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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-002429

Desa Ballard.....Appellant/Respondent,

v.

Newberry County Respondent/Appellant.

**RECORD ON APPEAL
VOLUME I OF III**

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Certificate of Counsel

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Desa Ballard,

Plaintiff,

vs.

Newberry County,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CASE NO. 2015-CP-36-00141

) **ORDER**

)

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 is void of any special exemptions or exceptions claimed by Defendant as to the specific documents sought. See S.C. Code Ann. § 30-4-40.

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.

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.

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.

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:

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.

² See T. p. 85, lines 9-14.

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). **ROA 00011**

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

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, and therefore the subject matter of these sessions must be disclosed to the public. As such, Defendant is ordered within thirty (30) days to submit to Plaintiff the redacted information contained in Plaintiff's Exhibit 16 and any other documentation which reflects the discussions during that executive session. Additionally, Defendant is required in the future to properly announce the specific purpose of the executive session and not merely recite the statutory language.

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 \$11,103.75 in attorneys' fees and \$2,604.88 in litigation costs.

PART IV. CONCLUSION

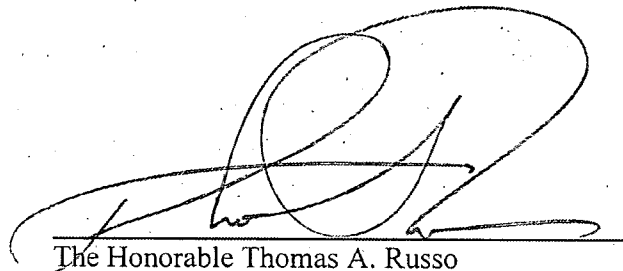
Based on the forgoing, it is hereby ORDERED, ADJUDGED, AND DECREED that:

- (a) Defendant must, within thirty (30) days of the date of this order, submit to Plaintiff the redacted information contained in Plaintiff's Exhibit 16 and any other documentation which reflects the discussions during that executive session.
- (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 Thirteen Thousand Seven Hundred Eight Dollars and Sixty Three Cents (\$13,708.63).

AND IT IS SO ORDERED.

This 7th day of July, 2017

Florence, South Carolina



The Honorable Thomas A. Russo
Presiding Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A **ROA 00014**
CASE NUMBER **2015CP3600141**

Desa Ballard

Newberry County

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

*Order Denying Plaintiffs Motion for Reconsideration
and to Amend Judgement and Granting
Defendants motion to Alter or Amend the Judgement*

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/THOMAS A RUSSO

2141

10/24/2017

Circuit Court Judge

Judge Code

ROA 00014

For Clerk of Court Office Use Only

ROA 00015

This judgment was entered on **OCTOBER 26 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **OCTOBER 30 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Kathy R. Schillaci PO Box 11623 Columbia, SC 29211

Boyd Benjamin Nicholson Jr. PO Box 2048 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

ELIZABETH P FOLK (MRV)

Court Reporter

Elizabeth P. Folk - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ROA 00015

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)
)
Desa Ballard,)
)
Plaintiff,)
)
v.)
)
Newberry County,)
)
Defendant.)
_____)

ROA 00016
IN THE COURT OF COMMON PLEAS

CASE NO. 2015-CP-36-00141

**ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION
AND TO AMEND JUDGMENT AND
GRANTING DEFENDANT'S MOTION
TO ALTER OR AMEND THE
JUDGMENT**

THIS MATTER came before the Court on Plaintiff's Motion for Reconsideration and to Amend Judgment pursuant to Rule 59(e), SCRCP, and on Defendant's Motion to Alter or Amend the Judgment pursuant to Rule 59(e), SCRCP, both dated July 24, 2017. Having considered its original July 7 Order and the submissions of both parties pursuant to SCRCP 59(f), the Court does find it necessary to clarify an issue raised by Defendant regarding the disclosure of attorney-client privileged information.

Plaintiff asks this Court to reconsider its finding that she lacks standing to bring an action under the South Carolina Public Records Act. Trial courts have a duty to raise the issue of subject matter jurisdiction *sua sponte* at any time. 15 S.C. Jur. Appeal and Error § 72 (2017). Although the Court appreciates Plaintiff's well-reasoned argument, it is not persuaded that the Legislature created a private right of action for individuals under the Public Records Act, as explained more thoroughly in the July 7 Order. As such, the Court need not reconsider its limited award of attorneys' fees and costs. The Court also denies Plaintiff's request for costs in the amount of \$1,000 for "late" production of documents, as Plaintiff has cited no authority to justify such an award.

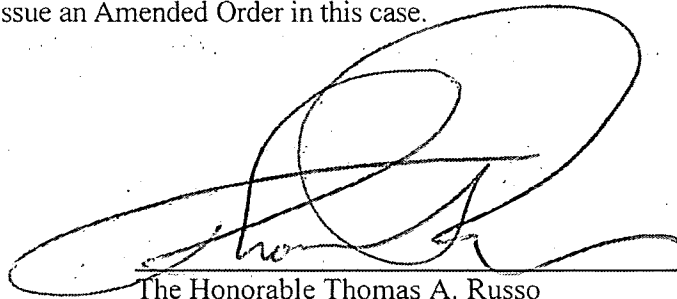
Defendant asks this Court to amend the July 7 Order to state that Newberry County did claim an exemption regarding attorney-client privilege, and to protect any attorney-client privileged

documents from disclosure pursuant to Plaintiff's FOIA request. To determine whether the specific document in question was attorney-client privileged, the Court conducted a post-trial *in-camera* review of the material redacted from Plaintiff's Exhibit 16. After careful review and consideration, this Court finds that the entirety of the redacted material in question is attorney work product, is thus protected, and need not be disclosed.

The Court will also modify an error of fact contained in Paragraph 3 of the Order to reflect that Defendant did claim privilege as to a select few documents pursuant to S.C. Code Ann. § 30-4-40(a)(7).

Based on the forgoing, Plaintiff's 59(e) motion is respectfully DENIED. Defendant's 59(e) motion is GRANTED, and the Court will issue an Amended Order in this case.

AND IT IS SO ORDERED.

A large, stylized handwritten signature in black ink, likely belonging to Thomas A. Russo, is written over a horizontal line.

The Honorable Thomas A. Russo
Presiding Judge

This 24th day of OCT, 2017
Florence, South Carolina

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A ~~ROA~~ 00018
CASE NUMBER 2015CP3600141**

Desa Ballard		Newberry County	

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk:

AMENDED ORDER

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/THOMAS A RUSSO
Circuit Court Judge

2141
Judge Code

10/24/2017

For Clerk of Court Office Use Only

This judgment was entered on **OCTOBER 26 2017**, and a copy mailed first class or placed in the appropriate envelope on **OCTOBER 30 2017**, to attorneys of record or to parties (when appearing pro se) as follows: **ROA 00019**

Kathy R. Schillaci PO Box 11623 Columbia, SC 29211

Boyd Benjamin Nicholson Jr. PO Box 2048 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

ELIZABETH P FOLK (MRV)

Court Reporter

Elizabeth P. Folk - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Desa Ballard,

Plaintiff,

vs.

Newberry County,

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2015-CP-36-00141

AMENDED ORDER

FILED
NEWBERRY COUNTY
CLERK OF COURT
2017 OCT 24 PM 4:39

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,

ROA 00025

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.

ROA 00027

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. Therefore, 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 Plaintiff'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

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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.

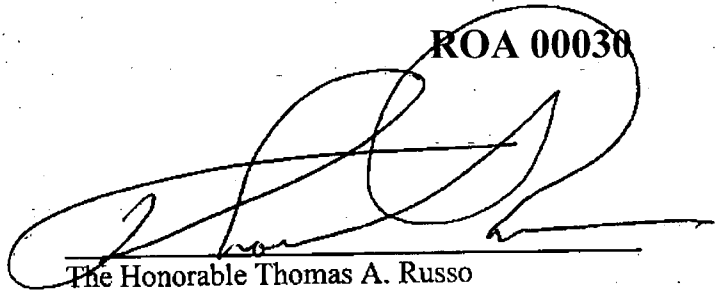
PART IV. CONCLUSION

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

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

ROA 00030

AND IT IS SO ORDERED.



The Honorable Thomas A. Russo
Presiding Judge

This 24th day of OCT., 2017

Florence, South Carolina

FILED
NEWBERRY COUNTY
2017 OCT 26 AM 11:26
ELIZABETH F. JOLLY
CLERK OF COURT

ROA 00030

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER** **ROA 00031**
2015CP3600141

Desa Ballard		Newberry County	

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):**

☐ Rule 12(b), SCRPC;
☐ Rule 41(a), SCRPC (Vol. Nonsuit);

☐ Rule 43(k), SCRPC (Settled);
☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):**

☐ Rule 40(j) SCRPC;
☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed;
☐ Reversed;
☐ Remanded;
☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

Order Granting Plaintiff's Motion to Amend Amended Judgment

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/ Thomas A. Russo
Circuit Court Judge

Judge Code

11/17/2017

Date
ROA 00032

For Clerk of Court Office Use Only

This judgment was entered on **November 20, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **November 20, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Kathy R. Schillaci PO Box 11623 Columbia, SC 29211

Boyd Benjamin Nicholson Jr. PO Box 2048 Greenville, SC
29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Elizabeth P. Folk (jt)

Court Reporter

Elizabeth P. Folk - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Desa Ballard,

Plaintiff,

v.

Newberry County,

Defendant.

ROA 00033
IN THE COURT OF COMMON PLEAS

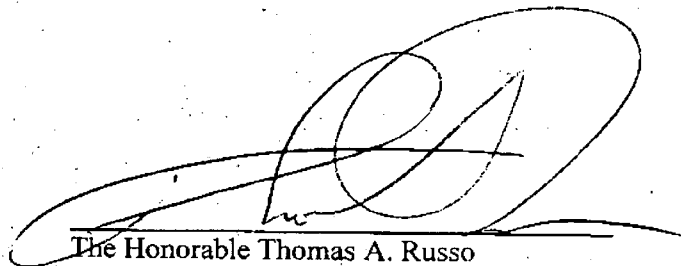
CASE NO. 2015-CP-36-00141

**ORDER GRANTING PLAINTIFF'S
MOTION TO AMEND AMENDED
JUDGMENT**

THIS MATTER came before the Court on Plaintiff's Motion to Amend Amended Judgment, filed November 2, 2017. Having considered its original Order (July 7), its Amended Order (October 24), and the submissions of the parties pursuant to SCRCP 59(f), the Court does find it necessary to issue a second amended order to specifically reaffirm an unchallenged portion of the July 7th Order that was inadvertently deleted from the Amended Order.

Based on the forgoing, Plaintiff's 59(e) motion is GRANTED. The Court will issue a Second Amended Order in this case.

AND IT IS SO ORDERED.



The Honorable Thomas A. Russo
Presiding Judge

This 7th day of November, 2017
Florence, South Carolina

Filed 11.27.17

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER **ROA 00034**

Desa Ballard

Newberry County

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk:

Second Amended Order

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/ Thomas A. Russo
Circuit Court Judge

Judge Code

11/17/2017

Date
ROA 00035

For Clerk of Court Office Use Only

This judgment was entered on **November 20, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **November 20, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Kathy R. Schillaci PO Box 11623 Columbia, SC 29211

Boyd Benjamin Nicholson Jr. PO Box 2048 Greenville, SC
29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Elizabeth P. Folk (jt)

Court Reporter

Elizabeth P. Folk - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1...

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Desa Ballard,

Plaintiff,

vs.

Newberry County,

Defendant.

IN THE COURT OF COMMON PLEAS ROA 00036

CASE NO. 2015-CP-36-00141

SECOND AMENDED ORDER

FILED
NEWBERRY COUNTY
2017 NOV 20 AM 10:21
CLERK OF COURT

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.* **ROA 00037**

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. **ROA 00038**

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, non
ROA 00039
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.

ROA 00040

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. Reed, 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. 12) 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). **ROA 00043**

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). **ROA 00044**

Plaintiff further requested that the Court order Defendant, as part of its declaratory relief in this matter, to turn over the material redacted from Plaintiff'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. Lötter, 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

ROA 00045
("On 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.]

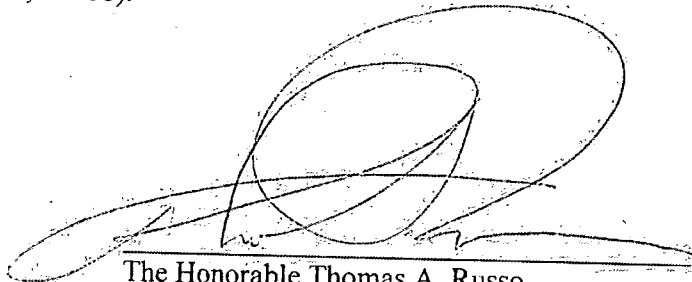
PART IV. CONCLUSION

ROA 00046

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.

