

John Alden Bauer III  
109 Ashton Hill Drive  
Columbia, South Carolina 29229

January 9, 2016

Jenny Abbott Kitchings  
Clerk of Court  
PO Box 11629  
Columbia, SC 29211

Re: John Alden Bauer, III v. Beaufort Co. Sch. Dist.  
Appellate Case No. 2016-000955

Dear Ms. Kitchings,

I am stunned that the Risk Manager for the Beaufort County School District (Respondent), Jennifer Staton, in a Response to my FOIA Request actually admits that the district may be guilty of spoliation in my case.

This seems to me to be an important development so I am filing copies of her Response and of my Reply for the consideration of the court.

I hope that the New Year is going well for you.

Very truly yours,

*John Alden Bauer III*

John Alden Bauer III

copies: David T. Duff, Esquire  
Jennifer Staton

**RECEIVED**

JAN 09 2017

**SC Court of Appeals**

John Alden Bauer, III  
109 Ashton Hill Drive  
Columbia, South Carolina 29229

January 9, 2017

Jennifer Staton  
Risk Manager  
PO Drawer 309  
Beaufort, SC 29901

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RE: APPELLATE CASE NO. 2016-000955

Dear Ms. Staton,

RE: Reply to your January 3, 2017, FOIA Response.

RE: District indicates Spoliation

My case is currently in the SC Court of Appeals and I will provide the court with a copy of your Response letter of January 3, 2017 and a copy of my Reply.

This letter will also serve as an appeal to your decision.

Points of Reference:

- *Preserved* Evidence, cannot legally be destroyed. That is Spoliation.
- Emails: 4.5% of the estimated total number of emails was provided, according to testimony by Alice Walton. The other 95.5% has not been provided.
- Video Evidence was agreed to be preserved, *i.e.*, “...cease the regular use and rotation for reuse of those devices as described above until all relevant data can be copied..and verified...” Failure to do so violates Spoliation law.
- Evidence was ordered to be *preserved* February 5, 2014.
- Childs and Halligan confirmed that all relevant evidence had been *preserved*.

- The McAden letter of December 13, 1013 [sic] is a public record and the District entered it as an exhibit in a public hearing on April 30, 2015.

Your letter indicates that the District (“Respondent” in this case) is allegedly guilty of not complying with the law concerning preservation of evidence after a Litigation Hold.

### Specifics

As Jill McAden, Principal of Hilton Head Elementary School

testified, *“Everything was to be preserved.”* (Page 209, line 19+, Board Hearing,)

George McMaster of Tomkins and McMaster, sent a Litigation Hold Letter to Alice Walton, (Chief Administrative and Human Resources Officer), to Dr. Jeffrey C. Moss (Superintendent of the Beaufort County School District) and to Jill Matthews McAden. Mr. McMaster’s letter emphasized: “...cease the regular use and rotation for reuse of those devices as described above until all relevant data can be copied..and verified...”

The law firm of Childs and Halligan confirmed that all data had been preserved by the administration at both the district level and at the school level. *“We checked with the administration and have been assured that the staff has taken appropriate steps to preserve the data contained in District-owned computers and other electronic devices at the District level and at Hilton Head Elementary School, which are applicable to your client.”*

Do lawyers and administrators not understand the purpose of “... *cease the regular use and rotation for reuse of those devices as described above until all relevant data can be copied..and verified...*” (?)

And yet your letter strongly indicates that the evidence was not preserved, not copied, and not verified.

The **2006 Amendment** to the FRCP requires that public schools be able to reproduce emails.

Section VI, Video Monitoring System Procedures of the Beaufort County School District Policy Manual, “Video recordings and data files may be viewed and used...as part of a potential claim against the district.”

No phone records, thousands of emails withheld, no video footage, etc. With those exculpatory “*Preserved Records*” in tact I should have been exonerated and have continued my career.

From your letter, referring to emails you state: “... *to fulfill this request the BCSD would be required to task an employee with making the records available.*” Not true.

Ms. Walton testified that she could and would make all emails accessible to my computer in three minutes.

