STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF NEWBERRY	)	CASE NO. 2015-CP-36-00141
	)	
Desa Ballard,	)	
	)	
Plaintiff,	)	**SECOND AMENDED ORDER**
	)	
vs.	)	
	)	
Newberry County,	)	
	)	
Defendant.	)	

THIS MATTER came before me for a non-jury trial beginning on September 6, 2016. Plaintiff was represented by Joseph M. McCulloch, Jr., Esq., and Kathy R. Schillaci, Esq. Defendant was represented by Boyd B. Nicholson, Jr., Esq. This matter involves an action for equitable relief against Defendant, Newberry County, pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. Section 30-4-10 *et seq.* (hereinafter "FOIA"), and the South Carolina Public Records Retention Act (hereinafter "Public Records Act"). Specifically, Plaintiff seeks a declaratory judgment that Defendant violated FOIA and the Public Records Act by: (1) failing to preserve documents as required by state law, failing to provide those documents as required by FOIA, and failing to provide other documents subject to FOIA in a timely manner; and (2) failing to properly announce the "specific purpose" of executive meetings as required by law. Additionally, Plaintiff seeks an award of attorney fees pursuant to S.C. Code Ann. Section 30-4-100(b).

PART I. DOCUMENT REQUESTS UNDER FOIA

1. The South Carolina Freedom of Information Act governs the public disclosure of the activities of public bodies. Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014). Our case law is consistent: "The essential purpose of FOIA is to protect the public from secret government activity." Id., 760 S.E.2d at 789; see also Seago v. Horry Cnty., 378 S.C. 414, 663 S.E.2d

38 (2008). Pursuant to FOIA, any person has the right to inspect and copy public records unless an exception applies. S.C. Code Ann. § 30-1-10, *et. seq.*

2. Defendant, Newberry County, is a public body subject to both FOIA and the Public Records Act. See Id. and S.C. Code Ann. § 30-4-20(a) (defining "public body" as "any state board, commission, agency, and authority, and public or governmental body or subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts . . . including committees, subcommittees, advisory committees, and the like of any such body by whatever name known.").

3. The record shows that while the majority of the 2,000 documents produced by the County were produced with no claim of exemption, the County did claim exemptions concerning the production of several documents. Concerning Plaintiff's Exhibit 16, the County wrote on the document itself that a portion had been "redacted as related to executive sessions matters." See S.C. Code Ann. § 30-4-40(a)(7).

4. This court finds the documents sought—non-privileged litigation documents and county related emails/texts of the county administrator—are public records subject to FOIA. See S.C. Code Ann. § 30-4-20(c).

5. Plaintiff, Desa Ballard, is an attorney licensed in the State of South Carolina. This court finds Plaintiff has a right to inspect public documents. See S.C. Code Ann. § 30-4-30(a) ("Any person has a right to inspect or copy any public record of a public body . . . in accordance with reasonable rules concerning time and place of access.").

6. On December 2, 2014, as part of her representation of a client, Plaintiff properly served a FOIA request upon Defendant seeking a number of documents. She ultimately narrowed her request to include email and text messages to and from Defendant's county administrator, Wayne Adams, related to the magistrate's court.

7. Administrator Adams selected Jay Tothacer, Defendant's county attorney, as the "point person" in responding to Plaintiff's FOIA request. In this role, Mr. Tothacer served as Defendant's authorized representative.

8. Defendant concedes that as it relates to electronic data, it had no archiving policy, no document retention policy, and no FOIA compliance policy in place prior to receipt of the FOIA request.

9. As to the FOIA request for Administrator Adams' emails, Mr. Tothacer informed Plaintiff that the Adams' computer had crashed in March 2014, and that the emails from that computer had not been archived. Thus, Defendant could only provide emails from March 2014 forward.[1] Defendant presented no documentation evidencing the computer crash; however, Defendant's Information Technology Director at that time, Dylan Snyder, testified that he examined Adams' computer immediately after the crash. After running diagnostic tests on the computer, he found it to be "completely toasted." In other words, the hard drive was so useless that no data could have been recovered without outsourcing for a recovery procedure that was both expensive and not guaranteed to be successful. Mr. Snyder then disposed of the hard drive. These events occurred in March of 2014, several months before Plaintiff's FOIA requests were made.