A large, stylized handwritten signature in black ink, appearing to read 'T. Russo', is written over a horizontal line.

The Honorable Thomas A. Russo
Presiding Judge

This 7th day of November, 2017

Florence, South Carolina

ROA 00046

ROA 00047

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

CASE NO. 2015-CP-36-

00141

Desa Ballard,)

Plaintiff,)

Vs.)

Newberry County,)

Defendant.)

COMPLAINT FOR DECLARATORY
RELIEF - FOIA
AND PUBLIC RECORDS ACT
NON-JURY TRIAL

FILED
NEWBERRY COUNTY
2015 MAR 20 PM 4 04
JACKIE S. BOERS
CLERK OF COURT

Plaintiff seeks a declaratory judgment from this court, and in support thereof, would show unto this Honorable Court:

1. Plaintiff is a citizen and resident of South Carolina, with her primary place of business located in Lexington County, South Carolina.
2. Defendant Newberry County (hereafter "County") is a body politic created under the authority of the South Carolina Legislature, with the ability to sue and be sued in its own name pursuant to S.C. Code Ann. Section 4-1-10 (1986).

VIOLATION OF FREEDOM OF INFORMATION ACT

3. On or about December 2, 2014, Plaintiff served a Request pursuant to the South Carolina Freedom of Information Act, in proper form (hereafter referred to as "the Request"), to the County Administrator for Newberry County (hereafter "County Administrator") who is the designated official pursuant to S.C. Code Ann. Section 30-1-20 and who is responsible to maintain the county records. **Exhibit A.** The County Administrator is charged with the duty to protect the public records of the County from, *inter alia*, loss. S.C. Code Section 30-1-70.

ROA 00047

4. Plaintiff thereafter was contacted by the county attorney for Newberry County, to whom the County Administrator apparently delegated responsibility for responding to the Request. By agreement between plaintiff and the county attorney, certain items in the Requests were modified and narrowed; in addition, plaintiff agreed to limit production of certain items that were otherwise available through the county's website.
5. Subsequently documents were produced to plaintiff by the county attorney on January 9, 2015, January 13, 2015, January 26, 2015, January 29, 2015 and February 9, 2015. A subsequent email from the county attorney on February 23, 2015 enclosed additional documents responsive to the Request.
6. In the February 9, 2015 response, the county attorney indicated that the County believed it had "responded completely to [the] FOI request dated December 2, 2014."
7. On February 14, 2015, Plaintiff advised the county attorney that the production to date did not appear to be complete.
8. The county attorney thereafter provided a summary of the FOIA request and indicated that the County's response was complete. **Exhibit B.**
9. Plaintiff was charged, and paid, the sum of nine-hundred forty-four dollars and sixty-five cents (\$944.65) for copies of the documents produced. **Exhibit C.** The charges included an entry for \$128.10 expense which was not incurred by the county.
10. On February 26, 2015, the county attorney indicated he would search for additional records through outside counsel for the County, but did not agree to provide those records. **Exhibit D.** No additional records have been provided.

11. At the same time, the county attorney reiterated that it had completed its response to FOIA requests relating to communications by the County Administrator related to county business and no further production would be supplied.
12. The County's production is incomplete as it relates to Items 6, 7, and 11. The County has claimed a variety of reasons for its failure to provide emails relevant to county business, claiming, at different times, that the county administrator's computer crashed and his emails were unavailable, there was no computer back-up, and that he used Apple products when the county IT system is PC-based and therefore incompatible.
13. The County has also declined to produce records from the county administrator's personal email and cell phone texts that relate to county business, alleging, essentially, that it is too much trouble to get that information.
14. Based on information provided by the county attorney, the County Administrator has failed to safeguard and protect from loss items that should have been produced in response to the FOIA request, including documents set forth in Items 7 and 11 of the Request.
15. It is unknown whether the County permitted the County Administrator to conduct official business of the County using a personal email address or via text messages from his personal phone. No documents from the County Administrator's personal email or texts have been provided, but the County has not asserted that the County Administrator was prohibited from conducting County business from his personal data sources.
16. Pursuant to Section 12-503.15 of the General Record Retention Schedule for County Records, implemented by the South Carolina Department of Archives and History pursuant to S.C. Code Ann. Sections 30-1-70 and 80, "general correspondence" by a

county which is related to "public and program records" and "general administrative records" are required to be maintained by the County Administrator permanently or for a period of five (5) years, respectively.

17. Plaintiff's efforts to obtain public records from Newberry County have been frustrated and, on information and belief, production of requested documents is incomplete.
18. Pursuant to S.C. Code Ann. Section 30-4-100, Plaintiff seeks an inquiry into this matter and a declaration of the rights and obligations of the parties hereto, including equitable relief requiring compliance by Newberry County with the Request, and such other relief as may be necessary to insure compliance.
19. Because no remedy exists at law for the County's multiple violations of the FOIA and the Public Records Act, Plaintiff is informed and believes that equitable relief is necessary to prevent future violation of the law by Newberry County.
20. Plaintiff seeks entry of an order pursuant to S.C. Code Ann. Section 30-4-100(a) requiring the County to take such steps as are reasonably necessary to employ such specialists as may be necessary to search the relevant servers, hard drives and county-owned cell phones maintained by the County or the County's agents or such other electronic data storage as may be necessary for re-creation of public records which have been destroyed, for production of the materials requested in the Request, at its own cost.
21. Plaintiff seeks an order pursuant to S.C. Code Ann. Section 30-4-100(a) requiring the County to take such steps as are reasonably necessary to obtain records of emails and texts related to County business that was permitted to occur on the private email and/or phone accounts of the County Administrator, and to produce those records to Plaintiff pursuant to the Request, at its own cost and allow such effort to be reviewed, if not

overseen, by a designee of Plaintiff. In the event the County asserts an inability to reclaim lost or deleted personal emails, Plaintiff request the Court issue its order permitting Plaintiff to utilize its own experts in demonstrating recovery methods and allow such recovery by Plaintiff's experts.

22. Plaintiff further seeks the entry of a temporary and permanent injunction pursuant to S.C. Code Ann. Section 30-4-100(a) prohibiting the County from actively disposing of public records, including email and/or text communication whether on public email or phones or private email or phones (to the extent county officials are permitted to use private email or phones to conduct county business) related to official county business, and requiring the County to preserve all future records in accordance with the General Record Retention Schedule for County Records, implemented by the South Carolina Department of Archives and History pursuant to S.C. Code Ann. Sections 30-1-70 and 80.
23. Plaintiff has and will incur attorney fees in connection with this proceeding, and seeks an award of reasonable attorney fees and costs incurred in connection with pursuing this action, pursuant to S.C. Code Ann. Section 30-2-100(b) and Section 30-4-100(b).

VIOLATION OF PUBLIC RECORDS ACT

24. Records produced (or made available via online resources) in response to Plaintiff's FOIA request reflect that Newberry County is not in compliance with certain provisions of the Public Records Act, codified at S.C. Code Ann. Section 30-1-10 *et seq.*, specifically as it relates to actions by county council regarding executive session meetings.
25. Pursuant to S.C. Code Ann. Section 30-4-70, a public agency is required to "vote in public on the question" for which executive session is sought and, when the vote is in

favor of executive session, "the presiding officer shall announce the specific purpose of the executive session."

26. On information and belief, Newberry County Council does not publish the names of persons who attend executive session meetings.

27. On information and belief, Newberry County Council does not maintain transcripts of its meetings. Therefore, the only official records of those meetings are the minutes prepared and maintained by county council.

28. Minutes for the Newberry County Council meetings on the following dates reflect that executive sessions were held during council meetings in violation of Section 30-4-70 in that the "specific purpose of the executive session" was not stated or recorded.

- August 20, 2014
- July 16, 2014
- May 21, 2014
- May 7, 2014
- April 16, 2014
- December 28, 2013
- October 16, 2013
- August 21, 2013
- December 19, 2012
- March 7, 2012
- February 15, 2012
- February 1, 2012

29. None of the minutes for the referenced meetings identify the people who were present during executive session.

30. Plaintiff seeks an order declaring that the defendant Newberry County Council violated the Public Records law by failing to state the specific purpose of the executive sessions for the referenced dates.

31. Plaintiff is informed and believes that there is no adequate remedy at law for the multiple violations by Newberry County of the public records law, and pursuant

Ann. Section 30-4-100(a), County should be required to issue amended County Council minutes that identify the specific purpose of the executive sessions that were held on the dates on which the County failed to properly specify the purpose of each executive session and the identity of those individuals who were present in the executive session meetings.

32. Plaintiff is informed and believes that pursuant to S.C. Code Ann. Section 30-4-100(a) Newberry County should be further ordered to comply with the requirements of the Public Records Act in the future, and at all future meetings of County Council, shall be required to publicly state and identify the specific purpose for which County Council adjourns into executive session, to identify the persons to be present during executive session, and to require Newberry County to comply with applicable laws in the future.

ATTORNEY FEES AND COSTS

33. Each and every allegation set forth above is repeated herein where relevant as fully as if repeated herein verbatim.
34. Plaintiff has and will incur attorney fees in connection with this proceeding, and seeks an award of reasonable attorney fees and costs incurred in connection with pursuing this action, pursuant to S.C. Code Ann. Section 30-2-100(b) and Section 30-4-100(b).
35. Plaintiff has incurred costs and attorney fees in connection with recovering for the excess costs she was charged for production of materials provided to her in response to the Request.
36. Plaintiff is informed and believes that, by way of bifurcated proceeding, the Court should conduct a hearing enabling Plaintiff to establish the reasonable costs and attorney's fees

incurred by her in pursuit of this action, and awarding reasonable costs and attorney's fees as prayed for herein.

WHEREFORE, having fully set forth the grounds for relief set forth herein, Plaintiff seeks an order:

- A. Declaring that Newberry County violated the Freedom of Information Act in failing to maintain public records as required by law;
- B. Declaring that Newberry County violated the Public Records Act in failing to maintain proper public records as required by law;
- C. Requiring Newberry County to employ such efforts as may be necessary to reconstruct and correct omissions found to exist in its public records as set forth herein;
- D. Requiring Newberry County to fully respond to the outstanding Freedom of Information Act request.
- E. Issuing a temporary and permanent injunction prohibiting Newberry County from failing to maintain proper public records in the future and ordering it to comply with the Public Records law at all times in the future;
- F. Issuing such other order as may be necessary to require Newberry County to comply with its obligations under the public records laws applicable to counties as governed by the South Carolina State Archives;
- G. Awarding her attorney fees and costs incurred by her in bringing this action and prosecuting it;
- H. Awarding her a refund of excess fees charged to her by Newberry County for production of materials provided to her under the Request herein;

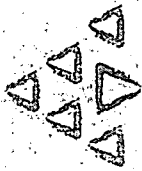
I. Such other and further relief as the Court deems just and proper.



Joseph M. McCulloch Jr.
Kathy R. Schillaci
Law Offices of Joe McCulloch, Jr.
Post Office Box 11623
Columbia, South Carolina 29211
Telephone 803.779.0005
Facsimile 803.779-0666
joe@mccullochlaw.com
kathy@mccullochlaw.com

ATTORNEY FOR PLAINTIFF

March 20, 2015



Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

ROA 00056

Desa Ballard
Harvey M. Watson III

December 2, 2014

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

Via U.S. Mail
Wayne Adams
County Administrator
County of Newberry
Post Office Box 156
Newberry, South Carolina 29108

Re: Freedom of Information Act Request

FILED
NEWBERRY COUNTY
CLERK OF COURT
JACKIE S. BOWERS
2015 MAR 20 PM 4:04

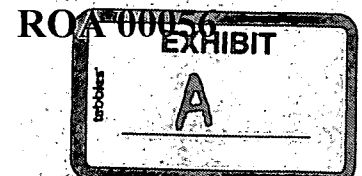
Dear Mr. Adams:

This correspondence is addressed to you based upon your position as custodian of records for Newberry County pursuant to S.C. Code Ann. § 30-1-20 or the records officer thereof, for purposes of receiving and responding to the request herein. If you are not the proper individual for receipt of this request, please advise by return mail. Otherwise, the requesting party will consider the request properly received by you in accordance with the Act.

