: Your Honor, what we

7 are doing now --

8 THE COURT: Before we do that, how
9 about giving these to the court reporter and let
10 her mark them as Court's Exhibits 1 and 2.

11 MS. CANTWELL: And, Your Honor, may
12 I belatedly introduce the three defendant's
13 exhibits?

14 THE COURT: Yeah, that's fine.

15 (SO ENTERED AS COURT'S EXHIBIT 1)

16 (SO ENTERED AS COURT'S EXHIBIT 2)

17 (SO ENTERED AS DEFENSE EXHIBIT 1)

18 (SO ENTERED AS DEFENSE EXHIBIT 2)

19 (SO ENTERED AS DEFENSE EXHIBIT 3)

20 MR. TISDALE: Those would be
21 Court's Exhibit 1 and 2, is that correct, Your
22 Honor?

23 THE COURT: Yes, sir. Those are the
24 excerpts of the depositions, is that correct?

25 MR. TISDALE: Yes.

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1 THE COURT: That you want the Court
2 to consider.

3 MR. TISDALE: And, Your Honor,
4 this is the original deposition of Santos which
5 will be designated as Court's Exhibit ---

6 THE COURT: Are the original
7 depositions in the book that I just gave to the
8 court reporter?

9 MR. TISDALE: Yes. Those are
10 designations. These are the originals.

11 THE COURT: The originals aren't in
12 that file? Look at th book. I think the
13 originals are in that -- or copies of the
14 originals are in the book. Look and see if they
15 aren't.

16 MR. TISDALE: (Upon review), --
17 Denise the entire depositions are in the book;
18 right?

19 DENISE: Santos and ---

20 MR. TISDALE: --- and Bustos.
21 They are in the book, sir.

22 THE COURT: I don't need the
23 originals. Just hang onto to the originals.
24 I don't need both of them in the record.

25 MR. TISDALE: All right, sir. We

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1 will. However, one of them is already on file,
2 that on Mr. Bustos. It's already on file. And
3 this is the deposition of Robert M. Burdette
4 that we want to put in in its entirety.

5 THE COURT: Okay. Mark it as Court's
6 Exhibit 3.

7 MR. TISDALE: It will be number
8 three, Court's Exhibit number 3.

9 (SO ENTERED AS COURT'S EXHIBIT 3)

10 MR. TISDALE: We would now call
11 Mr. Mark Mason.

12 THE COURT: Before we get there, I
13 want to ask the attorneys a question, if they
14 know, referring to Plaintiff's Exhibit 35 about
15 the e-mail management. On page three where they
16 talk about convenient copies or record copies,
17 is there any place -- I see right above it that
18 they the official copy is a record copy. What
19 is the difference between a record copy and a
20 convenient copy? And, where do you keep a
21 record copy? Where do you keep a convenient
22 copy?

23 MR. TISDALE: Good question.

24 MS. CANTWELL: I think the record
25 copy -- I know that the convenient is -- if I am

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1 copied on something, I have a convenient copy.

2 THE COURT: okay.

3 MS. CANTWELL: The author or the
4 person ---

5 THE COURT: Has the record copy?
6 Whoever initiates the e-mail is the record copy?

7 MS. CANTWELL: I can't say that,
8 Your Honor. I don't know.

9 THE COURT: I don't know.

10 MS. CANTWELL: I think that's a
11 good question.

12 MR. TISDALE: I can't answer that.

13 THE COURT: Can you all sort of try
14 to figure it out and give me something in
15 writing as to what it is. I think that it makes
16 a difference in this e-mail management. I don't
17 have any idea what they are.

18 MR. TISDALE: I believe ---

19 THE COURT: Is the record copy the
20 one that goes on the big server, that people
21 keep and the convenient copy is on your local --
22 on your personal computer? I don't know.

23 MR. TISDALE: I can say, Your
24 Honor, that this whole thing -- that all of this
25 comes out of the Federal Records Act, which is

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1 statute, which we have provided copies of in
2 your book of authorities.

3 THE COURT: All right.

4 MR. TISDALE: We will also look at
5 the ---

6 THE COURT: I mean, there may be a
7 definitions section. I don't know. I don't see
8 a definitions in this management -- the e-mail
9 management.

10 MR. TISDALE: Your Honor, if you
11 look at page three of that exhibit, we might be
12 able to answer it right now.

13 THE COURT: Okay.

14 MR. TISDALE: The top right-hand
15 column, Official Copies, Convenience Copies, ---

16 THE COURT: "An official copy is a
17 record copy. The document constitutes a record
18 of the business transaction." Right?

19 MR. TISDALE: Right.

20 THE COURT: Okay. Well, ---

21 MR. TISDALE: And then you have
22 convenience copies.

23 THE COURT: I mean, what -- I
24 understand, but what is it? Is it one that --
25 is that the person that initiates it or is it

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1 the -- or is it kept on a server or -- let me
2 explain to you what I am saying. We got a list
3 serve with Court Administration. It's a large
4 server that keeps records of all of that. We
5 delete them on our personal computers. Is that
6 what they're talking about? Or are they talking
7 about something else? I don't know. I am just
8 asking a question.

9 MS. CANTWELL: Your Honor, the
10 Records Retention Act, Section 30-4-206, defines
11 the ---

12 THE COURT: I'm sorry. 34-what?

13 MS. CANTWELL: Section 30-4-206.

14 THE COURT: That's the statute? What
15 does it say?

16 MS. CANTWELL: It says -- defines
17 "public record" as "materials that..." -- and I
18 am quoting from my -- I've got the statute right
19 here.

20 THE COURT: Okay.

21 MS. CANTWELL: (Reading): "...
22 prepared, honed, used, in the possession of or
23 retained by a public authority."

24 THE COURT: Okay, so that's the
25 public body that retains it on their server?

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1 MS. CANTWELL: That's what ---

2 THE COURT: And the convenience is
3 the one that people are using on their personal
4 computer, I would assume from what you read to
5 me. Is that correct?

6 MS. CANTWELL: That's what I would
7 interpret it, Your Honor.

8 THE COURT: Okay. All right.

9 MR. TISDALE: We will see if we
10 can elucidate it any further during the trial.

11 THE COURT: That was my gut reaction
12 to it, but I may be wrong. I don't know.

13 MR. TISDALE: Well, I don't know.
14 I can tell you that right now.

15 THE COURT: Okay.

16 MR. TISDALE: We will try to find
17 out.

18 THE COURT: okay. Well, call your
19 next witness.

20 MR. TISDALE: Mr. Mark Mason.

21 MS. CANTWELL: Your Honor, I
22 misspoke. 30-4-206 is part of the Freedom of
23 Information Act.

24 THE COURT: Freedom of Information
25 Act?

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1 MS. CANTWELL: Yes. And I believe
2 Records Retention Act refers to you to the FOIA.