Page 252, Walton Deposition, February 5, 2015.

10 Q Did you ever unblock it so that he

11 could download his E-mails?

12 A No.

13 Q How long did it take to disable it?

14 A Three minutes.

15 Q How long would it take to enable his

16 computer so he could retrieve his own E-mails?

17 A Three minutes.

And page 260

12 Q Well, we are interested in everything.

13 A Okay. I will send spam as well.

14 Q Okay.

Note: Walton had estimated that there were 2,000 emails per year. The district supplied only 1,087 covering a 6 year period.

The order to preserve the evidence was given to Ms. McAden on February 5, 2014 as she testified (page 209, Board Hearing). That evidence was to be preserved (see above quotations from McMaster and from the firm of Childs and Halligan) Since “...*all relevant data*” was to be “*copied..and verified...*”. There was no reason not to preserve the evidence and therefore the district is allegedly guilty of spoliation. (see below for more detail on the law)

You also falsely state that the McAden letter December 10, 1013 [sic] is not a public document. The document was introduced by the district at a public hearing on April 30, 2014. But the existence and availability of the document is not the issue. The only question concerned the creation date, which is part of the record--a ten second right-

click---left-click,---voila operation-- that could have revealed the truth. From the S.C. Code Ann. § 30-4-20(c). “...other documentary materials regardless of physical form or characteristics,” And that last quotation is commented on in the South Carolina - Open Government Guide “which has been construed to include records in electronic media”.

The district again seems to admit spoliation if it has not preserved the computer.

(The McAden letter was actually written on, or about, June 27, 2014)

Concerning Spoliation.

“Once the duty to preserve arises, a litigant is expected, at the very least, to ‘suspend its routine document and retention/ destruction policy and to put in place a litigation hold.’”<sup>28</sup> ACORN v. County of Nassau, 2009 U.S. Dist. LEXIS 19459 (E.D.N.Y. Mar. 9, 2009) (quoting Zubulake, 220 F.R.D. at 218).

“Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”<sup>1</sup> West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

“ABA Model Rule 3.4, which is codified in many states’ Rules of Professional Conduct, instructs that “..shall not . . . obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value[ ] . . . or assist another person to do any such act[.]”<sup>19</sup> ABA Model Rule of Professional Conduct, Fairness to Opposing Party and Counsel, 3.4(a) (2003).

The above are quoted from the *Journal of the American Academy of Matrimonial Lawyers*, Vol. 23, 2010

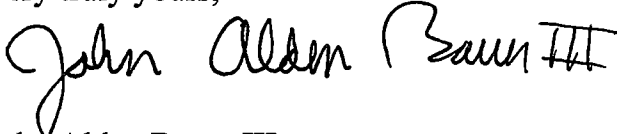
Apparently the BCSD has again flagrantly violated my rights and continues to cause significant damage to me. The District should take remedial action. (SCRCP Rules 3.3(3), 1.2(d), 1.0(f), 1.6), 8.4(a))

FERPA

Your claim that the emails may contain student educational records is incorrect. Confidential student records were not sent nor discussed via email, so the Family Educational Rights and Privacy Act (FERPA) does not apply.

Ironically BCSD violated FERPA on July 2, 2015 when it sent 13 un-redacted confidential 504's, etc., to Professor John Bauer in Columbia. Still worse the district did not inform nor apologize to the families for the violation. The fact that the district thought it was sending the confidential files to me is irrelevant since neither Dr. Bauer nor I were authorized to receive them. That was the same shipment where 9 of my notebook binders were lost by the district, all of my evidence exhibits were shredded, and a set of master keys to the district offices was enclosed!

Very truly yours,



John Alden Bauer III

Copy: David T. Duff

**RECEIVED**

JAN 09 2017

SC Court of Appeals



January 3, 2017

John Alden Bauer III  
9 Ashton Hill Drive  
Columbia, SC 29229

Dear Mr. Bauer:

The District is in receipt of your correspondence dated December 13, 2016 in which you asked several questions pursuant to the South Carolina Freedom of Information Act (FOIA.) Below I have restated each of your questions and the District's response is below.