Pursuant to S.C. Code Ann. §§30-4-10 *et seq.*, the Freedom of Information Act (herein "the act"), you are requested to produce to the undersigned copies of the following public records. The term "public records" is defined in Section 30-4-20(c), as amended. This request does not include a request for any materials that are protected by the attorney-client relationship or are otherwise privileged or materials that exempt from disclosure by statutory law. Provided, however, any documents which are responsive to this request that are withheld on the basis of privilege or exemption should be identified, along with the basis upon which such document(s) is withheld from disclosure. Such identification shall include the author and date of the document, a general description thereof, as well as the names of all recipient(s) of such document, in order to allow the requesting party to determine whether there is need for further inquiry to determine the validity of the response.

Within five (5) days of the receipt of this letter, please provide an estimate of the fees you anticipate will be required in order to produce the materials requested. Pursuant to Section 30-4-30(b), fees may not be charged for examination and review to determine if the documents requested are subject to disclosure. Such five (5) day period shall not reduce or extend the response time period provided by Section 30-4-30(c).

1. The records management program for Newberry County Magistrate's Court as required by Section 30-1-80.



2. Any and all approvals received by Newberry County or any of its agents from the Director of the State Archives authorizing the destruction of any public record regarding the Magistrate's Court of Newberry County at any time since 1995, as required by S.C. Code Ann. § 30-1-110.
3. Documents related to the appointment of magistrates for Newberry County at all times from 2010 to the present, including communication in any form with any member of the South Carolina Senate, including but not limited to Senator Ronnie Cromer.
4. Documents related to the number of full-time or part-time magistrates for Newberry County at all times from 2007 to the present, including communication in any form with any member of the South Carolina Senate, including but not limited to Senator Ronnie Cromer.
5. Any memoranda or document from 2010 to the present in which the operations and/or staffing of the Newberry County Magistrate Court, including its judges and/or employees, is discussed or referenced in any manner, directly or indirectly.
6. Any and all documents related to the case of Thomas Abraham v. Newberry County, Case No. 8:11-cv-03016-TMC (United States District Court for the District of South Carolina) and Case No. 2011-CP-36-464 (Newberry County Court of Common Pleas). Your response should not include any documents that available of record through the Newberry County Clerk of Court public files or the public files of the United States District Court for the District of South Carolina nor should it include any materials exempt from disclosure pursuant to the attorney-client relationship. It should include any and all correspondence generated or received during the litigation of the case or afterwards, if related.
7. Any and all electronic messages (to or from wadams@newberrycounty.net or any private email address), including texts on private cell phones, sent to or received by you with the members of county council or any of their agents for the period 2010 to the present.
8. Any and all communications of any kind between any officer or agent of Newberry County with Robert L. McCurdy of South Carolina Court Administration regarding the Magistrate's Court for Newberry County.
9. Any and all opinions requested or received from any officer or agent of Newberry County from the South Carolina Attorney General regarding compensation of magistrates.
10. Any and all documents relating to the implementation of the \$4,500.00 payment authorized by county council at its meeting in September, 1995, other than confidential compensation reports, including but not limited to memoranda, documents, emails, notes, or other form of communication or recordation, at any time from September 1995 to the present.

Mr. Wayne Adams
In re: FOIA Request
December 2, 2014

ROA 00058

Page 3 of 3

11. Any and all electronic messages sent to or received by tabraham@newberrycounty.net from 2005 to the present.
12. Agenda or minutes reflecting agenda or items discussed (or to be discussed) for all meetings of executive session of county council from 2004 to the present.
13. All agenda for Newberry County Public Safety and Courts committee from 2004 to the present.
14. All minutes for Newberry County Public Safety and Courts committee from 2004 to the present.
15. Voting records for any action taken in executive session whether during county council meetings or otherwise for any time since 2004 to the present.
16. Any and all documents evidencing or reflecting directives from Chief Magistrate Jayroe regarding the allocation of use of the supplemental full-time magistrate's pay approved by resolution or other action of Newberry County Council in or about September, 2005.

To the extent the requested materials are stored or held by the custodian by electronic means, we will provide at your request electronic media storage device(s) to assist with reproduction for purposes of responding to this request. Any materials stored electronically are requested to be produced in electronic format that is capable of being read by generally-available and identifiable software which we may use to access the produced materials.

We look forward to hearing from you.

Sincerely yours,


Desa Ballard
desab@desaballard.com

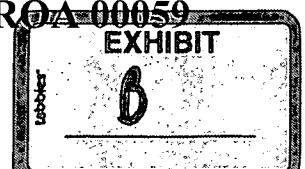
ROA 00058

Recap of FOI responses

All item references to your letter dated December 2, 2014

- Item 1 – From Judge Jayroe – enclosed with letter dated 1/13/2015.
- Item 2 – From Judge Jayroe – enclosed with letter dated 1/13/2015.
- Item 3 – From HR and Finance – enclosed with letter dated 1/8/2015. From Judge Jayroe – enclosed with letter dated 1/13/2015.
- Item 4 – From HR and Finance – enclosed with letter dated 1/8/2015. From Judge Jayroe – enclosed with letter dated 1/13/2015. From Wayne Adams – enclosed in letter dated 1/26/2015.
- Item 5 – From HR and Finance – enclosed with letter dated 1/8/2015. From Judge Jayroe – enclosed with letter dated 1/13/2015. From Wayne Adams – enclosed in letter dated 1/26/2015.
- Item 6 – Any documents not in the public case files would be attorney-client privileged.
- Item 7 – From HR and Finance – enclosed with letter dated 1/8/2015. Modified by you in an email dated 1/27/2015 limiting to only *operating or staffing of magistrate courts*. From Wayne Adams – enclosed with letter dated 1/29/15. From others to Wayne Adams – enclosed with letter dated 2/9/15.
- Item 8 – Withdrawn by you in an email dated 1/5/15.
- Item 10 – From HR and Finance – enclosed with letter dated 1/8/15.
- Item 11 – Not available per IT.
- Item 12 – From Clerk to Council -- enclosed with letter dated 1/29/15.
- Item 13 – From Clerk to Council -- enclosed with letter dated 1/29/15.
- Item 14 – From Clerk to Council -- enclosed with letter dated 1/29/15.
- Item 15 – From Clerk to Council -- enclosed with letter dated 1/29/15.
- Item 16 – From HR and Finance – enclosed with letter dated 1/8/2015. From Judge Jayroe – enclosed with letter dated 1/13/2015.
- Enclosed with letter dated 2/9/15 were a few items that the Clerk to Council included but the bulk of her responses were with the letter dated 1/29/15.
- Since we cannot get any printout of text messages from Verizon I personally reviewed Mr. Adams cell phone (2/18/15) and there were no text messages dealing with any matter regarding magistrates. His phone contains very few texts and the oldest was in the December 2014 timeframe. During my last conversation with a Verizon representative she indicated that it would be doubtful that they could recapture any texts beyond ten (10) days.

FILED
NEWBERRY COUNTY
2015 MAR 20 PM 4
JACKIE S. BOWERS
CLERK COURT



Ballard FOIA (December 2, 2014) request

Costs incurred

FILED
LEWIS & CLARK COUNTY
MAR 20 PM 4 05
JACKIE S. BOWERS
CLERK OF COURT
ROA 00060

January 6, 2015 – Deposit of Ballard advance check (#3162)	\$500.00
January 8, 2015 HR and Finance copies @ 30¢ per page (259)	\$ 77.70
January 8, 2015 HR time 1.75 hours at \$29/hour	\$ 50.75
January 8, 2015 Finance time 1 hour @ 37/hour	\$ 37.00
Balance	\$ <u>334.55</u>
January 13, 2015 Chief Magistrate copies @ 30¢/page (427)	\$ 128.10
Balance	\$ <u>206.45</u>
January 26, 2015 Administrator copies @ 30¢/page (74)	\$ 22.20
January 26, 2015 Administrator 2 hours at \$60/hour	\$ 120.00
Balance	\$ <u>64.25</u>
January 29, 2015 Administrator copies @ 30¢/page (116)	\$ 34.80
January 29, 2015 Administrator 1 hour @ \$60/hour	\$ 60.00
January 29, 2015 Clerk to Council copies @ 30¢/page (769)	\$ 230.70
January 29, 2015 Clerk to Council 5 hours @ \$26/hour	\$ 130.00
Balance	\$(391.25)
Additional deposits February 2 nd and 9 th	\$ 500.00
February 9, 2015 final response copies @30¢/page (178)	\$ 53.40
Balance (Check enclosed)	\$ 55.35

ROA 00060



Desa Ballard

From: Jay Tothacer <jtothacer@newberrycounty.net>
Sent: Thursday, February 26, 2015 2:03 PM
To: Desa Ballard
Subject: RE: Incomplete FOIA response

I will review my files and speak with Mr. Aydlette as to #6.

We have provided all of Mr. Adam's emails that we have and of the few texts available – there are none germane to your request – so that is my final response.

Jay

From: Desa Ballard [mailto:desab@desaballard.com]
Sent: Thursday, February 26, 2015 1:49 PM
To: Jay Tothacer
Cc: Laurie Renwick; Beth Cogan; Beth Cogan; Mara Ballard
Subject: RE: Incomplete FOIA response

FILED
 NEWBERRY COUNTY
 2015 MAR 20 PM 4 05
 JACKIE S. BOWERS
 CLERK OF COURT

I will compare this with the information I have.

The county or its attorneys (Aydlette – and therefore within the control of the county) will have a great deal of information on Item 6 that is not privileged, such as correspondence, roster notices, emails with the court and clerk for scheduling, you know what's privileged and what's not. As to anything that you are claiming privilege on, I will need a privilege log. In the interim, please send me all non-privileged documents and begin a privilege log.

Is this your final word on Mr. Adams' personal emails and texts?

db

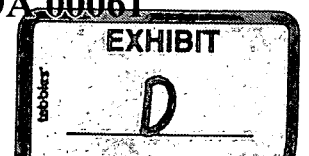
From: Jay Tothacer [mailto:jtothacer@newberrycounty.net]
Sent: Thursday, February 19, 2015 3:18 PM
To: Desa Ballard
Cc: Laurie Renwick
Subject: RE: Incomplete FOIA response

Attached to this email is a recap of the items we have sent to you along with reference to the letters (by date) that they were mailed.

In the last mailing (dated February 9th) there were a few items from the Clerk to Council – the bulk of her copies had been sent earlier.

I have asked her about the missing Public Safety and Courts committee meetings (August 11, 2014 and October 20, 2014). Once those have been posted on the website we will contact you via email.

After you have reviewed the attached recap please feel free to contact me if you have additional questions or concerns.



I do not believe we have any additional information to provide beyond the minutes from the two Public Safety and Courts Committee meetings.

Jay

From: Desa Ballard [<mailto:desab@desaballard.com>]
Sent: Saturday, February 14, 2015 3:17 PM
To: Austin Tothacer, Jr. (jtothacer@newberrycounty.net)
Cc: Beth Cogan; Beth Cogan; Mara Ballard
Subject: Incomplete FOIA response

I have received your letter of February 9, 2015 in which you suggest that you have completed the required FOIA production. I do not think the production is complete.

While I have not had the opportunity to review what you have produced in detail, and because of the inadequate labeling of the items you have produced, identifying missing items is difficult.

I would appreciate you itemizing to me what production of materials (I received letters from you dated January 8, 13, 26, 29, 2015 and February 9, 2015 with enclosures) are responsive to what item number of the original request, as amended by our subsequent communication.

As to the Public Safety and courts Committee, I am missing both minutes and agenda of items not on the website. Specifically, *inter alia*, I have no minutes for the Public Safety and Courts Committee for the meetings on August 11, 2014 or October 20, 2014 (which are not yet posted to the website). The last response I have from you regarding agenda and minutes that are not on the website was contained in your letter dated January 29, 2015, in which you indicated that Ms. Renwick was unable to complete her review and you expected to send me what was missing from her responses "early next week" as it related to Item Nos. 12, 13, and 14. The following letter dated February 9, 2015 does not include any additional materials from Ms. Renwick addressing Items 12, 13 and 14.

I still have no texts from Mr. Adams to council members or their agents. I will attempt shortly to give you a comprehensive list of everything I believe to be missing, but would appreciate you sending the above items at your earliest convenience.

db

Desa Ballard
Ballard & Watson
Attorneys at Law
Telephone 803.796.9299
Facsimile 803.796.1066
E-mail: desab@desaballard.com, copy to mara@desaballard.com

ROA 00063

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF NEWBERRY)

C.A. No. 2015-CP-36-00141

Desa Ballard,)

Plaintiff,)

ANSWER

vs.)