3 THE COURT: Refers you to what?

4 MS. CANTWELL: I believe that it
5 refers you to the Freedom of Information Act.

6 (WITNESS TAKES STAND)

7 MARK MASON, being duly sworn to tell
8 the truth, the whole truth and nothing but the
9 truth, testified, as follows:

10 DIRECT EXAMINATION

11 BY MR. TISDALE:

12 Q. Good afternoon, Mr. Mason.

13 A. Good afternoon.

14 Q. Mr. Mason, just have a few questions for
15 you concerning your involvement in the tran-
16 saction of what we've been calling the O.K. Tire
17 Store litigation or the Shem Creek property.

18 A. Okay.

19 Q. Are you the person who we heard about this
20 afternoon who sold the property to -- the O.K.
21 Tire Store property -- to the Town of Mount
22 Pleasant? You and another person?

23 A. Yes. I represented the LLC did, which was
24 actually a combination of Mr. Smith, his wife,
25 my wife and -- but, yes, I am that person.

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1 Q. Was it you who executed the settlement
2 agreement of that litigation which is Exhibit
3 1 in this case on December 5th, 2007?

4 A. Yes. I mean, I haven't seen the specific
5 document marked as Exhibit 1, but I recall it
6 as a settlement agreement.

7 Q. Okay. Well, I will show it to you.
8 Showing to Exhibit 1 in the case, (tendering).

9 A. All right.

10 Q. Now, Mr. Mason, are you aware that on
11 December 5th, 2007, that Town Council in
12 executive session agreed to purchase this
13 property and to pay six million dollars for it?

14 A. I assume that occurred. I mean, it was an
15 executive session and I obviously wasn't in
16 there. I know that the settlement agreement was
17 executed by the mayor, I believe, on the 6th of
18 December.

19 Q. Was that the 6th? The next day?

20 A. The next day.

21 Q. All right. Excuse me one second. Now,
22 were you ever informed that anything about this
23 agreement was subject yet to further Council
24 consideration?

25 A. No. I obviously assumed when it was

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1 executed that whatever steps needed to be taken
2 in advance of the execution, procedurally, had
3 been taken.

4 Q. Was there anything left to be done except
5 conduct a closing pursuant to the settlement
6 agreement?

7 A. Not as far as I was concerned. I mean,
8 whatever the agreement called for, we had to
9 perform but it set forth what that was.

10 Q. Was anything left, so far as you were
11 concerned, -- were you ever told that the
12 agreement was subject to further ratification by
13 Town Council before it would become effective?

14 A. No, I was never told that but I believe
15 that as a matter of -- I don't know how to
16 describe it. There was additional Council
17 action taken prior to the closing in case there
18 was a question about how it was originally
19 handled, so that prior to the closing any
20 possible legal defects in the procedure would be
21 "cured", I guess you might say.

22 Q. Would that have to do with whether or not
23 there was any notice to the public that they
24 were taking this action?

25 A. I assume so. Yes.

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1 Q. That's what you believed the issue
2 concerned?

3 A. I believe the issue concerned whether the
4 action was taken -- the action that all of us -
5 the date that the mayor and all of us signed the
6 settlement agreement was taken in a proper
7 procedure. That was the issue that I believed
8 was happening.

9 Q. Right. Did the public have notice of that
10 procedure, because they're required to give them
11 twenty-four hours notice as an agenda item of
12 this issue?

13 A. I assume so.

14 Q. Okay. Now, Mr. Mason, if someone from the
15 Town had come to you on December 5th, 2007, and
16 said 'look, we're required to let the public
17 know that we're getting ready to spend six
18 million dollars of their money and we've got to
19 give them twenty-four hours notice so that they
20 can come and speak on this issues if they wish',
21 would you have agreed to a twenty-four extension
22 under those circumstances?'

23 A. Yes, I would have. My main concern was
24 that at the end of the day it was done
25 procedurally correct so there was no way that

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1 any of the transaction could be questioned.

2 Q. Were you ever asked to give a twenty-four
3 hour extension for those reasons?

4 A. No, I wasn't. No at all.

5 Q. Now, just one last thing. With regard to
6 the settlement, I am referring you -- and Your
7 Honor -- to Exhibit 4. I would like, Mr. Mason,
8 for you to take a look at the bottom e-mail on
9 Exhibit 4. First, who is it to and who it is
10 from?

11 A. It's from Mr. Burdette to myself, with a
12 copy to Mr. Young.

13 Q. And what is the date of it?

14 A. December 6th, 2007.

15 Q. That would have been the morning after
16 Council approved the purchase of the property?

17 A. Yes.

18 Q. Would you read what Mr. Burdette wrote to
19 you?

20 A. (Reading): "We are very pleased to have
21 settled the matter pertaining to the purchase of
22 the property on Shem Creek. While we certainly
23 have had our differences, we would like to make
24 this a positive arrangement from both the
25 Council's perspective and your perspective. To

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1 that end, would you and Mr. Smith consider
2 coming to the Town Hall this afternoon for a
3 ceremonial signing and some handshakes. Please
4 let me know as soon as you can, either by e-mail
5 or phone call. Thank you for your considera-
6 tion."

7 Q. Now, look at Exhibit 5. Do you see an e-
8 mail there from Mr. Burdette to Mayor Hallman
9 and Town Council?

10 A. I do..

11 Q. Read that, too, please, if you will?

12 A. (Reading): "This gives us more time to
13 have a grand celebration for the whole town to
14 join. What we did last night has not even
15 begun to set in with what any of us would have
16 thought."

17 Q. Thank you.

18 MR. TISDALE: Your Honor, I don't
19 have any further questions.

20 THE COURT: Okay. Any questions?

21 MS. CANTWELL: Just a few, Your
22 Honor.

23 THE COURT: Pardon?

24 MS. CANTWELL: Just a few.

25 CROSS EXAMINATION

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1 BY MS. CANTWELL:

2 Q. Mark, how are you?

3 A. Okay.

4 Q. Good to see you.

5 A. Thank you.

6 Q. I don't want to get into the nitty-gritty
7 details, but the actions leading up the closing
8 between you and the Council were contentious at
9 times, were they not?

10 A. I would say that we -- obviously we were in
11 litigation. We both put our best foot forward
12 to work it out but, yes, we -- they were.

13 Q. I think what happened is that you were in
14 negotiation for all the property and they
15 weren't going forward, the Counsel wanted to
16 start a condemnation on part of the property;
17 is that right?

18 A. Yes, that's correct. There were two tracts
19 of land and then we -- we were negotiating to
20 sell them both then they moved forward just on
21 one, not the other.

22 Q. Then you came back with a litigation
23 against the Town and the Council?

24 A. Yeah, I was defending myself and I was ---

25 Q. It was quite impressive, I have to say.

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1 But you were suing Council individually and in
2 their official capacities?

3 A. Correct, because I had to bring an action
4 because of the condemnation in order to protect
5 the ---

6 Q. And you -- and some of the allegations were
7 against the Council personally. For the
8 record, I need to have it on here.

9 A. Sure.

10 Q. You included causes of actions, fraud and
11 deceit?

12 A. Whatever causes of action, I did include in
13 there because there were multiple -- there was a
14 Freedom of Information Act cause of action,
15 there was some various causes of action arising
16 from the condemnation statute and there -- there
17 were some others that -- probably those were
18 mentioned, certainly.