- "Pursuant to the South Carolina Freedom of Information Act (SCFOIA), I am requesting all e-mails sent and received from my school e-mail account between February 5, 2002 – February 5, 2014."

I understand that these e-mails were previously provided to defense counsel prior to your hearing before the Beaufort County School District Board of Education. As the requested e-mails may contain student educational records which the BCSD is prohibited from providing you pursuant to the Family Educational Rights and Privacy Act (FERPA) and which are thereby exempted from production pursuant to S.C. Code Ann. § 30-4-40(4), and as all or a part of the requested e-mails may otherwise be exempted from production pursuant to S.C. Code Ann. § 30-4-40, to fulfill this request, the BCSD would be required to task an employee with making the records available. Should you desire for the BCSD to proceed in such a manner, please notify me accordingly such that the BCSD may determine the estimated cost and required deposit necessary from you in this matter.

- "Pursuant to the South Carolina Freedom of Information Act (SCFOIA), I am requesting review access to all video surveillance footage that was required to be preserved, as required by the attorneys, school administration, and district administration from the dates of February 5, 2015 and November 1, 2013."

As I indicated to you in my October 12, 2015, FOIA response, school surveillance video is stored electronically and retained approximately ten (10) to fourteen (14) days before the storage space is reused. Requests for video must normally be made within seven (7) to ten (10) days of an incident if video is to be retrieved. I am unaware of any requests

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John Alden Bauer III

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made by you or your representative within that time period. There are no videos responsive to your request.

- "Pursuant to the Freedom of Information Act (FOIA), I am requesting review access to the school computer of Jill McAden, that was required to be preserved, and that she alleges to have used on December 10, 2013 to create a document dated December 10, 1013 [sic]."

The District denies your request. The purpose of FOIA is request existing public records. You have requested no public records as defined by S.C. Code Ann. § 30-4-20(c).

Sincerely,



Jennifer A. Staton, MS, CSP  
Risk Manager

Cc: Jeffrey C. Moss, PhD, Superintendent  
Alice W. Walton, Chief Administrative and Human Resources Officer  
Drew Davis, General Counsel  
James H. Foster, Director of Communications

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John Alden Bauer III  
9 Ashton Hill Drive  
Columbia, SC 29229  
843-384-1506

December 13, 2016

Jennifer Staton, MS, CSP  
Risk Manager  
Beaufort County School District  
2900 Mink Point Blvd  
PO Drawer 309  
Beaufort, SC 29901-0309

Re: FOIA Request

Dear Ms. Staton,

Pursuant to the South Carolina Freedom of Information Act (SCFOIA), I am requesting all emails sent and received from my school email account between February 5, 2002-February 5, 2014. ([john.bauer@beaufort.k12.sc.us](mailto:john.bauer@beaufort.k12.sc.us) ([alden.bauer@beaufort.k12.sc.us](mailto:alden.bauer@beaufort.k12.sc.us)))

I request that you furnish the information without any charge since the emails can be restored instantaneously to my computer at no cost to you, as testified to by Alice Walton on February 5, 2015, and also because the information may be used for evidence in the South Carolina Court of Appeals, the 14th Judicial Circuit Court, and the materials are in the public interest. Please contact me at the above address, phone number or email address if you have any questions regarding this request.

Pursuant to the SC Freedom of Information Act (SCFOIA), I am requesting review access to all video surveillance footage that was required to be preserved, as

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confirmed by the attorneys, school administration, and district administration, from the dates of February 5, 2015 and November 1, 2013.

Pursuant to the Freedom of Information Act (FOIA), I am requesting review access to the school computer of Jill McAden, that was required to be preserved, and that she alleges to have used on December 10, 2013 to create a document dated December 10, 1013 [sic].

Sincerely,

A handwritten signature in cursive script that reads "John Alden Bauer III". The signature is written in dark ink and is positioned above the printed name.

John Alden Bauer III