Newberry County,)

Defendant.)

FILED
NEWBERRY COUNTY
2015 APR 20 PM 12 22
JACKIE S. COOPER
CLERK OF COURT

The County of Newberry, South Carolina (the "County"), answering the complaint of the Plaintiff herein, would allege and show as follows:

FOR A FIRST DEFENSE
(General Denial)

1. The County admits paragraph one of the Plaintiff's complaint.
2. The County admits so much of paragraph two of the Plaintiff's complaint as alleges that the County is a body politic created under the authority of the South Carolina legislature. The County admits further that it has the ability to sue and be sued pursuant to applicable state and federal law. Any allegations contrary to the foregoing statements are denied.
3. The County admits the factual allegations contained in paragraph three of the Plaintiff's complaint. Responding to the legal allegations contained in this paragraph, the County admits so much of these allegations that may accurately paraphrase S.C. Code Ann. §§ 30-1-20 and 30-1-70, and the County craves reference to those sections. The County denies all allegations that are inconsistent with those sections or S.C. Code Ann. § 30-1-10, et seq.
4. Responding to paragraph four of the Plaintiff's complaint, the County admits that the County Attorney for the County is the official for the County who coordinates and delivers

ROA 00063

responses to requests made pursuant to the Freedom of Information Act ("FOIA"). The County admits further that the Plaintiff and the County Attorney did agree to narrow, limit and modify the Plaintiff's FOIA request. All allegations contrary to the foregoing are denied.

5. The County admits paragraph five of the Plaintiff's complaint.

6. The County admits that the quoted language set forth in paragraph six of the Plaintiff's complaint is accurate.

7. The County admits paragraph seven of the Plaintiff's complaint. The County denies that the FOIA response was not complete.

8. The County admits paragraph eight of the Plaintiff's complaint.

9. The County admits the allegations in the first sentence of paragraph nine of the Plaintiff's complaint, and denies the allegations in the second sentence of paragraph nine.

10. The County admits the allegations of the first sentence of paragraph 10 of the Plaintiff's complaint. Responding to the allegations of the second sentence of paragraph 10, the County states that it has offered to provide documents to the Plaintiff from the County's outside counsel pending payment by the Plaintiff of costs incurred by the County in procuring such documents.

11. The County admits paragraph 11 of the Plaintiff's complaint.

12. The County denies paragraph 12 of the Plaintiff's complaint.

13. The County denies paragraph 13 of the Plaintiff's complaint.

14. The County denies paragraph 14 of the Plaintiff's complaint.

15. Responding to paragraph 15 of the Plaintiff's complaint, the County admits that it does not prohibit the County Administrator from using a personal e-mail address or text messaging to carry out activities of the County. The County states further that the County

Administrator has no e-mails from a personal e-mail account or text messages that are responsive to the Plaintiff's FOIA requests. The County denies all allegations that are inconsistent with the foregoing.

16. Responding to paragraph 16 of the Plaintiff's' complaint, the County admits so much of this paragraph that may accurately paraphrase and/or quote portions of Section 12-503.15 of the General Record Retention Schedule for County Records, S.C. Code Ann. § 30-1-70 and S.C. Code Ann. § 30-1-80, and the County craves reference to those sections. The County denies all allegations that are inconsistent with those sections, the General Record Retention Schedule for County Records, or S.C. Code Ann. § 30-1-10, et seq.

17. The County denies paragraph 17 of the Plaintiff's complaint.

18. Responding to paragraph 18 of the Plaintiff's complaint, the County denies the Plaintiff is entitled to any relief based on the allegations set forth in her complaint.

19. The County denies paragraph 19 of the Plaintiff's complaint.

20. The County denies paragraph 20 of the Plaintiff's complaint.

21. The County denies paragraph 21 of the Plaintiff's complaint.

22. The County denies paragraph 22 of the Plaintiff's complaint.

23. The County denies paragraph 23 of the Plaintiff's complaint.

24. Responding to paragraph 24 of the Plaintiff's complaint, the County incorporates herein the relevant and consistent allegations of the preceding paragraphs.

25. Responding to paragraph 25 of the Plaintiff's' complaint, the County admits so much of this paragraph that may accurately paraphrase and quote portions of S.C. Code Ann. § 30-4-70, and the County craves reference to that section. The County denies all allegations that are inconsistent with this section or FOIA.

26. The County denies paragraph 26 of Plaintiff's complaint. The County states further that the County lists in its minutes of meetings those persons who are in attendance, but the County does not take minutes of executive session, nor is the County required to do so.

27. Responding to paragraph 27 of the Plaintiff's complaint, the County admits that it does not transcribe its council meetings in the ordinary course, but the County alleges that is not required to do so. The County admits that its meeting minutes are the official records of its council meetings.

28. The County denies paragraph 28 of the Plaintiff's complaint.

29. The County denies paragraph 29 of Plaintiff's complaint. The County states further that the County lists in its minutes of meetings those persons who are in attendance, the County does not take minutes of executive session, nor is the County required to do so.

30. The County denies paragraph 30 of the Plaintiff's complaint.

31. The County denies paragraph 31 of the Plaintiff's complaint.

32. The County denies paragraph 32 of the Plaintiff's complaint.

33. Responding to paragraph 33 of the Plaintiff's complaint, the County incorporates herein the relevant and consistent allegations of the preceding paragraphs.

34. The County denies paragraph 34 of the Plaintiff's complaint.

35. The County denies paragraph 35 of the Plaintiff's complaint.

36. The County denies paragraph 36 of the Plaintiff's complaint.

37. Each and every allegation of the Plaintiff's complaint that is not admitted, modified or explained is denied.

FOR A SECOND DEFENSE
(Failure to State a Claim)

38. The County incorporates herein the relevant and consistent allegations of the

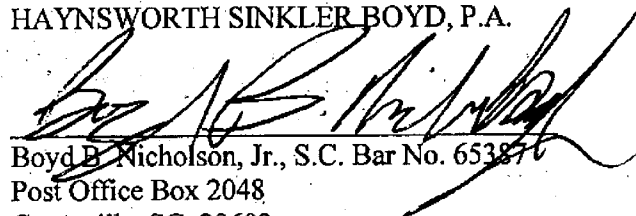
preceding paragraphs.

39. The Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against the County; therefore, the Plaintiff's complaint should be dismissed.

WHEREFORE, having answered the Plaintiff's complaint herein, the County requests that the Court dismiss the complaint with prejudice; that the Court award the County their costs in this action; and that the Court grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



Boyd B. Nicholson, Jr., S.C. Bar No. 65387

Post Office Box 2048

Greenville, SC 29602

Tel.: (864) 240-3247 (Telephone)

E-Mail: nnicholson@hsblawfirm.com

Attorneys for the Defendant

April 16, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

Desa Ballard,)
)
Plaintiff,)
)
)
)
vs.)
)
Newberry County,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2015-CP-36-00141

**DEFENDANT'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

FILED
NEWBERRY COUNTY
2016 JUN 10 AM 1 44
JACKIE S. DOWERS
CLERK OF COURT

ROA 00068

INTRODUCTION

Former magistrate Judge Arthur Jayroe ("Judge Jayroe") has sued Newberry County (the "County") three times in the last two years. Desa Ballard, the plaintiff in this action, has represented him in each of those cases.¹ While two of these actions were pending, Ms. Ballard submitted a request for documents to the County pursuant to the Freedom of Information Act ("FOIA"). The County produced over 1,800 pages of documents, but Ms. Ballard nonetheless sued the County, alleging that the County failed to produce e-mails and texts of the County Administrator and also alleging that the County failed to properly announce the specific purposes of certain executive sessions. At the very least, there are disputed facts related to these issues.

¹ These cases are:

Jayroe v. Newberry Cnty., 413 S.C. 176, 775 S.E.2d 382 (2015). Civil action in the original jurisdiction of the Supreme Court filed February 25, 2015 and disposed of pursuant to the cited case.

Jayroe v. Newberry Cnty., Appellate Case No. 2016-000305 (2016). Administrative action filed March 11, 2015 and tried before County Council. Judge Jayroe has appealed.

Jayroe v. Newberry Cnty., et. al., C.A. No. 2015-CP-36-636. Civil action filed in Court of Common Please on July 2, 2015 and pending.

ROA 00068

ROA 00069

For this reason and other reasons, all to be discussed below, the County respectfully requests that the Court deny Ms. Ballard's motion.

FACTS

On December 2, 2014 Ms. Ballard sent a request to Wayne Adams, the County administrator, seeking documents covering sixteen categories and going back, in some cases, to documents dated back to 1995. See first document of Exhibit 1 attached hereto. Category seven requested all electronic messages, in any format and including private devices, between Mr. Adams and County Council members dating back to 2010. Id. Mr. Adams received the FOIA request on December 3 and turned it over to Jay Tothacer, the County Attorney. Mr. Tothacer has roughly twenty years' experience serving as a County Attorney for Newberry, Berkeley and Greenville Counties. See deposition of Jay ("Tothacer Depo"), relevant portions of which are attached hereto as Exhibit 2, at pp. 7-11. On December 4 Mr. Tothacer sent communications to various employees of the County and Judge Jayroe that included the FOIA request and seeking assistance in gathering responsive documents. See 12-4-14 e-mail from Jay Tothacer attached as second document to Exhibit 1. See also Tothacer Depo (Exhibit 2) at p. 21, l. 17 – p. 22, l. 2. (Mr. Tothacer sent a copy of the FOIA request letter "to everybody that I thought would have information that would be responsive to it. I even suggested to them, as I saw it, this would be the area that you would have the information for. ... As an example, she asked a lot of questions about magistrates, and so I sent it to the Chief Magistrate [Judge Jayroe] and asked him to respond to it."). Mr. Tothacer also followed up verbally with the individuals to whom he had sent the FOIA request:

I would check with them and ask them where they were in the process because Ms. Ballard was hoping it would be responded to as quickly as possible, so I was trying to gauge where they were in the request. For

instance, some of the information that the finance director provided was not readily available. She had to go to our archive area. And so I was trying to get an idea of when responses would be back.

Tothacer Depo (Exhibit 2) at p. 23, line 15-22. He also consulted with the County's IT Director, Dylan Snyder, "because several of the requests were related to computers." *Id.* at p. 24, lines 5-10.

On December 22, thirteen business days after Mr. Adams received Ms. Ballard's request, Mr. Tothacer sent her a three-page letter detailing the status of his search thus far, including documents located, and the estimated costs for searching and copying documents. See 12.22.14 letter from Jay Tothacer, third document of Exhibit 1. Regarding Mr. Adams' e-mail, Mr. Tothacer informed Ms. Ballard that Mr. Adams' computer had crashed in March 2014 and "he is limited to whatever is on his system since then. As we discussed, we do not have archiving capabilities of email on any documents stored on personal computers beyond what is still available on that personal computer." *Id.* After Mr. Adams' computer crashed, the County's IT Director examined it. He concluded that it was useless and that no data could be recovered from it. Thus, he disposed of it. Affidavit of Dylan Snyder (attached hereto as Exhibit 3) at ¶ 5.

Through phone calls and correspondence with Mr. Tothacer, Ms. Ballard agreed to reduce the scope of her FOIA request. See, e.g., 12-30-14, 1-5-15 and 1-27-15 e-mails from Ms. Ballard to Mr. Tothacer, included as fourth, sixth and twelfth documents of Exhibit 1. Ms. Ballard and Mr. Tothacer corresponded on numerous other occasions about the FOIA response, up until the filing of this lawsuit. See Exhibit 1. Some of that correspondence concerned Ms. Ballard's request for text messages from Mr. Adams. See e-mails from 1-26-15 -- 1-28-15 between Mr. Tothacer and Ms. Ballard, included as thirteenth, fourteenth and eighteenth documents of Exhibit 1. As Mr. Tothacer explained to Ms. Ballard, the County's cellphone

carrier, Verizon, does not maintain text messages over an extended period. **ROA 00071**
See id. See also Tothacer Depo (Exhibit 2) at p. 45, ll. 11-15 and p. 49, l. 17 – p. 52, l. 8 (testimony concerning same). Mr. Tothacer even provided to Ms. Ballard an e-mail message from Verizon about the unavailability of texts, which stated:

VZW requires a valid state or federal search warrant. 18 U.S.C. 2703(a) requires that disclosure of the content of communications can be made only pursuant to a validly issued state or federal search warrant.

- VZW is only able to capture the last 3-5 days worth of content (never more than 10).
- Due to system limitations, terminating content is the only available option. Additionally, system outages and upgrades may result in VZW not capturing content.