19 Q. And also there was rafts of discovery that
20 you had served on the Town and also on the
21 Council, individually and in their official
22 capacities. Do you recall that?

23 A. Yes.

24 Q. I mean, we had Requests to Admit, we had
25 Interrogatories, we had Notices of Depositions,

1 we had Subpoenas for records. Do you remember
2 all that?

3 A. FOIA requests, yet.

4 Q. And time extensions were being given by
5 counsel to other counsel, it looks like; thirty
6 days to produce the documents. Correct?

7 A. Right. I think that there was a hearing
8 set, and that -- yes, there were deadlines and --
9 -- I was interested in moving the matter forward.

10 Q. Okay. The settlement agreement that you
11 signed, Plaintiff Exhibit 1, -- I believe that
12 you have a copy of it up there.

13 A. Right.

14 Q. Well, you can ignore my markings, but
15 that's what I want to direct your attention to.
16 You signed that agreement on the fifth of
17 December?

18 A. I did.

19 Q. I believe that it was delivered to Allen
20 Young at his home on that date; is that correct?

21 A. I hope that I wasn't delivering stuff to
22 Allen's home, but -- if you say so, that's
23 possible. I would hope that if it was delivered
24 to his home that I took it by his office and
25 perhaps Trish, his secretary, brought it by.

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1 But if it was delivered to his home and that's;
2 if that's the recollection, I can't dispute
3 that. That would certainly have been unusual.
4 Not impossible but unusual.

5 Q. But you did want to get ---

6 A. Absolutely. Absolutely.

7 Q. And then the ---

8 A. I wouldn't have taken it his home because I
9 am not sure that I know where he lives. It
10 would have been a messenger or ---

11 Q. Somebody from the office?

12 A. Yes.

13 Q. But the important thing is that it was not
14 put into the Town's hands until after you signed
15 it, is that right?

16 A. Correct.

17 Q. So they got it some point in day on the 5th
18 of December?

19 A. That's correct.

20 Q. And in the settlement agreement, on the
21 first page it says that time is of the essence
22 and that the agreement has to be signed by 5:00
23 p.m. on December 6th.

24 A. It says that. Now, obviously this document
25 is -- was drafted and went back and forth, I

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1 believe a number of drafts, that were commented
2 on and critiqued, maybe even by Town Council,
3 until this version was arrived at on the 5th.

4 Q. Right.

5 A. At which time I signed it and delivered
6 what would have been -- what I hoped would be
7 the final/accepted version, which is Exhibit 1.

8 Q. Which is what was ultimately signed?

9 A. Correct.

10 Q. And which was ultimately used to buy the --

11 A. Correct, this was the operative document.

12 Q. And that contains what I call a drop dead
13 date, "sign this by December 5, December 6th,
14 2007, before 5:00 o'clock. "

15 A. Yeah. And I am not -- I don't remember how
16 that date was arrived at. I don't know why it
17 was selected as opposed to some other date.

18 Whether there were ---

19 Q. Referring to the document -- and I don't
20 have it in front of me, but I think that it
21 talks about that if certain things don't happen
22 by a certain time, the hearings that you had
23 scheduled were going forward. Does that ring a
24 bell with you?

25 A. Yes, I see it.

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1 Q. So the idea was to get this thing signed,
2 sealed and delivered as quickly as possible?

3 A. Yes, to stop all the expenses, all the
4 fighting and get it resolved.

5 Q. And you had a vital interest, I would
6 think, in making sure that procedurally the
7 settlement was approved correctly?

8 A. Absolutely.

9 Q. So if there was any question about it,
10 whether it was a legitimate question or not, but
11 if there was any question about the propriety of
12 Council actions, you would have expected them to
13 ratify or reaffirm what they had done on the
14 night of December 5th?

15 A. Oh, absolutely.

16 Q. And in fact they did that, or do you know
17 if they did that some two months later?

18 A. I believe that it was the day before the
19 closing or just a few days before the closing.

20 MS. CANTWELL: Thank you. I have
21 nothing further.

22 MR. TISDALE: Thank you, Mr.
23 Mason, unless the Court has some questions.

24 THE COURT: No, sir.

25 MR. TISDALE: May he be excused?

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1 THE COURT: Yes, sir.

2 (WITNESS STEPS DOWN)

3 MR. TISDALE: Your Honor, at the
4 beginning this morning we said that we would
5 provide you -- give you notice of --
6 (tendering).

7 THE COURT: Yes, sir. Thank you.

8 MR. TISDALE: Would you like me
9 to mark one or do you just want to take it?

10 THE COURT: I'll be -- any objection
11 if we mark ---

12 MS. CANTWELL: No, sir.

13 THE COURT: Court's Exhibit 5, I
14 believe.

15 MR. TISDALE: Here's an extra copy
16 if you want to just leave that one in the file.

17 THE COURT: Is that number five?

18 COURT REPORTER: I believe it's
19 Court's Exhibit 4, Your Honor.

20 (SO ENTERED AS COURT'S EXHIBIT 4)

21 MR. TISDALE: Your Honor, that's
22 the plaintiff's case.

23 THE COURT: Okay. Any Motions?

24 MS. CANTWELL: Yes. I guess where
25 I will go to first, Your Honor, are the

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1 contentions that there were illegal e-mails
2 exchanged by and among Council such that
3 business was being conducted by a quorum of
4 Council via the internet. I think by the
5 testimony and the evidence that they proved
6 conclusively that that just did not cut it.
7 There was passive receipt by e-mail by more than
8 a quorum of Council but there was no evidence
9 than any action, discussion or any other
10 activity resulted from the transmission of those
11 e-mails.

12 As a matter of law, a meeting requires
13 a convening or an assemblage, if you will, of a
14 quorum of Council for the purpose of discussing
15 or acting on a matter over which it has
16 jurisdiction. There is no evidence that the
17 Council did that by these e-mails.

18 So I would move for a directed verdict
19 on that cause of action.

20 THE COURT: Let me see which one that
21 it is.

22 MS. CANTWELL: That would be ---

23 THE COURT: Notice is number two.
24 Number three is executive session. Number four
25 -- excuse me -- it goes from -- my copy goes

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1 from three to six.

2 MS. CANTWELL: It is number six.

3 THE COURT: Goes from three to six
4 and seven.

5 MS. CANTWELL: You have the Amended
6 Complaint, Your Honor?

7 THE COURT: Yeah, the Amended
8 Complaint goes from count one, count two, count
9 three and then it goes to count six, count five
10 and then count six and count seven.

11 MS. CANTWELL: It's the second
12 count six.

13 THE COURT: I assume it is supposed
14 to go from -- I guess that they got confused on
15 their Roman numerals. Okay. Maybe it's count
16 four. Count five. Count six is the one that we
17 are talking about. Okay.

18 MS. CANTWELL: Count 6. For the
19 reasons that I just orally adopted and as set
20 forth in my memorandum as that a meeting
21 requires simultaneous discussions, assemblage --
22 if not face to face, then instantaneous and
23 simultaneous discussion, and there is no
24 evidence that that has occurred or has ever
25 occurred.