10. Plaintiff testified that the pre-March 2014 period of time was the most relevant in terms of her FOIA request, and it appears from the various exhibits and her testimony that she made this fact known to Defendant.

11. In responding to the FOIA request, Mr. Tothacer did not ask Administrator Adams for hard copies of his emails, and Mr. Tothacer did not inspect Administrator Adams' computer.

[1] It should be noted that Defendant did attempt to turn over some pre-crash emails by producing them from computers of other County employees and from hard copies that were available.

12. As to the FOIA request for Administrator Adams' text messages, none were provided. Although Mr. Adams testified that he may have conducted county business via text message (albeit "very seldom"), Defendant does not archive or save text messages in any way. Neither does Defendant's cellphone carrier, Verizon, maintain text messages over an extended period.

13. It appears to this Court from the exhibits and testimony that, as of the date of trial, Defendant had no system in place for backing up or archiving county emails, no connected email servers, no cloud storage, and no end user back-ups. As Mr. Tothacer testified, the only e-mail archiving done by Defendant is what individual users do on their computers.

DECLARATORY RELIEF AS TO FOIA

14. The Court finds that Plaintiff is entitled to a declaratory judgment that Defendant has violated the act and is entitled to relief. See S.C. Code Ann. § 30-4-100(a). While Plaintiff in her Complaint requested Defendant employ, at its expense, any necessary technology consultants to retrieve the records at issue, it appears from the evidence that such records were inadvertently destroyed.[2] As such, this relief does not appear to be available.

PART II. COMPLIANCE WITH THE PUBLIC RECORDS ACT

1. A large portion of the trial of this matter dealt with accusations from Plaintiff regarding violations of the Public Records Act, S.C. Code Ann. Section 30-1-10, *et seq*. A threshold matter for consideration on this issue is whether Plaintiff has standing to bring a claim under the Public Records Act.

2. The statutory scheme for enforcing the Public Records Act creates no explicit private right of action. When determining whether a statute creates a private cause of action, the Court must consider legislative intent:

[2] See T. p. 85, lines 9-14.

> 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 form or 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.

Whitworth v. Fast Fare Markets of S.C. Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985) (quoting 73 Am.Jur.2d, Statutes § 432 (1974)). 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. Doe v. Marion, 373 S.C. 390, 396-97, 645 S.E.2d 245, 248 (2007) (citing Citizens of Lee Cnty. v. Lee Cnty., 308 S.C. 23, 416 S.E.2d 641 (1992)).

3. While the Public Records Act is silent as to a private right of action, it does specifically empower the Director of Archives to pursue civil remedies. See S.C. Code Ann. § 30-1-50 ("In addition, the legal custodian or the Director of the Archives may apply by verified petition to the court of common pleas in the county of residence of the person withholding the records and the court shall upon proper showing issue orders for the return of the records to the lawful custodian or the Director of the Archives.") Furthermore, the Act provides criminal liability under sections entitled "Unlawful removing, defacing or destroying public records" and "Penalties for refusal or neglect to perform duty respecting records." S.C. Code Ann. § 30-1-30 & 140. If the legislature intended for a private right of action, it could have easily stated so, and the fact that such language is missing from the statutory scheme indicates a legislative intent to not create a private right of action. See, e.g., Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) ("The fact that [language regarding civil liability for making a false report] is missing from § 20–7–510 indicates the legislative intent was for the reporting statute not to create civil liability."); Byrd v. Irmo High Sch., 321 S.C. 426, 433–34, 468 S.E.2d 861, 865 (1996) (finding when one provision does not include a right that is included in a related provision,

legislative intent is that a right will not be implied where it does not exist); State v. Hood, 181 S.C. 488, 188 S.E. 134 (1936) ("It is presumed that the Legislature was familiar with prior legislation, and that if it intended to repeal existing laws it would have expressly done so.").