VZW has a charge for the preservation of text message content. It is billed per number at \$50 per 5-day increments at a minimum of \$50 for each request.

See 1-28-15 e-mail from Ciarra Jones to Jay Tothacer, included as seventeenth document to Exhibit 1. Mr. Tothacer also reviewed Mr. Adams' cell phone and saw no text messages that were responsive. Tothacer Depo (Exhibit 2) at p. 56, ll. 11-21.

On January 29, 2015 Mr. Tothacer sent Ms. Ballard responsive e-mails either from or to Wayne Adams. This production totaled 139 e-mails that contained 376 pages of material (e-mails and attachments). See Exhibit 4 (given the size of this exhibit it will be presented at the hearing). In all, the County produced over 1,800 pages of documents to Ms. Ballard.

SUMMARY JUDGMENT STANDARD

Pursuant to Rule 56(c), SCRCF, the party seeking summary judgment has the responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). The court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the

non-moving party. David v. McLcod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit only a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). “Summary judgment is a drastic remedy, which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues.” Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

ARGUMENT

I. THE COUNTY HAS FULFILLED ITS DOCUMENT PRODUCTIONS OBLIGATIONS UNDER FOIA.

Ms. Ballard seems to make three arguments:

1. The County failed to produce certain e-mails and no texts of Mr. Adams.
2. If the County really did not have the e-mails and texts as they have stated repeatedly, then the County violated the State Records Act.
3. The County willfully violated FOIA because it only produced certain documents after the lawsuit was filed.

Neither the record nor the law supports these arguments.

A. The Record Demonstrates that the County Complied with FOIA by Diligently Searching for and Producing 139 Responsive E-mails to or from the County Administrator and by Making a Diligent Search for any Responsive Texts of the County Administrator.

Jay Tothacer testified that it is his belief that the County has complied with FOIA. Tothacer Depo (Exhibit 2) at p. 93, l. 24 – p. 94, l. 4. (“Q. Now, today, do you believe that Newberry County has fully complied with its obligations under Exhibit 1, which was Ms. Ballard's FOIA? A. To the best of our ability to provide the information that we have or have access to, I believe that is the case. That, yes, we have fully responded.”). See also id. at p. 94,

II. 5-7 ("Q. You believe you fully complied with your obligations? A. I believe we've fully responded. I don't know how else to couch that."). Mr. Tothacer's testimony is the only testimony that has been offered. This testimony alone defeats Ms. Ballard's summary judgment motion.

Regarding Mr. Adams' e-mails, Ms. Ballard argues "The County has not provided the requested materials claiming the county administrator's computer crashed in March 2014. While the County has provided some e-mails where the county administrator is a sender or recipient, it appears that none of the e-mails were provided by the county administrator." See Motion at p. 3, ¶ 8. This is simply not true. The County has produced 139 e-mails totaling 376 pages, ranging in dates from May 2010 to December 2014. Moreover, the County did produce e-mails from Mr. Adams' post-crash computer. Regarding the text messages, the only testimony on this point comes from Mr. Tothacer, who reviewed Mr. Adams' phone and found no responsive texts.

FOIA requires the production of non-exempt documents in the possession of a governmental body. The County has done that, producing over 1,800 pages. Summary judgment on this point should be denied.

B. Ms. Ballard Can Neither State nor Prove a Claim Under the State Records Act.

As an initial matter, the County contends that there is no private right of action under the State Records Act, S.C. Code Ann. § 30-1-10, et seq. "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 the statute.... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil

liability.” Adkins v. South Carolina Dept. of Corrections, 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004) (quoting Whitworth v. Fast Fare Markets of South Carolina, Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)). “Where a statute does not specifically create a private cause of action, one can be implied **only if the legislation was enacted for the special benefit of a private party.** Adkins, 360 S.C. at 418, 602 S.E.2d at 54 (quoting Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992) (emphasis supplied in Adkins opinion). The overall purpose of the Records Act is to preserve government documents for the benefit of South Carolinians generally. The General Assembly did not promulgate this law to benefit Ms. Ballard or anyone similarly situated. Thus, Ms. Ballard may not properly state a claim under this Act.

Even if there were a cause of action under the Records Act, it does not dictate how a local government should preserve records, and it certainly does not dictate what a County must spend in doing so. Instead, the Records Act states:

A records management program directed to the application of **efficient and economical management** methods and relating to the creation, utilization, maintenance, retention, preservation, and disposal of public records must be established and administered by the Archives...The head of each agency, the governing body of each subdivision, and every public records custodian shall cooperate with the Archives in complying with the provisions of this chapter and to establish and maintain an active, continuing program for the **economical and efficient management** of the records of the agency or subdivision.”

S.C. Code Ann. § 30-1-80 (emphasis added). Thus, the Act recognizes that local governments like the County may consider economy and efficiency in determining how best to protect and preserve their records. As a county government, the County has great discretion in determining what it feels is efficient and economical for Newberry County as decreed by Home Rule. See

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S.C. Constitution, Art. VIII, § 17². See also S.C. Code Ann. § 4-9-25 (codifying Home Rule for counties).³

The reason for this deference to local government is the legislature's "realization that different local governments have different problems that require different solutions. . . . By enacting statutes like § 4-9-25 . . . the General Assembly gave local governments the power to deal with these problems at the local level rather than at the State Capitol." Hospitality Ass'n. of South Carolina v. Cnty. of Charleston, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995). Our appellate courts recognize that "legislators and administrators are properly concerned with balancing numerous competing considerations and thus, we will normally refrain from reviewing the merits of their decisions, absent evidence of arbitrariness or irrationality." County of Charleston v. Sleepy Hollow Youth, Inc., 340 S.C. 174, 181, 530 S.E.2d 636, 640 (Ct. App. 2000). See also Smith v. Georgetown County Council, 292 S.C. 235, 239, 355 S.E.2d 864, 866

² The full text of Article 17 reads as follows:

The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

³ The full text of Section 4-9-25 reads as follows:

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

(Ct. App. 1987) ("it is not the role of the courts to substitute their judgment for that of local legislative bodies, which are better qualified to act upon local ... matters.").

Ms. Ballard has put forth no proof that the County violated the Records Act. Instead, she simply argues that the County's losing of documents through a computer crash is a *per se* violation of the Act. This is simply not the law. Under Ms. Ballard's theory, local governments would violate the law if documents were lost due to catastrophic fires or other calamities. At the very least, these are factual arguments that require a trial on the merits.

C. The County Did Not Willfully Violate FOIA.

Ms. Ballard argues that the County "willfully" violated FOIA because documents related to the case of Thomas Abraham v. Newberry County (FOIA request no. 6) were provided after the lawsuit was filed. The documents in question, however, were not in the possession of the County. Instead, they were documents that Dirk Aydlette, a lawyer who represented the County in the Abraham case, had prepared or received in connection with that litigation. On February 26, 2016 Ms. Ballard asked the County to produce documents related to the Abraham case that were in Mr. Aydlette's possession. 2-26-15 e-mail from Ms. Ballard to Mr. Tothacer, included as document twenty-four to Exhibit 1. Rather than argue that these documents were not "prepared, owned, used, in the possession of, or retained by" the County, see S.C. Code Ann. § 30-4-20(c), Mr. Tothacer responded that same day that he would "speak with Mr. Aydlette" about these documents. 2-26-15 e-mail from Mr. Tothacer to Ms. Ballard, included as document twenty-four to Exhibit 1. Upon receiving the documents from Mr. Aydlette, Mr. Tothacer notified Ms. Ballard and told her the costs to be paid, which was roughly one-third of what the County actually paid Mr. Aydlette for searching for and providing these documents. See Exhibit C to Plaintiff's Motion. The County did not violate FOIA with respect to

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these documents. Instead, it went above and beyond the requirements of FOIA by paying the majority of Mr. Aydlette's costs to produce these records.

II. THE COUNTY PROPERLY ANNOUNCED THE PURPOSES OF EXECUTIVE SESSION.

A. Ms. Ballard Has No Standing to Challenge Any of the Announcements of Executive Sessions that Took Place Prior to March 20, 2014.

Ms. Ballard does not seek to undo any of the actions that are tied to the executive sessions that she has challenged. Because these underlying actions are over, Ms. Ballard's requests are moot, present no justiciable claim, and present questions that would only render an advisory opinion. South Carolina courts, however, will not "issue advisory opinions on questions for which no meaningful relief can be granted." In the Interest of Kaundra C., 318 S.C. 484, 486, 458 S.E.2d 443, 444 (Cl. App. 1995). Courts do not have standing to issue advisory opinions. Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.").

The General Assembly has carved out an exception under FOIA for matters that occurred within one year of being challenged. See S.C. Code Ann. § 30-4-100(a). Thus, all of the executive sessions that Ms. Ballard challenged that took place after March 20, 2014 – one-year prior to the filing of Ms. Ballard's complaint – are ripe for decision. With regard to the remaining executive sessions that took place before that, however, the County submits that the Court lacks subject matter jurisdiction to rule upon them. Those executive sessions are the August 21, 2013 County Council meeting and the October 16, 2013 County Council meeting.

ROA 00078

B. The Record Demonstrates that the County Properly Announced the Purpose of Executive Sessions.

Under FOIA "[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. § 30-4-70(b). FOIA explains further that "specific purpose" means "a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section." *Id.* These sub-sections are as follows:

(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; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

(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.

S.C. Code Ann. § 30-4-70(a).

Mr. Tothacer testified that the County announces the specific purpose of each executive session "[w]ithin the requirements of the law," Tothacer Depo (Exhibit 2) at p. 71, ll. 16-18, explaining:

[Y]ou give one of the reasons for the session and if you can give any additional information, you may include that. But if you give the reason that's stated, like, here's a simple one: Investigative proceedings regarding the allegations of criminal misconduct. That's a specific purpose. You don't say, for example: Personnel matters, because there's not an exemption for personnel matters.

Id. at p. 71, l. 25 – p.72, l. 8. Mr. Tothacer's testimony echoes FOIA, which defines "specific purpose" as "a description of the matter to be discussed as identified in items (1) through (5) of subsection (a)." The County submits that it has done this in announcements of executive sessions at issue.

The case of Quality Towing v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001) illustrates the point. There, the announcement of an executive session was simply "Towing — Contractual Recommendation." 345 S.C. at 164, 547 S.E.2d at 866. The court held the meeting minutes reflected the city council failed to announce the specific purpose of the executive session. Id. This announcement did not comply with FOIA because a "contractual recommendation" is not set forth in any of the sub-sections of 30-4-70(a), which define the term "specific purpose." The County submits that it has gone well beyond what was announced in Quality Towing and that it properly announced the specific purposes of the executive sessions at issue.

CONCLUSION

For the foregoing reasons the Court should deny the Plaintiff's motion.

Respectfully submitted,
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June 10, 2016
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS
CASE NO. 2015-CP-36-00141

Desa Ballard,

Plaintiff,

vs.

Newberry County,

Defendant.

MOTION FOR RECONSIDERATION
AND TO AMEND JUDGMENT

FILED
NEWBERRY COUNTY
2017 JUL 24 PM 3:35
CLERK OF COURT

The Plaintiff, by and through undersigned counsel, moves this Honorable Court pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, to reconsider its July 7th Order¹ only in the following respects: (1) that the Court reconsider its finding in "Part II. Compliance with the Public Records Act" that Plaintiff has no standing to bring an action under the South Carolina Public Records Act; (2) Plaintiff seeks a finding by this Honorable Court that the non-privileged litigation documents sought as part of the original FOIA were not produced until *after* this litigation was filed and award those costs of \$1,000; and (3) that the Court reconsider its finding limiting Plaintiff's recovery of attorney fees and costs based on its finding of no standing under the South Carolina Public Records Act;

STANDING

The Plaintiff respectfully requests this Court reconsider "Part II" of its Order and find that the Plaintiff has standing to bring an action under the Public Records Act. In its July 20, 2017 Order, this Court found that "[a] large portion of the trial of this matter dealt with accusations from Plaintiff regarding violations of the Public Records Act, S.C.

¹ Counsel received the Order by e-mail from the court on July 12, 2017.

Code Ann. Section 30-1-10, *et. seq.*” Order, p. 4, ¶1. This Court found that “Plaintiff has no standing to bring a private cause of action against Defendant under the Public Records Act. . . .” Order, p. 6, ¶4. Specifically, this Court found that “the Public Records Act creates no explicit private right of action.” *Id.*, p.4, ¶2. It reasoned, “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. *Id.*, p. 5, ¶3. The Court also found that “[w]hen 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.” *Id.*, p. 4, ¶2.