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1 THE COURT: Well, the problem I have
2 is that I haven't read any of the depositions.
3 I don't know if there are any admissions in
4 there or not.

5 MS. CANTWELL: Well, there's no
6 admissions with respect to this issue.

7 THE COURT: Well, okay.

8 MS. CANTWELL: That I can recall.

9 THE COURT: Okay.

10 MS. CANTWELL: I do -- I also would
11 like to move for a directed verdict on what's
12 been denominated as count one ---

13 THE COURT: Count one? Well, first
14 of all let me hear plaintiff's counsel, the e-
15 mails, count six?

16 MR. TISDALE: Your Honor, I also
17 think that -- I mean, I think Your Honor would
18 need to review in some detail to determine ---

19 THE COURT: I think I pretty well
20 read them all while she was going through them.
21 Okay?

22 MR. TISDALE: Well, it's
23 established that ---

24 THE COURT: I think I pretty well
25 read just about all of them while we were going

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1 through them.

2 MR. TISDALE: There is no
3 question, I don't think, under the statute.
4 Therefore, I -- because they discussed public
5 issues electronically and that's specifically
6 covered by FOIA. So it's a public record.
7 There is no question, based on the documents
8 that they are ---

9 THE COURT: So you think just sending
10 an e-mail to the other council members
11 constitutes -- what? Even though it is very
12 clear that they all didn't respond, on occasions
13 one or two did, on occasions four did, three or
14 four.

15 MR. TISDALE: Here is what I think
16 in that regard, if we -- say that we had a
17 Council meeting in person in this room, if three
18 of the nine council members don't say anything
19 during the meeting, it doesn't mean that they
20 are not present. So the fact that they don't
21 respond to an e-mail, doesn't mean that they
22 haven't received any information concerning the
23 public interest about something that they are
24 responsible for. That makes an affirmative
25 argument between the quorum of Council whether

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1 or not they responded, uh, and it's, uh,
2 something that the public is entitled to know
3 about. It is a defacto meeting of Council under
4 the law and under the cases.

5 I think that this is an -- the case
6 versus Sumter County deals with this issue, as
7 well as at least one of the ---

8 THE COURT: Even though no action was
9 taken? No votes or anything, no position, just
10 e-mails back and forth discussing matters.

11 MR. TISDALE: That the public
12 knows nothing about, that influences matters ---

13 THE COURT: How are those e-mails any
14 different than two of the council members
15 meeting in a grocery store and talking?

16 MR. TISDALE: Because there's more
17 of them, Your Honor. There is ---

18 THE COURT: Have all of the members
19 received copies? Is that your ---

20 MR. TISDALE: Yes, sir.

21 THE COURT: Okay.

22 MR. TISDALE: They very definitely
23 received copies.

24 THE COURT: Okay.

25 MR. TISDALE: The staff is

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1 involved, too. The whole action is to discuss
2 and lead to a decision on public issues that are
3 within the purview of the Council, that the
4 public has no way of knowing anything about.
5 That's what that Freedom of Information Act is
6 all about.

7 The Attorney General's Opinion 092-2
8 deals with this subject. You have a copy of
9 that.

10 THE COURT: Okay. Thank you so much.
11 I am going to really have to read on some of
12 this before I can make a decision. For
13 practical purposes, I'll take it under
14 advisement. But it's going to come out one way
15 or the other when I rule.

16 MR. TISDALE: When you ---

17 MS. CANTWELL: Are you going to
18 take it under advisement on all causes of
19 action?

20 THE COURT: I will be glad for you to
21 go ahead and put on the record on all the causes
22 of action but I'm going to have to take it under
23 advisement because it's just a voluminous amount
24 of material that I'm going to have to read.

25 MR. TISDALE: We certainly ---

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1 THE COURT: And I don't think that
2 there is any way that I can sit here and make a
3 rational decision without at least reading the
4 e-mails and reading the law and at the same time
5 reading those depositions. Okay?

6 MS. CANTWELL: Well, if -- if I
7 could, just for the record, ---

8 THE COURT: Go ahead and put on the
9 record your Motions.

10 MS. CANTWELL: Okay. Well, you
11 heard me on the e-mail. The first count in the
12 Amended Complaint is the December 7th meeting of
13 Council and whether or not it was appropriate to
14 amend the agenda for executive session. I
15 believe that the law of this state does not even
16 require an agenda for executive session and that
17 *Herald Publishing v Barnwell* case is right on
18 all corners where a special meeting was
19 convened, whether an executive session was on
20 the agenda, where the agenda was amended, action
21 was taken and the court upheld the actions of
22 the City of Barnwell.

23 THE COURT: Well, did the City of
24 Barnwell have the ordinance that the city of
25 Mount Pleasant has? Let me see. I think that

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1 it is thirty-nine, let me see -- you're talking
2 about apples and apples. You've got a city
3 ordinance here that specifically says you're
4 going to put out an agenda.

5 MS. CANTWELL: Right.

6 THE COURT: Okay?

7 MS. CANTWELL: Yes, sir.

8 THE COURT: On the case that you
9 cited to the court, was there an ordinance
10 similar as to here? Because, I think that would
11 make a difference.

12 MS. CANTWELL: The facts were ---

13 THE COURT: What were the facts in
14 that case.

15 MS. CANTWELL: The facts were --
16 in our case, obviously, state law requires
17 notices of meetings, special meetings and
18 regular meetings. So does our local ordinance.

19 In Barnwell, the -- (pause).

20 The allegation against the town in
21 this case is that we violated the Freedom of
22 Information Act by amending the agenda of
23 executive session to include Mr. Mason's
24 settlement.

25 THE COURT: Right.

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1 MS. CANTWELL: In the specific
2 Barnwell case, the specific allegation was the
3 same thing. It had to do with contractual
4 matters, that they were considering a situation
5 and they called a special meeting, with an
6 executive session in the special meeting. When
7 they got to the meeting, they amended the agenda
8 and went into executive session, came out and
9 took whatever action they wanted. The media
10 brought an action against the city and said,
11 'you violated FOIA because you amended that
12 agenda improperly and we didn't have notice of
13 it.'

14 What the Court of Appeals said is that
15 the Freedom of Information Act does not require
16 an agenda for an executive session be posted or
17 that the news media be noticed of an agenda for
18 an executive session.

19 So I think what we have to deal with is
20 the allegations that this Complaint sets forth.
21 What the court said is that the Act requires an
22 executive session, for the presiding officer to
23 announce the purpose to go into executive
24 session and come out and you take whatever
25 action that you want to take. That not only is

1 reflective of what happened at the December 5th
2 meeting but it -- I'll give you an example.

3 If you could not ever amend an agenda,
4 particularly for an executive session, -- things
5 come up during public meetings all the time
6 where a councilman or a mayor or even the
7 administrator might say, 'you know, you might
8 need to hear some legal advice on this before we
9 move forward.' So the purpose of allowing for
10 executive sessions is not when you have business
11 that comes out, that needs attention, you
12 announce why you're going behind closed doors,
13 you discuss it, you don't take any action and
14 then whatever action you want to take, the
15 public is privy to.