4. This Court finds Plaintiff has no standing to bring a private cause of action against Defendant under the Public Records Act, and therefore declines to make any further findings of fact or conclusions of law on this issue.

PART III. EXECUTIVE SESSIONS OF COUNTY COUNCIL

1. Plaintiff seeks a declaration that Defendant violated FOIA—specifically, S.C. Code Section 30-4-70—with respect to numerous occasions whereby the Newberry County Council went into executive session but did not properly announce the "specific purpose" of the session as recorded in its minutes.

2. This court limits its review to those executive sessions held one year prior to the filing of this lawsuit. S.C. Code Ann. § 30-4-100.

3. Defendant concedes its county council meetings are governed by FOIA.

4. FOIA creates an affirmative duty on the part of public bodies to disclose information. Burton v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004). "The essential purpose of FOIA is to protect the public from secret government activity." Lambries v. Saluda Cnty. Council, 409 S.C. 1, 8-9, 760 S.E.2d 785, 789 (2014). "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001) (citing S.C. Dep't of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978)).

5. 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:

> (a) 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 . . . 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.

(3) Discussion regarding the development of security personnel or devices.

(4) Investigative proceedings regarding allegations of criminal misconduct.

(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.

(6) The Retirement System Investment Commission . . . .

S.C. Code Ann. § 30-4-709(a). However, "[b]efore 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." S.C. Code Ann. § 30-4-709(b). "Specific purpose" is defined as "a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section." Id. "No action may be taken in executive session except to (a) adjourn or (b) return to public session." Id.

6. A public body satisfies its obligation to identify the purpose of executive session when it "disclose[s] specifically what [is] going to be discussed." Herald Publ'g Co. Inc. v. Barnwell, 291 S.C. 4, 11, 351 S.E.2d 878, 882 (Ct. App. 1986).

7. Plaintiff alleges, and this court agrees, that when Defendant merely recited S.C. Code Section 30-4-70 verbatim, in whole or in part, and in such a general way that the specific topic of the actual executive session was hidden, the public had no way of knowing what was being discussed.

For example, in reference to an August 20, 2014, County Council meeting, the Agenda (Pl.'s Ex. 16) contains redacted matters relating to executive session. The minutes then announce the executive session (Pl.'s Ex. 12) as "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" which is identical to S.C. Code Section 30-4-70(a)(2).

7. Based on a review of the minutes provided and liberally construing FOIA to carry out the purpose mandated by the legislature, this court finds Defendant violated both the letter and spirit of FOIA by not setting forth the "specific purpose" of executive session in its minutes. "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 v. City of Myrtle Beach, 345 S.C. 156, 164, 547 S.E.2d 862 (2001) (finding the mere description of executive session "Towing – Contractual Recommendation" in the meeting minutes of City Council violated FOIA).

8. As such, I find declaratory relief in favor of Plaintiff is appropriate.

DECLARATORY RELIEF AS TO EXECUTIVE SESSIONS

Because this court finds Defendant violated FOIA by not properly announcing the specific purpose of executive session, declaratory relief is appropriate. Specifically, per Defendant's County Council minutes, the executive sessions held on these occasions were not properly identified; as such, the non-privileged subject matter of these sessions must be disclosed to the public. Therefore, Defendant is ordered within thirty (30) days of the date of this Order to submit to Plaintiff any documentation which reflects the discussions during the executive sessions at issue, notwithstanding any material that the Court has determined to be attorney-client privileged. Additionally, in all future County Council meetings where executive session is utilized, Defendant is ordered to properly announce the specific purpose of the executive session and not merely recite the statutory language,

as further explained by our Supreme Court in the case Brock v. Town of Mount Pleasant, 415 S.C. 625, 785 S.E.2d 198 (2016).

Plaintiff further requested that the Court order Defendant, as part of its declaratory relief in this matter, to turn over the material redacted from Platiniff's Exhibit 16. Normally, it would be within the Court's discretion to consider this relief for failure to properly announce the purpose of executive session. However, here, after a post-trial *in-camera* review of the material redacted from Defendant's August 20, 2014 County Council minutes, the Court has determined that material to be attorney work product. The Court finds that material is therefore protected from disclosure and need not be turned over to Plaintiff.