The Plaintiff respectfully asks that these conclusions be withdrawn and that this Court hold that Plaintiff has standing because her claims arise under her FOIA causes of action for which standing is explicitly conferred by statute. No separate standing to enforce the Public Records Act is necessary because Plaintiff had standing to request the documents under FOIA. This Court should also find the right to ensure a public body’s compliance with the Public Records Act is a necessary predicate to any statutory right of public access to records promised by the FOIA and comports with at least two of this State’s standing doctrines.

First, this Court has, respectfully, overlooked the fact that Plaintiff pled² and litigated Defendant’s failure to preserve public records, specifically emails and text messages, as part and parcel of Plaintiff’s claims under the FOIA. In order for this Court

² It appears This Court is making a *sua sponte* subject matter jurisdiction ruling as to standing as this issue was not raised at the trial of the matter, and Defendant did not plead “standing” as an affirmative defense in its Answer. The matter was first raised by Defendant in its Opposition to Plaintiff’s Motion for Summary Judgment.

to know what Newberry County *should have produced*, it was necessary to know what it *should have retained*. Thus, statutory standing under the Public Records Act is created by way of the FOIA statute which explicitly grants a private right of action. S.C. Code Ann. §30-4-100; Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40, 44 (2012) (“FOIA contains a specific standing provision allowing any citizen of South Carolina to seek a declaratory judgment or injunctive relief to enforce the Act’s requirements.”). The Public Records Act exists as a mandate to public bodies. The remedy lies in FOIA. The two are intertwined.

In ATC South, Inc. v. Charleston County, the South Carolina Supreme Court explained that standing can arise in a number of ways: (1) by statute; (2) through the rubric of constitutional standing; or (3) under the “public importance” exception). Id., 380 S.C. 191, 669 S.E.2d 337, 339 (2008).

This Court should hold that the express right of action codified at South Carolina Code §30-4-100 (FOIA) necessarily extends to the record retention mandates of the Public Records Act because the FOIA *presumes* the existence of records for the public to inspect. The Public Records Act defines what public documents must be kept, and FOIA defines the parameters of production for public documents. *See* S.C. Code Ann. §30-1-10, *et. seq.* and 30-4-10, *et. seq.*

The Public Records Act’s logical service to the FOIA under Title 30, “Public Records,” has mandated the chief administrative officer of a public body as the one “responsible for carrying out the duties and responsibilities of this chapter.” S.C. Code Ann. §30-1-20. If the chief administrative officer does not carry out his or her duties in

retaining public records under the Public Records Act, then FOIA is rendered meaningless.

For the FOIA to have significance, in order for citizens to be able “to learn and report fully the activities of their public officials,” governmental bodies must *retain* public records. S.C. Code Ann. §30-4-15. Public records and the documents evidencing the inner workings of government are not “musty parchments³,” but rather are tethers to unbridled state power free from oversight. As the defendant readily admitted at trial, “I suppose you have to have the record to provide it.”⁴ As The Court’s FOIA holding in this case explained:

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. *As such, this relief does not appear to be available.*

Order, p. 4, ¶14. (emphasis added, footnote omitted). This Court’s holding, if left in place, creates an unintended incentive for government entities not to retain any records as a means to avoid disclosure under FOIA while the beneficiaries of retention – this State’s citizens – are left with no recourse to challenge that decision. Surely, this Court does not intend such a result and should hold accordingly.

This conclusion also comports with the rules of statutory construction by harmonizing the statutory scheme consistent with legislative intent while avoiding an absurd result. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Hodges.v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581

³ Sam Adams in a speech to the State House in Philadelphia, August 1, 1776.

⁴ T. p. 150, lines 15-21.

(2000). When the statute's language is plain and unambiguous, no construction is needed, but when the statute is silent or unclear, the rules of construction are tools to discern and give effect to legislative intent. *See Id.* "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Jones v. State Farm Mut. Auto Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005).

Here, the only sensible reading of Title 30 presumes the right to enforce record retention laws under FOIA because the right of access outlined in Chapter 4 (the FOIA) cannot exist without the definitional and retention mandates outlined in Chapter 1 (Public Records Act). The legislature's intent to tie record retention mandates to FOIA's enforcement right is evidenced by the interdependent language contained in the two chapters. For example, the FOIA guarantees access to "public records" which it defines. When the Public Records Act defines a public record, it does so by adopting the definition in the FOIA. *See* S.C. Code Ann. 30-1-10(A) ("For the purposes of Sections 30-1-10 to 30-1-140 'public record' has the meaning as provided in Section 30-4-20(c)). In short, these Chapters must be read together to accomplish a shared purpose: public access to public records. This Court's holding frustrates this reading by treating the two as unrelated and that conclusion should be revisited.

This reading is also consistent with the General Assembly's unambiguous intent that the public's records be made accessible. As the FOIA specifically states:

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. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the person seeking access to public documents or meetings.

S.C. Code Ann. §30-4-15. "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Jones, 364 S.C. at 232, 612 S.E.2d at 724 (internal citations omitted).

This is consistent with case precedent in recognizing the symbiotic relationship between FOIA and the Public Records Act. In Glassmeyer v. City of Columbia, the appellate court held, "The FOIA is remedial in nature and shall be liberally construed to carry out the purpose mandated by the General Assembly." Id., 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015). In Brock v. Town of Mt. Pleasant, 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2015), the Court of Appeals considered a private cause of action under *both* FOIA and the Public Records Act. As our case law has held, "statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result. Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject must be reconciled, if possible, so as to render both operative." Amisub of S.C., Inc. v. S.C. Dept. of Health & Env'tl. Control, 407 S.C. 583, 757 S.E.2d 408, 416 (2014)(internal citations omitted).

In summary, this Court should conclude that Plaintiff has standing to enforce public records retention requirements because Plaintiff has standing under FOIA and FOIA presumes the existence of records for the public to inspect, a conclusion bolstered by both construction and the legislature's unambiguous intent.

Lastly, the Court should also hold that Plaintiff has standing to enforce record retention mandates pursuant to South Carolina's public importance exception. The South Carolina Supreme Court has "long recognized the public importance exception to the general standing requirements." ATC, 380 S.C. at 198, 669 S.E.2d at 341. "Standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." Id. (internal citations omitted). As Justice Kittredge explained:

An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits. The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. Yet the very nature of the public importance exception to general standing requirements resists a formulaic approach, as each case must turn on "the competing policy concerns" as we expressed in *Sloan v. Sanford*.

Id.

Here, the public importance and need for future guidance are paramount. "The essential purpose of the FOIA is to protect the public from secret government activity."

Glassmeyer, 414 S.C. at 219, 777 S.E.2d at 839.

Newberry County failed to retain not “its” records, but the public’s records. As this Court found, “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.” Order, p. 3, ¶8. Cost is not an excuse. The County should have implemented its own approved budget item for e-mail backup to accomplish compliance with the Public Records Act (and FOIA). This would have prevented the admitted loss of e-mails from Mr. Adams’ county computer – who ironically was the very person charged with preserving documents under the Public Records Act here - would have been prevented.⁵ This is especially important since the Defendant’s former IT employee acknowledged⁶ computer crashes were common and no retention policies existed for Newberry County. Importantly, the Newberry County attorney testified that since this litigation, Defendant has still not changed its procedure regarding archiving of emails or text messages.⁷ In other words, even after this matter drew its attention, Defendant continues to thwart the ability of citizens now and in the future to avail themselves of the protections afforded by the FOIA. Beyond Newberry County, other public bodies are no doubt looking to this Court’s decision as precedent that might inform their own retention practices. Truly, future guidance here is necessary.

As such, This Court should recognize and find that Plaintiff’s pleadings, arguments, and trial questioning concerning violations of the Public Records Act were *necessary components of her FOIA causes of action*. As such, The FOIA statute confers standing on Plaintiff. Moreover, even if such arguments were not a necessary part of her

⁵ T. p. 180, line 6 – p. 181, line 16.

⁶ T. p. 75, line 21 - p. 76, line 4.

⁷ Plaintiff’s Trial Exhibit 27; T. p. 91, lines 19 – p. 92, line 1.

FOIA action, which they are, this court should find that Plaintiff has statutory standing under the Public Records Act, also by way of the FOIA statute. In order to effectuate the intent of FOIA, Newberry County must retain documents and have a system in place for complying with FOIA – neither of which was done here. Further, this Court should find that there is no greater “public importance” than the preservation of public records and as such, should find standing for Plaintiff both as to the public importance exception and statute by reading the FOIA and Public Records Act as conjoined in *pari materia*. The Plaintiff respectfully requests this Court reconsider its Order on the issue of standing and the Public Records Act and find that Plaintiff has standing.

ABRAHAM LITIGATION DOCUMENTS

In Plaintiff’s original FOIA request in December 2014, the Plaintiff sought the non-privileged litigation documents in the *Newberry County versus Abraham* case.⁸ Although those documents were requested as part of the original FOIA, they were not produced by Defendant until April 2015 *after* the lawsuit was filed.⁹ While the Defendant may argue these documents were in the possession of outside counsel, these were documents the *Defendant should have had* and timely produced. Moreover, pursuant to S. C. Code Ann. §30-4-30(b), “The records must be furnished at the lowest possible cost to the person requesting the records . . . Fees may not be charged for examination and review to determine if the documents are subject to disclosure.” *Id.* Here, however, Defendant charged outside counsel’s \$225 hourly fee for his search and review to determine what was non-privileged. Defendant’s Trial Exhibit 5. The Plaintiff specifically requested these documents before the lawsuit was filed. As such, we

⁸ Complaint, ¶10; Plaintiff’s Trial Exhibit 1.

⁹ T. p. 27, lines 14 – p. 28, line 5; Defendant’s Exhibit 5; Plaintiff’s Exhibits 1, 8-9.

respectfully request this court make a finding that said documents were not provided
timely by the Defendant, in violation of FOIA. **ROA 00090**

ATTORNEY FEES

The Plaintiff respectfully requests this Court reconsider its award of partial attorney fees and award the full amount of fees and costs sought. Specifically, This Court found that as the Plaintiff did not prevail on standing under the Public Records Retention Act and a large bulk of time was spent on the argument, that only a partial award of fees was justified. Based on the arguments set forth herein requesting this Court reconsider that finding as any such arguments were made in pursuit of Plaintiff's FOIA claim, the Plaintiff respectfully requests that the Court award the entirety of the requested attorney fees and costs. Respectfully, the Plaintiff additionally requests this court reconsider its finding and award as costs the \$1,000 fee Plaintiff paid for FOIA documents post-litigation.

CONCLUSION

Based on the above arguments, the Plaintiff respectfully requests this Court reconsider its July 7, 2017 Order only as to the issues addressed and find (1) that Plaintiff has standing under the Public Records Act; (2) Defendant failed to timely produce the Abraham litigation documents in violation of FOIA; and (3) that a full award of attorney fees and costs is appropriate, including the award of \$1,000 in costs for the *Abraham* non-privileged litigation documents.

Respectfully Submitted, ROA 00091



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Attorneys for Plaintiff

July 24th, 2017

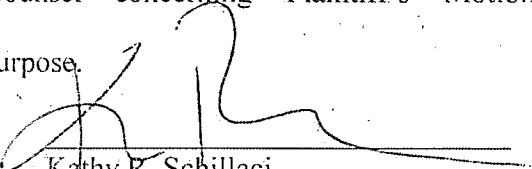
Columbia, South Carolina

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

RULE 11 CERTIFICATION

FILED
NEWBERRY COUNTY
2017 JUL 24 PM 3:35
ELIZABETH P. FOLK
CLERK OF COURT

Pursuant to Rule 11, South Carolina Rules of Civil Procedure, counsel certifies that consultation with opposing counsel concerning Plaintiff's Motion for Reconsideration would serve no useful purpose.


Kathy R. Schillaci
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(803) 779.0005
Attorneys for Plaintiff

This 24th day of July, 2017

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)
Desa Ballard,)
Plaintiff,)
vs.)
Newberry County,)
Defendant.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2015-CP-36-00141

**DEFENDANT'S REPLY TO PLAINTIFF'S
MOTION FOR RECONSIDERATION
AND TO AMEND JUDGMENT**

FILED
NEWBERRY COUNTY
2017 JUN 22 AM 11:32
CLERK OF COURT

INTRODUCTION

The Plaintiff has made a motion for reconsideration and to amend the Court's Order issued in this case on July 12, 2017. For the reasons to follow the Defendant Newberry County ("Defendant" or "County") respectfully requests that the Court deny the Plaintiff's motion.