16 But -- and so the factual situation
17 that evolved is right on with respect to this
18 case. And additionally what the court of
19 appeals said is that there's been no prejudice
20 as a result of what happened. Here that holds
21 doubly true because -- because not only was Mr.
22 Brock at this meeting, had the opportunity to
23 object, did not object, in fact left the
24 meeting, but the -- but the actions of the
25 Council were cured. Mr. Mason was correct,

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1 that's what the law required. They came back
2 two weeks later and reaffirmed what they had
3 done.

4 THE COURT: Well, it was to solidify
5 the agreement. I don't think that has anything
6 to do with whether they violated FOIA on
7 December the 5th, or the 6th, or whenever it was.
8 I think that is immaterial about the
9 ratification of it later. It may be material as
10 to the contract and the transaction, I agree
11 with you. But for purposes of what we're here
12 for, I don't think that it makes any difference
13 whether they ratified it or didn't ratify it.

14 MS. CANTWELL: Well, Your Honor, I
15 would just direct your attention to *Multimedia*
16 *v. Greenville Airport Commission* where the
17 Commission did something wrong in the way that
18 they approved something. They came back and
19 they ratified it sometime later on and the court
20 upheld it and said 'that's not a violation of
21 the Freedom of Information Act, nobody has been
22 harmed, you cured the defect. We are not going
23 to hang you out on a technical offense.'

24 THE COURT: Um-humm.

25 MS. CANTWELL: So I think what you

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1 have here is not only was Mr. Brock not at the
2 meeting to begin with, but he testified that at
3 the second meeting that there was no notice, so
4 if he had gone he would have had the requisite
5 notice that the public had. So whatever
6 happened, if it was wrong, at the December 5th
7 was cured on December 17th. I don't think that
8 there is any evidence to the contrary. That's
9 my position.

10 THE COURT: Okay. I understand.

11 MR. TISDALE: Do you want to hear
12 my response to that.

13 THE COURT: If you want to address
14 that. I think that she's talking about the
15 first cause of action, notice.

16 MR. TISDALE: Well, I just want to
17 comment on what you just said, Your Honor. I
18 think ---

19 THE COURT: I may be wrong. That was
20 just my gut reaction to what she said. I
21 haven't read the cases.

22 MR. TISDALE: Well, I think you're
23 correct. I think you're absolutely correct
24 that it goes beyond that, because I think she's
25 missed the point. The reason that they did the

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1 ratification was because it had been pointed out
2 to them that the public did not know anything
3 about them spending six million dollars of their
4 money for property that was worth three million.
5 There was a possibility that the whole thing
6 could get set aside at their expense.

7 But as far as Mr. Mason is concerned,
8 it was a done deal and over with.

9 So the point is that the public had
10 nothing to say about this transaction. The
11 public would not have any leg to stand on in the
12 ratification area because if they went in and
13 complained they were only truthfully being told,
14 'Look, we have already done this.' As Mr. Mason
15 testified, it's over with. 'And what you think
16 about it, whether you think we should have spent
17 six million dollars or not, it's over it. Thank
18 you for coming.'

19 The public needed to be notified in the
20 beginning so that it could go to the meeting and
21 say it is not right, ---

22 THE COURT: Your opposing counsel
23 says the case that you're referring to says just
24 the opposite. I read the case. I don't know
25 whether the facts are the same or not.

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1 MR. TISDALE: I have already asked
2 Mr. McLeod (phonetic) to make a note of the case
3 so that we can take a look at it.

4 THE COURT: Okay. Well, if you have
5 a different conclusion, how about submitting it
6 to me very briefly in a short letter. Okay?

7 MR. TISDALE: With copy to her?

8 THE COURT: With a copy to opposing
9 counsel.

10 MR. TISDALE: We certainly will do
11 that.

12 THE COURT: I mean, the facts have to
13 be the same. I don't know if they were
14 questioning -- there was a lawsuit involved in
15 the other case, trying to set it aside and the
16 ratification cured it or if we are just talking
17 about a strict FOIA violation. Okay?

18 MR. TISDALE: Yes, sir.

19 THE COURT: I think that there's a --
20 could be a distinction there.

21 MR. TISDALE: Yes, sir. And if I
22 could just say one more thing about this agenda
23 issue.

24 THE COURT: Okay.

25 MR. TISDALE: The FOIA has not --

1 in this part of it, not document production but
2 in this way of doing business, has not been
3 litigated much in this case. But what one of
4 the attorney general's opinion says is -- that
5 we've submitted to you -- that to say that
6 agenda can be amended to add public matter after
7 the notice has been posted would make the
8 requirement for the agenda to be posted for a
9 special meeting completely meaningless.

10 THE COURT: Well, let me -- and while
11 you're on that point -- and when you made your
12 opening statement, you alluded to Robert's Rules
13 of Order stating that in a special meeting they
14 cannot amend the agenda.

15 If we read -- and if you would, turn to
16 Plaintiff's Exhibit 39, down at the very bottom,
17 "Agenda." At the bottom it says, "Additional
18 items may be added to a Council agenda after the
19 stated time only through a motion approved by
20 the majority of Council to amend the agenda at
21 one of the meetings." And up above it says
22 "Robert's Rules of Order effective except as
23 provided by law or this section."

24 Now, don't you think that section on
25 Robert's Rules of Order about amending a special

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1 agenda is modified by that Ordinance?

2 MR. TISDALE: Well, it could be.

3 But it doesn't automatically trump the FOIA
4 which says that a special meeting has to have an
5 agenda posted twenty-four hours prior to ---

6 THE COURT: I understand that. That
7 is not what I am asking you. My question is
8 about modifying it, amending it, after it has
9 been published by motion and vote by the
10 majority of Council. That's what I am asking
11 you.

12 MR. TISDALE: I agree that is
13 their rule, they say that is their rule.

14 THE COURT: Right.

15 MR. TISDALE: But I am saying now
16 that that is in conflict with the FOIA.

17 THE COURT: Where?

18 MR. TISDALE: I was getting ready
19 to give you -- let's see, what section is it?
20 It's a well-known section.

21 THE COURT: Are you saying amendments
22 of all agendas or just ---

23 MR. TISDALE: Special.

24 THE COURT: Special?

25 MR. TISDALE: It says a special

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1 meeting is optional to have an agenda but if you
2 post one that it has to be the agenda, that it
3 can't be amended later. The statute doesn't say
4 that. A special meeting is set under 30-4-20.

5 THE COURT: What does it say?

6 MR. TISDALE: Well, let me find
7 it. It's -- well, that's not it. It's 80, Your
8 Honor.

9 THE COURT: 30-4-80?

10 MR. TISDALE: Yes, sir. I am
11 trying to turn to it right now. I will just
12 read this particular sentence of 30-4-80,
13 (reading): "All public bodies must post on a
14 bulletin board public notice for any called
15 special or rescheduled meetings. Such notice
16 must be posted as early as practical but no
17 later than twenty-four hours before the meeting.
18 The notice must include the agenda, date and
19 time and place of the meeting. This requirement
20 does not apply to emergency meetings of public
21 bodies."