ATTORNEY FEES AND COSTS

Section 30-4-100 of the S.C. Code provides that if a person or entity seeking declaratory judgment and/or injunctive relief under FOIA prevails, she "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 [her] reasonable attorney fees or an appropriate portion thereof." See also Glassmeyer v. City of Columbia, 414 S.C. 213, 224, 777 S.E.2d 835, 841 (Ct. App. 2015). "As a general rule, the amount of attorneys fees to be awarded in a particular case is within the discretion of the trial judge." Burton v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 357-58, 594 S.E.2d 888, 898 (Ct. App. 2004) (citing Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989)).

There are six factors for the trial court to consider when determining an award of attorneys' 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 attorneys' fees that are authorized by statute, the trial court should make specific findings of fact for each of these factors. See Jackson, 326 S.C. at 308, 486 S.E.2d at 760

("[O]n appeal, an award for attorneys fees will be affirmed so long as sufficient evidence in the record supports each factor."); Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993) ("When an award of attorneys fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor.").

In this case, based on a review of Plaintiff's Affidavits of Attorney Fees and Costs, the Court finds a partial award is appropriate. As to the nature, extent, and difficulty of the case, the Court finds that the Freedom of Information Act and related matters are complex, heavily regulated, and can present numerous legal issues, and so justify the fees charged. As to time devoted, it appears from the filed affidavits that Plaintiff's counsel spent approximately one hundred combined hours on this case. The Court finds that both Joseph McCulloch and Kathy Schillaci have extensive reputations as litigators of the highest quality and have been practicing law for a number of years. See Aff. of Attorney Fees and Costs for Joseph McCulloch and Aff. of Attorney Fees and Costs for Kathy Schillaci. Contingency of compensation is not relevant because this was not a contingency fee case. The Court also finds that the legal fees charged were appropriate and customary for similar services. Thus, the Court's award of attorney's fees hinges on the factor of beneficial results obtained. Of three overarching legal issues, Plaintiff prevailed on two, and one of those produced no benefit to Plaintiff. Based on the time devoted at trial to the issue of the Public Records Retention Act and a review of counsels' affidavits, it appears that a large bulk of time was spent on what was ultimately an unsuccessful legal argument, and no beneficial result was obtained for Plaintiff on that cause of action. Based on this "split" result, the Court awards Plaintiff $9,867.00 in attorneys' fees and $2,604.88 in litigation costs.

[*Continued on next page.*]

PART IV. CONCLUSION

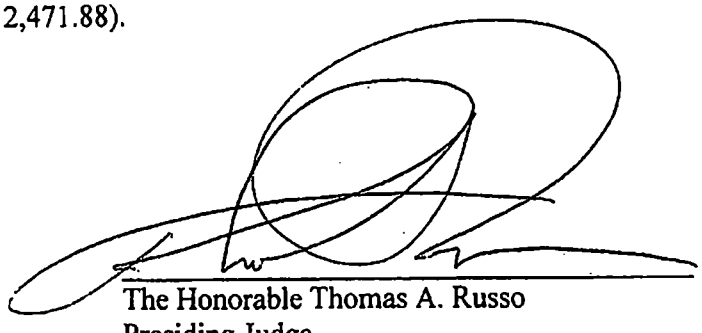
Based on the forgoing, it is hereby ORDERED, ADJUDGED, AND DECREED that:

(a) Defendant must, within thirty (30) days of the date of this Order, submit to Plaintiff any documentation which reflects the discussions during the improperly announced executive sessions at issue, notwithstanding any material the Court has deemed to be privileged.

(b) Defendant is required in the future to properly announce the specific purpose of the executive session and not merely recite the statutory language.

(c) Defendant must, within thirty (30) days of the date of this order, pay to Plaintiff her awarded attorneys' fees and costs in the amount of Twelve Thousand Four Hundred Seventy One Dollars and Eighty Eight Cents ($12,471.88).

AND IT IS SO ORDERED.



The Honorable Thomas A. Russo
Presiding Judge

This 17th day of November, 2017

Florence, South Carolina