ARGUMENT

I. The Court Properly Held that the Plaintiff Has No Private Right of Action Under the State Records Act; thus, the Court Should Deny the Plaintiff's Motion.

The Plaintiff first argues that the County did not raise the argument that the Plaintiff has no private right of action under the State Records Act. This argument has no merit for several reasons. First, the County pled as an affirmative defense in its answer that the Plaintiff's complaint failed to state facts sufficient to constitute a cause of action against the County. See answer at paragraph 39. Second, the County raised the no private right of action argument in its memorandum in opposition to the Plaintiff's motion for summary judgment. See Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at pages 6-7. Third, the County raised this argument in its post-trial submissions. Until her Motion to Reconsider, Plaintiff never asserted that the County failed to raise the no private right of action argument.

The Plaintiff next argues that her remedy under the State Records Act "lies is FOIA" because the "two are intertwined." Plaintiff's Motion at 3. This simply is not the case. As the Court properly analyzed and discussed, "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)). See also Order at pp. 3-4 (quoting Whitworth). Moreover, as the Court noted, "[w]hen 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)). See also Order at p. 4 (quoting Doe v. Marion). As the Court noted, "[i]f 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." Order at p. 4. Instead of creating a private right of action, the Legislature went the opposite direction and gave the Director of Archives the express ability to "pursue civil remedies." Order at p. 4 (citing See S.C. Code Ann. § 30-1-50). Criminal penalties are also possible for violating the State Records Act. See S.C. Code Ann. §§ 30-1-30 and 30-1-140.

Given the clear legislative intent in the State Records Act that a private right of action does not exist, it is not surprising that the Plaintiff seeks to create a claim by invoking FOIA. This claim, however, fails. Indeed, the legislative intent of FOIA also shows that the Legislature did not intend to create a private right of action in the State Records Act. Unlike the State Records Act, FOIA contains an express private right of action. See S.C. Code Ann. § 30-4-100

(A) ("A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later."). The Legislature could have drafted the same provision in the State Records Act, but it did not do so. Instead, it chose two different mechanisms for the pursuit of civil remedies for the State Records Act and FOIA: Director of Archives has the authority to pursue remedies under the State Records Act (S.C. Code Ann. § 30-1-50), while the citizens of South Carolina have the authority to pursue remedies under FOIA (S.C. Code Ann. § 30-4-100 (A)). In short, Plaintiff's argument that FOIA and the State Records Act are "intertwined" so that Plaintiff has a private right of action under the State Records Act finds no support in the State Records Act, FOIA, or case law. The Court's Order is correct, and therefore the Plaintiff's motion to alter the judgment should be denied.

II. The County Charged Ms. Ballard for Less than One-Third of the Expenses the County Incurred to Produce the Records in the Possession of Its Lawyer, Mr. Aydlette, and Furthermore, Plaintiff Admitted at Trial that the County's FOIA Production Was Timely; thus, the Court Should Deny the Plaintiff's Motion.

Plaintiff argues that because the documents in Dirk Aydlette's possession were produced after this lawsuit was filed, that she is entitled to the \$1000 that she paid to the County to reimburse it, in part, for the cost the County incurred for obtaining these documents from Mr. Aydlette. First, while it was true these documents – 307 of them – were produced after the Plaintiff filed her complaint, they were not in the Defendant's possession, but in the possession of their attorney, Dirk Aydlette, who had to review these documents for privilege since they related to a lawsuit involving the Defendant, whom Mr. Aydlette had represented. At trial, the Plaintiff testified at length regarding the back and forth cooperation between her and Mr. Tothacer in producing documents she requested, a process that took several months. At the end

of the day, however, Ms. Ballard admitted on cross-examination that the Defendant's response was timely, see Trial Transcript at p. 48, lines 4-23, and the County produced over 2,000 documents over a several months-long process while the Plaintiff and Mr. Tothacer worked together on the production. See, generally, Defendant's Exhibit 1 (correspondence between Plaintiff and Mr. Tothacer) and Defendant's Exhibits 2-4 (documents produced by Defendant).

Second, nothing in FOIA says that the costs that a citizen must pay for searching and producing requested records, see S.C. Code Ann. § 30-4-30(B), are automatically forgiven if a particular timetable for production is not met. Regarding timeliness of production, the FOIA only required a response within 15 business days. S.C. Code Ann. § 30-4-30(c).¹ As the Plaintiff admitted, the Defendant's response was timely. Trial Transcript at p. 48, lines 4-23.

The Plaintiff next argues that the Defendant improperly charged her for time Mr. Aydlette spent reviewing documents for privilege.² The record does not support this assertion.

¹ In May 2017, after this case was tried, the Legislature amended FOIA in several particulars. One change gave definite timelines for the production of documents. See S.C. Code Ann. § 30-4-30(c) (stating in part: "Each public body, upon written request for records made under this chapter, shall within ten days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of the request, notify the person making the request of its determination and the reasons for it; provided, however, that if the record is more than twenty-four months old at the date the request is made, the public body has twenty days (excepting Saturdays, Sundays, and legal public holidays) of the receipt to make this notification. ... If the request is granted, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the final determination was provided, unless the records are more than twenty-four months old, in which case the public body has no later than thirty-five calendar days from the date on which the final determination was provided."). The fact that the Legislature saw it necessary to give guidelines regarding the timeliness of actual production, in addition to the timeliness of a response, shows that prior to May 2017 FOIA did not impose any hard and fast rules governing when document production had to occur.

² As part of amending FOIA, the Legislature now allows governmental bodies to establish fees for redaction, in addition to the cost of research and retrieval. S.C. Code Ann. § 30-4-30(B). Prior to this amendment, however, redaction was not a cost that a governmental body could recover.

The Defendant charged the Plaintiff for less than one-third of what it actually paid Mr. Aydlette for searching for and providing these documents. Contrary to the Plaintiff's assertion, the County did not charge the Plaintiff for Mr. Aydlette's time reviewing the documents for privilege and redacting those privileged materials. Indeed, the County expressly informed the Plaintiff that it was not charging her for time spent on these activities. Moreover, the County then further discounted the cost that was attributable to the search and production of these documents. In short, Mr. Aydlette spent 13.5 hours in gathering, reviewing for privilege/redacting, and producing these documents. Half of this time was spent in privilege review and redaction, for which the County did not charge the Plaintiff. This left 6.75 hours that rendered a cost of \$1,518.75. The County further reduced that cost by another \$518.75 and charged the Plaintiff \$1000. Mr. Tothacer's email to the Plaintiff sums it up:

Desa,

I have received the materials from our outside Counsel in the Abraham case (Item #6 in your FOI request). He spent 13.5 hours gathering and redacting the materials and has provided them in an electronic format. I have spoken with him and he says that approximately half of that time was spent reviewing the documents for privilege, redacting the privileged portions of the materials and preparing a privilege log. Although Newberry County will reimburse him for the total time he spent on this matter we do not expect you to pay for the redaction time. His hourly rate is \$225 per hour and for 6.75 hours that would represent a cost of \$1518.75. We intend, however, to reduce the amounts that you will be required to pay to \$1000.00 (or roughly 1/3 of our outside counsel's time). Therefore, that you will need to forward \$1000.00 to Newberry County before we release the documents to you. Since they have been provided to us in an electronic format there will be no charge associated with copying.

Jay

Defendant's Exhibit 5. Thus, of the \$3,037.50 (13.5 hours * \$225 per hour) that the County paid Mr. Aydlette for production of these documents, the County charged the Plaintiff \$1,000. The Court should deny the Plaintiff's motion to reconsider.

III. Considering that the Only Claim for which the Plaintiff Received a Remedy Took Up Less than Twenty Percent of the Testimony and Arguments Offered in this Case, the Plaintiff Has No Valid Argument Demonstrating that the Court Erred in Awarding Her Fifty Percent of her Attorneys' Fees Claim and One-Hundred Percent of her Court Costs' Claim; thus, the Court Should Deny the Plaintiff's Motion.

The Court was well within its discretion to grant the amount of attorneys' fees that it did. While the County believes that there is ample support in the record for the attorneys' fees award to have been lower than it was, the County has made no motion to amend this portion of the judgment given the wide range of discretion that the Court has in setting these fees. Hueble v. S.C. Dept. of Natural Resources, 416 S.C. 220, 785 S.E.2d 461 (2016) ("The specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion or an error of law."). As the Court correctly noted, the great majority of this case dealt with the Plaintiff's cause of action under the State Records Act, for which she received no relief.

The combined trial transcript and the deposition transcript of Mr. Tothacer that the parties submitted to the Court totaled 280 pages. Of that combined testimony and argument, only 54 pages, or less than 20%, dealt with the executive session issue.³ Given this breakdown of the testimony and argument, the County submits that the Court was indeed generous to the Plaintiff in awarding her one-half of her attorneys' fees and all of her related court costs. This breakdown certainly justified the Court's ruling that "[b]ased 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." Order at p. 9. Importantly, the Plaintiff has made no showing that the Court abused its discretion

³ The trial transcript consists of 185 pages, and the executive session issue was discussed (either in testimony or argument) in 27 of these pages (specifically, pages 5, 6, 14, 15, 22-27, 31-34, 63-68, 139-43, 158 and 159). The Tothacer deposition transcript consists of 95 pages, and the executive session issue was discussed in 27 of these pages as well (specifically, pages 64-91).

or should otherwise amend its order with regard to the attorneys' fees ruling. For these reasons the Plaintiff's motion should be denied.

CONCLUSION

For the foregoing reasons the Court should deny the Plaintiff's motion.

Respectfully submitted,
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August 18, 2017
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Desa Ballard,

Plaintiff,

vs.

Newberry County,

Defendant.

) IN THE COURT OF COMMON PLEAS

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CASE NO. 2015-CP-36-00141

**PLAINTIFF'S REPLY TO MOTION TO
ALTER OR AMEND THE JUDGMENT**

ROA 00100
NEWBERRY COUNTY
FILED
JUN 21 AM 9:11

For the first time, Newberry County (hereafter "the County") asserts that certain of the materials requested by Ballard in her FOIA request, and which this Court has now ordered be produced, are protected by attorney-client privilege. The County is prohibited from raising this new issue now, after judgment, when it neither pleaded nor argued this issue in this case. The document at issue, Exhibit 16, appears to claim a different privilege – executive session – which privilege has been waived by the failure of the County to abide by the FOIA requirements as to executive session.

The complaint in this action framed the issue before the Court as the county's failure to comply with the Freedom of Information Act, and its failure to comply with the Public Records Act. (Complaint dated March 20, 2015). The County's answer was limited to its' defense that "no, we didn't violate those statutes." (See Answer dated April 16, 2015). The County's answer did not raise the attorney-client privilege as an issue to be addressed by the Court, nor did it offer testimony or evidence to bring this issue to the Court's attention during trial.

The issues for decision by the Court are framed by the pleadings, and the Court normally cannot grant relief not requested in the pleadings. Pittman Mortgage co. Inc. v. Edwards, 327

S.C. 72, 488 S.E.2d 335 (1997). If the County had offered evidence of its claim of attorney-client privilege and raised the issue, the Court could have allowed the County to amend its pleadings at that stage. Ball v. Canadian American Express Co., 314 S.C. 272, 442 S.E.2d 620 (Ct.App. 1994).

Nothing prevented the County from raising this issue at the proper and required time and from pleading inconsistent defenses. MacFarlane v. Manly, 274 S.C. 392, 264 S.E.2d 838 (1980) (permitting inconsistent defenses). The County could have chosen to defend this action by saying "no, we didn't violate the statute," and could have also pled that "if the Court finds we violated the statute(s), then, we assert the attorney-client privilege over the materials requested." However, the County determined its only defense to Ballard's complaint was a denial of the allegations of her complaint (that it had violated the statutes), and to assert that she failed to state a cause of action. Answer, *supra*.

Even if this Court finds the County properly pled the attorney-client privilege as a defense in this action, which it has not, nothing in the evidence or testimony presented established that Exhibit 16 is protected by the attorney-client privilege. The burden of proof to establish an attorney-client privilege exists is on the party asserting it. State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980). Even if the County had pled the privilege as a defense, and even if it had litigated the issue, a claim of attorney-client privilege in a Freedom of Information case carries an especially high burden. Here, the County failed to meet that high burden. See Evening Post Publishing Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 708 S.E.2d 745 (2011):

FOIA's basic premise is to give 'any person has a right to inspect or copy any public record of a public body'. This right is not without some exceptions. . . . However, the exemptions should be narrowly construed to not provide a blanket prohibition of disclosure in order to "guarantee the public reasonable access to certain activities of the government." The burden of proving an {FOI} exemption exists lies with the government.