22 But as Mr. Burdette testified in his
23 deposition that we filed, there has never been
24 an emergency in Mount Pleasant, an emergency
25 meeting.

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1 THE COURT: Okay.

2 MR. TISDALE: However, Your Honor,
3 what I just read was a special meeting, that
4 required ---

5 THE COURT: But what does it say
6 about amending that ---

7 MR. TISDALE: It just says that
8 there has to be an agenda ---

9 THE COURT: But it doesn't prohibit
10 the amendments by majority of Council, -- does
11 it?

12 MR. TISDALE: Well, what the
13 Attorney General says ---

14 THE COURT: I don't care what the
15 Attorney General says, I want to know what the
16 Court of Appeals or the Supreme Court said.

17 MR. TISDALE: They haven't said
18 yet.

19 THE COURT: Okay.

20 MR. TISDALE: That's why we are
21 here.

22 THE COURT: Do you have any cases in
23 any other jurisdictions that address that narrow
24 issue?

25 MR. TISDALE: I can address that,

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1 too.

2 THE COURT: Yes, sir. Please do.

3 I am asking that in that particular issue, if
4 the language is the same in the statute, can
5 the agenda be amended by majority of the Council
6 members present?

7 MR. TISDALE: We will -- we will
8 address that issue briefly in our letter

9 THE COURT: Because I think that's
10 your issue.

11 MR. TISDALE: That is the issue.

12 THE COURT: Right.

13 MR. TISDALE: And to the extent
14 that it applies -- I can't remember now whether
15 or not the ---

16 THE COURT: I mean, the FOIA is solid
17 on that.

18 MR. TISDALE: Well, it is.

19 THE COURT: Okay.

20 MR. TISDALE: But what I am saying
21 is that one of these opinions, I believe, and we
22 will put this in the letter, cites some law from
23 other places that says that it would be meaning-
24 less to post an agenda, then change it or add to
25 ---

1 THE COURT: I agree with you that the
2 intent of the statute is to provide the public
3 an opportunity to be heard on the issues coming
4 up with Council, not having a surprise change in
5 the agenda.

6 MR. TISDALE: Right.

7 THE COURT: It doesn't purport to the
8 purpose of the statute. I agree with you on
9 that. But that doesn't necessarily mean that
10 they can't amend it when you've got a majority
11 of the Council there that approves it.

12 MR. TISDALE: They can only amend
13 it, I agree, Your Honor -- unless it violated
14 the FOIA.

15 THE COURT: Okay.

16 MR. TISDALE: And that is the
17 issue that we will address for you.

18 THE COURT: Okay. All right.
19 Anything else? Or are we getting too far
20 afield?

21 MR. TISDALE: No, nothing else on
22 that point.

23 THE COURT: Okay, do you want to
24 address the other causes of action or do you
25 just want to make a Motion for ---

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1 MS. CANTWELL: I will just make a
2 motion to preserve for the record at this time
3 -- we move for a directed verdict on ---

4 THE COURT: Go ahead and protect your
5 record. Make your Motion.

6 MS. CANTWELL: Well, Your Honor, I
7 don't want to ---

8 THE COURT: You just make a directed
9 verdict motion on all causes of action presented
10 by the plaintiff, is that correct?

11 MS. CANTWELL: Yes, sir.

12 THE COURT: I will take them all
13 under advisement.

14 MS. CANTWELL: Thank you, Your
15 Honor.

16 THE COURT: Yes, ma'am.

17 MR. TISDALE: Please enter our
18 opposition.

19 THE COURT: Pardon?

20 MR. TISDALE: Put in our standard
21 opposition.

22 THE COURT: And the plaintiff
23 opposes. I understand. You want to call your
24 first witness?

25 MS. CANTWELL: I can do that.

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1 THE COURT: Please do.

2 MS. CANTWELL: We call Mac
3 Burdette.

4 (WITNESS TAKES STAND)

5 MAC BURDETTE, being duly sworn to tell
6 the truth, the whole truth and nothing but the
7 truth, testified, as follows:

8 DIRECT EXAMINATION

9 BY MS. CANTWELL:

10 Q. Mr. Burdette, what is your current
11 occupation?

12 A. I am the Executive Director for the
13 Patriots Point development park.

14 Q. How long have you held that position?

15 A. Seven weeks.

16 Q. Seven weeks?

17 A. (No verbal response).

18 Q. Prior to taking on that task, what was your
19 job?

20 A. I was the Town Administrator for the Town
21 of Mount Pleasant.

22 Q. And how long did you hold that position?

23 A. Just under twenty-five years.

24 Q. When did you retire?

25 A. November the 12th, 2010.

1 Q. 2010. So you were out of work for six
2 weeks before you jumped back into the fire?

3 A. About three days.

4 Q. Three days. Okay. You were the Town
5 Administrator then through all the times that
6 we've discussed today when -- with respect to
7 this litigation -- June, July, -- June '07
8 through June of '09?

9 A. Yes.

10 Q. All right. You have a master's degree, I
11 think, from Clemson; is that right?

12 A. Two masters degrees; yes, ma'am.

13 Q. And what are they in?

14 A. A masters degree in American History and a
15 masters degree in City Administration and
16 Planning.

17 Q. And when you came to work for the Town,
18 again what year was that?

19 A. 1986.

20 Q. What was the population of Mount Pleasant
21 then?

22 A. 22,000, approximately.

23 Q. And what is it today?

24 A. Approximately 70,000.

25 Q. So there's been huge growth over the last

1 twenty years?

2 A. Yes.

3 Q. You have been -- you have been the
4 administrator throughout that entire time?

5 A. Yes, ma'am.

6 Q. And as administrator, departments of the
7 Town report to you?

8 A. That's correct.

9 Q. And then you report to the Council?

10 A. Yes, ma'am.

11 Q. Okay. Before I get started, let me -- Mac,
12 let me give you the documents that I have marked
13 as Defendant's Exhibit 7.

14 A. Thank you.

15 Q. Can you tell the court what this document
16 is?

17 A. It's public records. Do you need more than
18 that?

19 Q. Does it lay out a program for addressing to
20 retaining public records for the Town of Mount
21 Pleasant?

22 A. I think that's an accurate way to describe
23 it.

24 Q. Can you just give us a capsulized version
25 of how it's handled with the Town?

1 A. How?

2 Q. How records were kept?

3 A. Record retention. Well, first of all of
4 course the government statute is the state
5 statute that regulates the maintenance of
6 records, disposal or records. Our policies were
7 certainly consistent with that. We maintain
8 the records in such a manner that has the
9 overall efficiency of accessing records for the
10 efficiency of town government.

11 Q. With respect to the specific people in the
12 Town who are responsible for the program, how
13 does that work?

14 A. Every department is responsible. I am also
15 responsible as the Town Administrator for every
16 department that I had.

17 Q. And to your knowledge, have they
18 coordinated their actions with the department
19 of archives and history?

20 A. Indirectly, yes.

21 Q. Okay. During your tenure as town
22 administrator, have you ever had any
23 investigation(s), inquiries or complaints from
24 the department of history with respect to the
25 manner in which the Town maintains its records?

1 A. None that I recollect.

2 Q. Mac, I'll give you a document which I have
3 marked as Defendant's Exhibit 8. If you would,
4 briefly describe or identify what those
5 documents are?

6 A. (Reviewing).

7 MR. TISDALE: We have no objection
8 to this, by the way.

9 THE COURT: Okay.

10 MR. TISDALE: Or any of the
11 others?

12 MS. CANTWELL: Pardon?

13 MR. TISDALE: We don't object to
14 any of the documents you've presented thus far.

15 THE COURT: Thank you.

16 DIRECT EXAMINATION CONTINUED

17 BY MS. CANTWELL:

18 Q. Christiane Farrell, who is she?

19 A. Director of Planning.

20 Q. And she, on page 431 of Exhibit 8, she has
21 provided to Allen Young the records retention
22 policy for the planning department; is that
23 correct?

24 A. It appears so. It's dated after I left so
25 I'm not familiar with it directly.

1 Q. All right, let me ask you about Lee Cabe
2 (phonetic)?

3 A. Yes, he is -- he works for the planning
4 department.

5 Q. What about Wuneka Kirven (phonetic).

6 A. She is the clerk of court for ---

7 Q. All right. Robert Waggenbrenner?

8 A. He is the assistant fire chief.

9 Q. And Captain Stan Craig?

10 A. He is a captain in the Police Department.

11 Q. How about Ken Ahue (phonetic)?

12 A. Ken was director of recreation.

13 Q. And were all of these individuals that I've
14 just named -- and I'm got one more to go. How
15 about Christie Arnette?

16 A. I don't know Christie.

17 Q. This was in 1993?

18 A. Sorry, I don't recall.

19 Q. The individuals that you do recall, did
20 they hold positions in the town whereby they
21 would have input, if not responsibility, for
22 maintaining the records of the various
23 departments?

24 A. Certainly as department managers, they
25 would. Department managers could assign that

1 responsibility to another staff person, and it
2 sounds very logical that those that you named
3 may have assigned those duties.

4 Q. Thank you. With respect to Town Council,
5 if I understand correctly, was it last year that
6 Town Council were issued Town laptops?

7 A. Yes, ma'am, I believe it was late summer,
8 August perhaps.

9 Q. And what was the reasoning behind that, if
10 you recall? Why was that decision made?

11 A. Well, actually it came from the request of
12 one particular -- of one council member, that
13 felt like it would be more efficient for
14 communication to, let's say, move into the 21st
15 Century, to use the technologies that are
16 available rather than doing everything by paper,
17 which is costly and very inefficient. That was
18 the primary reason for doing it, as I recall.

19 Q. Would those computers be used for the
20 purpose of Town business?

21 A. Absolutely.

22 Q. Like would you send them agendas now by
23 internet as opposed to by paper?

24 A. Agendas and all supporting documents.

25 Q. Essentially that would be how you, as

1 administrator, would communicate with your
2 council?

3 A. That's correct, along with telephone calls.

4 Q. All right. If you could look at Exhibit
5 40, please. Plaintiff's Exhibit 40.

6 A. I have it, Ms. Cantwell.

7 Q. Resolution of -- you see that?

8 A. Yes, ma'am.

9 Q. Tell me what this resolution is about?

10 A. The resolution calls for elected officials
11 use of Town computers and e-mail accounts?

12 Q. Was this resolution passed in conjunction
13 with Council being supplied Town laptops and e-
14 mail addresses?

15 A. I think this policy was adopted right after
16 the computers were initially used, very shortly
17 thereafter.

18 Q. All right. Would you look at Exhibit A to
19 the Resolution. It talks about the use of Town
20 computers and e-mail accounts.

21 A. Yes, ma'am.

22 Q. Does it lay out rules and regulations that
23 guides the Council in the use of Town computers?

24 A. It does.

25 Q. And does it address the deletions of e-

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1 mails and the retention of e-mails? I direct
2 your attention to paragraphs three and four of
3 page two of two.

4 A. Three actually lays out that when Council
5 members are communicating with Town employees
6 and other officials they should -- shall -- use
7 the Town-provided computers.

8 Four, all electronic communications
9 originating on official Town-provided computers
10 and all electronic communications received from
11 sources other than a Town computer, along with
12 all responses made by official thereto, shall be
13 retained on the computer unless otherwise
14 directed by the clerk of council.

15 Q. And would the clerk of council be the
16 department head, if you will, that would manage
17 Council records?

18 A. Would not be the department head but let's
19 -- she's appointed by Town Council. She is not
20 an elected employee.

21 Q. Mr. Burdette, with respect to e-mails in
22 general, if an e-mail gets on the Town server,
23 whether it was originated by somebody who is in
24 the Town or whether it is sent by someone out of
25 the Town, how would those e-mails get ---

1 A. They are then simply public documents.

2 They are maintained according to our policies,
3 with no exceptions.

4 Q. To your knowledge have any of those ever
5 been deleted from the Town server?

6 A. Not that I know of.

7 Q. So anything that originated from the Town
8 or that has come through the Town, you could
9 find it?

10 A. (No verbal response).

11 Q. Of course, if somebody ---

12 A. Maybe not me, but you could find it
13 somewhere.

14 Q. Let's talk about amending agendas for a few
15 minutes.

16 THE COURT: Let me ask you a question
17 before you leave this. You were sitting in the
18 courtroom when your attorney went through
19 Plaintiff's Exhibit 38 in great detail, all
20 these e-mails between various parties, some
21 Council members, yourself and other parties and
22 constituents.

23 THE WITNESS: Yes, sir.

24 THE COURT: Were these e-mails, did
25 they use the Town system and the Town computers,

1 used in these e-mails; or do you know?

2 THE WITNESS: I believe that all
3 of these are predating the time that Council was
4 issued Town computers, so these should have been
5 on private computers.

6 THE COURT: All right.

7 THE WITNESS: Except for what came
8 into the Town, and of course those are public.

9 THE COURT: Thank you very much.
10 Please proceed.

11 MS. CANTWELL: Thank you, Your
12 Honor.

13 DIRECT EXAMINATION CONTINUED

14 BY MS. CANTWELL:

15 Q. Mac, you were in the courtroom today when
16 there was discussion about amending agendas.
17 Would you explain -- first of all, would you
18 explain how amending an agenda is, given your
19 experience.

20 A. I would say that it happened when before
21 a council meeting or during a council meeting
22 there may have been an oversight, maybe
23 something that came up at the last minute that
24 was important that Council should consider, or
25 a council member might have something that they

1 decided was important to be heard that did not
2 make the deadline for the agenda -- which, by
3 the way, is Thursday at 4:30 prior to the
4 Council meeting. So you're talking about four
5 days before Council meetings.

6 Q. The Council meeting on the following
7 Tuesday?

8 A. That's correct.

9 Q. So if something comes up after 4:30
10 Thursday before the Tuesday meeting that
11 requires Council attention, those would be the
12 types of things that would be the subject of
13 agendas being amended by and large?

14 A. (Affirmative nod), would have to be voted
15 on by Council; a motion, seconded and a vote.

16 Q. And the rules of procedure set out how
17 agendas can be amended?

18 A. Yes, ma'am.

19 Q. And those rules of procedure, I think we
20 heard earlier, they are readily available to the
21 public?

22 A. Yes, ma'am.

23 Q. They are posted on your website?

24 A. That's correct.

25 Q. Okay. Have there been -- can you give the

1 Court -- we've heard examples today about
2 amended agendas pertaining to executive
3 sessions. What types of things that you can
4 recall that have been added to an agenda by the
5 Council, for whatever reason?

6 A. If you can give me a moment to think, I'm
7 sure I can think of something. Once you leave
8 things behind, you kind of leave behind your
9 memory bank sometimes. I apologize.

10 MS. CANTWELL: Can I give him a
11 little hint, Your Honor?

12 THE COURT: Yeah, give him a little
13 hint.

14 MS. CANTWELL: How about grants?

15 THE COURT: You're concentrating on
16 the Yorktown now, huh?

17 THE WITNESS: Yes, sir.
18 Absolutely. I've got enough to worry about.

19 DIRECT EXAMINATION CONTINUED

20 BY MS. CANTWELL:

21 Q. Grants?

22 A. Grants? Absolutely. There are times when
23 we discover a grant opportunity prior to Council
24 meeting but after the deadline for establishing
25 the agenda. We find out that the deadline for

1 actually applying for the grant will be between
2 this Council meeting -- the next Council meeting
3 and the one that's -- the one that's a month
4 later. Our policy is that Council must approve
5 the application for grants, so that we don't in
6 fact incur a cost without Council's approval.

7 So that's an example of something that
8 if we felt was a great opportunity, we'd ask the
9 mayor to consider and ask Council to consider a
10 motion and second to amend the agenda, so that
11 we can be allowed by policy to apply for the
12 grant.

13 Q. You've been in the courtroom today and
14 certainly the Minutes have reflected,
15 oftentimes, you as Town Administrator suggesting
16 amendments being made to the agenda for various
17 reasons. In doing so, were you -- were you
18 doing that in an effort to accommodate the
19 public's business?

20 A. Absolutely. Absolutely.

21 Q. If an agenda could not be amended, if that
22 were the rule -- if you had an agenda and it
23 could not be amended, how would that affect the
24 operations of the Town?

25 A. Well, it could have quite serious effects.

1 There could be legal ramifications. We've had
2 employee situations that needed to be dealt with
3 by Council, that occurred between the issuance
4 of the agenda and the meeting and in fact needed
5 Council action to address that personnel
6 situation. There's a number of examples. It
7 could involve department managers, in which case
8 -- only Council can deal with department
9 managers. Such matters.

10 Q. Certainly I think the question is why
11 wouldn't you just call a special meeting?

12 A. Certainly that could be done. I think out
13 of an issue of efficiency, you -- our Council
14 meetings, regular, special and committee, which
15 are two full days of committee meetings, we try
16 to understand their time limitations. Most of
17 our Council members have jobs. We try to take
18 that into account. So certainly if we can use
19 an established meeting, even if we have to amend
20 the agenda, we try to do that.

21 Q. And if you have to there is a procedure in
22 place for doing that, available to the public?

23 A. Yes.

24 Q. I was going to ask you about that. Is the
25 position of mayor, is that a fulltime or a part-

1 time position?

2 A. It is a part-time position that's fulltime.

3 Q. That's fulltime?

4 A. (No verbal response).

5 Q. How about members of Council?

6 A. Well, it's certainly part-time in every
7 legal sense of the word, but I'd suggest that
8 they probably spend somewhere in the neighbor-
9 hood of fifteen to eighteen hours a week working
10 on Council business.

11 Q. And are they paid?

12 A. Yes, ma'am. They are.

13 Q. What does the mayor make?

14 A. The mayor makes somewhere around \$24,000.
15 I'm guessing.

16 Q. What about Council?

17 A. \$400 per.

18 Q. I want to turn your attention to the
19 timeframe of the summer, winter, fall of 2007.
20 I want to talk to you about what led up to the
21 purchase of what we are calling the O.K. Tire
22 Store property. Would you just explain to the
23 court -- well, I think that's already been
24 explained. But this property is located on Shem
25 Creek, access to the water?

1 A. Right. High land with associated docks,
2 owned by the same individual that owned O.K.
3 Tire. Council was very interested in obtaining
4 the high land property as well as the docks to
5 allow public access to one of the most important
6 bodies of water in our community.

7 Q. And you entered negotiations with Mr. Mason
8 and his various LLCs?

9 A. Actually started before Mr. Mason became
10 involved with the property. It started with the
11 original owner and then after the negotiations
12 had started, Mr. Mark Mason acquired the
13 property and we had negotiations with him and so
14 forth.

15 Q. Is it fair to say that negotiations started
16 really picking up in the summer and fall of
17 2007?

18 A. That's sounds like about the right date.

19 Q. And was that an issue of public discussion?

20 A. Oh, -- yes, ma'am. Sure was. It was
21 written about many times in the *Post & Courier*,
22 as well as television media.

23 Q. And it was discussed publicly in committee
24 meetings and council meetings?

25 A. Yes.

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1 Q. And what about the purchase price, was the
2 number six million dollars every quoted?

3 A. Oh, many times.

4 Q. That original offer tendered to Mr. Mason
5 was rejected, was it not?

6 A. As I recall.

7 Q. And after that offer was rejected, the
8 decision was made to condemn some of or all of
9 the property?

10 A. That's correct.

11 Q. And after that, Mr. Mason -- understandably
12 -- got a little upset and he sued back, if you
13 will?

14 A. He was quite adversarial.

15 Q. And there was intense discovery going on?

16 A. Absolutely. Mr. Mason was a diligent
17 attorney.

18 MR. TISDALE: That's on the
19 record.

20 THE WITNESS: That's a compliment.

21 DIRECT EXAMINATION CONTINUED

22 BY MS. CANTWELL:

23 Q. And counsel -- and I don't know if you
24 remember, but if you don't remember just let me
25 know. But after that do you remember if

1 members of the council were being sued in their
2 individual capacities?

3 A. Absolutely.

4 Q. And was there a concern by members of the
5 council that their personal assets were at
6 stake?

7 Q. Absolutely.

8 Q. All right. So when all this was going on,
9 there was a series of meetings of the Council,
10 special and regular? Is that right?

11 A. Yes, ma'am.

12 Q. There were two meetings, as you heard
13 today, in November of 2007; one was on the 13th
14 and one was on the 16th. If you can -- I need
15 the exhibit numbers. If you would, take a look
16 at Exhibit 22.

17 A. Thank you, (reviewing).

18 Q. I have a 21 and a 23. I don't see a 22, or
19 22 is blank. Sorry, it's not there.

20 Q. You can use mine, (tendering). Exhibit 22
21 is an agenda and the minutes of a meeting held
22 on November 13th, 2007.

23 A. Yes, ma'am.

24 Q. Turn to page two. If you read down, there
25 was a Motion made to amend the agenda to add