Id., 708 S.E.2d at 748 (emphasis added).

Exhibit 16 is a document that speaks for itself and on its face reads, “[t]his page and a portion of the next were redacted as it related to executive session matters,” which is an entirely different matter from attorney-client privilege, which the County has failed to make and preserve. See S.C. Code Ann. 30-4-70. Even if such privilege had been made and preserved, the privilege has evaporated due to the County improperly going into executive session and failing to follow the law. Here, Ballard has a right as a member of the public in knowing what was discussed.

In the Evening Post case, the South Carolina Supreme Court addressed a claim by the public body that certain documents were exempt from FOIA production because they were attorney-client privileged. In reversing a grant of summary judgment where the trial judge had not examined the allegedly privileged documents *in camera* (when the attorney-client privilege was clearly pleaded and argued), the Supreme Court noted that the public’s interest in public documents is a significant compelling issue in addressing a claim of privilege in a FOIA claim:

The General Assembly, by the clear language of the statute, believes FOIA should be broadly construed to allow the public to gain access to public records. The interest in confidentiality expressed through the attorney-client privilege should not trump the public’s right to know. . . .

Id., 708 S.E.2d at 749 (emphasis added).

If the County had asserted or preserved the issue, which it did not, the County could have requested the trial judge at that time perform an *in-camera* review to determine the County’s claim of attorney-client privilege. At this point, however, where the issue is raised for the first time after judgment, the record is closed and the trial judge has already ruled, the County

cannot now assert, for the first time, that the trial court erred (in not ruling on an objection the County did not plead and did not prove). ROA 00103

It is true, as the County argues, that prior to litigation in its original response to Ballard's FOIA request, the County reserved all objections, including the attorney-client privilege. But that was then. Once the FOIA lawsuit was filed, the County chose not to raise the privilege issue and thereby abandoned its claim of privilege at trial by not pleading it and certainly not proving it.

As such, this Court correctly followed its legislative mandate to "order equitable relief as it considers appropriate. . . ." S.C. Code Ann. §30-4-100. The County's motion for reconsideration should be denied.

Respectfully Submitted,



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Attorneys for Plaintiff

August 17, 2017

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

) IN THE COURT OF COMMON PLEAS ROA 00104
)
) CASE NO. 2015-CP-36-00141
)

Desa Ballard,

Plaintiff,

vs.

Newberry County,

Defendant.

**PLAINTIFF'S
MOTION TO AMEND
AMENDED JUDGMENT**

FILED
NEWBERRY COUNTY
2017 NOV -2 AM 11:12
CLERK OF COURT

The Plaintiff, by and through undersigned counsel, moves this Honorable Court pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, to amend its Amended Order dated October 24, 2017 on the following grounds.¹

RELIEF NOT REQUESTED BY NEWBERRY COUNTY

In its original order dated July 7, 2017, this Court found and concluded that Newberry County had “violated both the letter and the spirit of FOIA by not setting forth the ‘specific purpose’ of executive session in its minutes.” (Order, ¶ 7, p. 8). By way of remedy, this Court ordered Newberry County to, within thirty (30) days, “submit to Plaintiff the redacted information contained in Plaintiff’s Exhibit 16, and any other documentation which reflects the discussions during that executive session.” (emphasis added)(Id. p. 8).

In its Motion for Reconsideration, Newberry County sought an amendment of this Court’s order only as it relates to Exhibit 16, asserting attorney-client privilege. (Newberry County Motion to Alter or Amend the Judgment dated July 24, 2017, Issues I and II). Plaintiff

¹ Plaintiff reserves all objections previously raised in her prior Motion to Reconsider, which issues remain preserved for appeal, while this motion is filed for amendment of the amended order. Plaintiff will file a Notice of Appeal with the South Carolina Court of Appeals and request a limited remand for purposes of permitting this Court to consider the instant motion.

ROA 00105
opposed the relief sought by the County, asserting that Newberry County had not raised the attorney-client privilege as to Exhibit 16 at trial. (Plaintiff's Reply to Motion dated August 17, 2017).

In its Order Granting Newberry County's Motion to Reconsider, this Court concluded that the privilege issue was preserved at trial as to Exhibit 16.² The Court reviewed Exhibit 16 *in camera* and determined that the redacted portions of Exhibit 16 were, in fact, privileged. (Order on Motions to Reconsider, October 24, 2017). That order indicated that the Court would amend its original order accordingly. *Id.*

However, instead of amending its original order to grant Newberry County's Motion as to Exhibit 16 only, this Court amended its grant of relief on this issue *entirely* by deleting the original order that Newberry County disclose both Exhibit 16 and "any other documentation which reflects the discussions during that executive session." The effect of the Court's amended order is to remove all relief granted to Plaintiff in connection with the improperly noticed Executive Session on August 24, 2015 (other than the partial grant of attorney's fees), even though Newberry County did not request that relief.

Newberry County did not request that relief in its Motion to Reconsider, so that portion of this Court's original July 7, 2017 order that required Newberry County to produce "any other documentation which reflects the discussions during that executive session" remains in full force and effect. Newberry County sought no relief as to that portion of this Court's original order, and therefore this Court's amended order overlooked that relief that remained in effect from the July 7, 2017 order.

² Plaintiff disagrees that the issue of privilege was preserved at trial, but that issue is already preserved for appeal and is not raised in this motion to amend the amended order. The instant motion addresses only those issues which have arisen by virtue of the amendment of this Court's original order.

ROA 00106

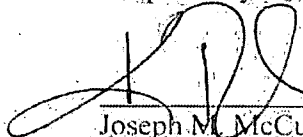
Even if Newberry County's Motion for Reconsideration had sought relief beyond the redacted portion of Exhibit 16 (which it did not), the County offered no testimony or evidence to establish who was present during the Executive Session on that date, so it would have been impossible for this Court to properly consider any attorney-client privilege claim raised after judgment as to "any other documentation which reflects the discussions during that executive session." If any person other than the members of County Council, its direct staff, and its lawyers were present during the Executive Session on that date, any claim of attorney-client privilege as to the discussions in that Executive Session was waived. Ross v. Medical University of South Carolina, 317 S.C. 534, 320 S.E.2d 44 (Ct.App. 1984); South Carolina State Highway Department v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973). Newberry County offered no testimony at trial as to who was present at the Executive Session in question.

That portion of this Court's original order of July 7, 2017 which required Newberry County to produce "any other documentation which reflects the discussions during that executive session" remains in full force and effect. Plaintiff respectfully requests that this Court's Amended Order be amended to specifically include that portion of its original order that was not challenged by Newberry County in its Motion for Reconsideration.

This Court will necessarily retain jurisdiction to determine whether Newberry County complies with its order that it produce to Plaintiff "any other documentation which reflects the discussions during that executive session." When and if Plaintiff receives the materials this Court ordered to be produced in its original order (and which Newberry County did not challenge), it may well become necessary for this Court to inquire into the sufficiency of production, and to continue to supervise the County's compliance with and enforcement of its obligations under that portion of its original July 7, 2017 order which remains in effect.

WHEREFORE, Plaintiff moves this Court for an order amending its amended order to specifically reaffirm that portion of its original order (which was not challenged) that, as a result of its failure to comply with S.C. Code Ann. §30-4-70, Newberry County is required to produce to Plaintiff "any other documentation which reflects the discussions during that executive session."

Respectfully Submitted,



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Attorneys for Plaintiff

October 31, 2017

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	CASE NO. 2015-CP-36-00141
Desa Ballard,	)	
Plaintiff,	)	PLAINTIFF'S REPLY TO
	)	DEFENDANT'S RESPONSE TO
vs.	)	PLAINTIFF'S MOTION TO AMEND
Newberry County,	)	AMENDED JUDGMENT
Defendant.	)	

FILED
 NEWBERRY COUNTY
 2017 NOV 17 AM 11:02
 CLERK OF COURT

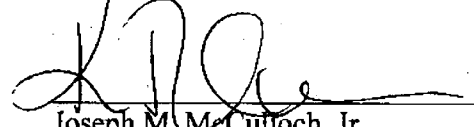
The Plaintiff, by and through undersigned counsel, has moved this Honorable Court pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, to amend its Amended Order dated October 24, 2017 to re-include the language "and any other documentation which reflects the discussions during that executive session." (emphasis added)(*Id.* p. 8).

While Newberry County asserts in its Opposition that such language is not necessary because no such documents exist, Plaintiff requests the Court revise the order to re-include the original language so that there is an affirmative obligation on Newberry County officials to search and produce any documents that do exist or may be found. Respectfully, opposing counsel cannot testify that no such documents exist.

As such, Plaintiff moves this Court for an order amending its amended order to specifically reaffirm that portion of its original order (which was not challenged) that, as a result of its failure to comply with S.C. Code Ann. §30-4-70, Newberry County is required to produce to Plaintiff "any other documentation which reflects the discussions during that executive session."

ROA 00109

Respectfully Submitted,



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Attorneys for Plaintiff

November 15, 2017

Columbia, South Carolina

ROA 00110

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Desa Ballard,

Plaintiff,

vs.

Newberry County,

Defendant.

) IN THE COURT OF COMMON PLEAS

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CASE NO. 2015-CP-36-00141

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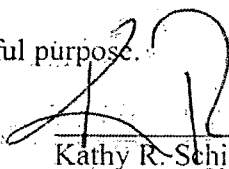
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RULE 11 CERTIFICATION

Pursuant to Rule 11, South Carolina Rules of Civil Procedure, counsel certifies that consultation with opposing counsel concerning Plaintiff's Motion to Amend Amended Judgment would serve no useful purpose.


Kathy R. Schillaci
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This 31st day of October, 2017

Columbia, South Carolina

FILED
NEWBERRY COUNTY
2017 NOV -2 AM 11:12
ELIZABETH B. FOLK
CLERK OF COURT

ROA 00110

ROA 00111
IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-36-00141

TRANSCRIPT OF RECORD

SEPTEMBER 6-7, 2016
NEWBERRY, SOUTH CAROLINA

THE HONORABLE THOMAS A. RUSSO, JUDGE

ATTORNEYS FOR PLAINTIFF:

ATTORNEY FOR DEFENDANTS:

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

ROA 00111

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1 PLAINTIFF'S EXHIBITS

2 Binder containing Exhibits #1-#26

3 Exhibit #27 Tothacer deposition

4 Exhibit #28 Dylan Snyder affidavit

5 Exhibit #29 Response to requests to produce

6

7 DEFENDANT'S EXHIBITS

8 Exhibit #1 Binder containing 24 exhibits

9 Exhibit #2 Banker's Box with contents

10 Exhibit #3 Folder containing documents

11 Exhibit #4 Folder containing documents

12 Exhibit #5 Emails from Tothacer to Ballard

13 Exhibit #6 Emails

14 Exhibit #7 Budget Request

15 Exhibit #8 Budget Request

16 Exhibit #9 Budget

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1 THE COURT: We're ready to proceed.

2 MR. MCCULLOCH: Your Honor, this is a -- as we talked
3 about in the chambers, we'll tried to keep this brief.
4 This is really a presentation complaint with four parts.
5 Through the complaint and Ms. Ballard, who is obviously a
6 lawyer and the Plaintiff in this case, we have pled the
7 duty under the Public Records Act, as filled out by the
8 state archives regulations with the very simple purpose of
9 stating the duty of every municipality, every county and
10 every governmental subdivision to ensure the preservation
11 and retention of records because of their historical nature
12 to inform the public, if the public should have questions,
13 as well as to inform and allow in litigation the
14 determinations about the actions proper or improper. So
15 this first part of this presentation is about that legal
16 duty, and the legal duties under the Freedom of Information
17 Act. This case, of course, involves that legal duty in the
18 context of of Freedom of Information request filed by Ms.
19 Ballard for the purposes that she will briefly outline to
20 the Court, not because it's necessary, Your Honor, but I
21 think it's helpful if the Court has some understanding of
22 the context.

23 THE COURT: Yes, sir.

24 MR. MCCULLOCH: The next thing, of course, is the
25 failures under the law, under this public records,

1 archives, regulations and the failures under the Freedom of
2 Information Act. Those are pled as three problems, if you
3 think of a three-legged stool, the three legs of the
4 delinquencies that we assert occurred by Newberry County
5 are their failure to preserve by any method emails and
6 texts which are not specifically cited in the public
7 records definition. But the Defense in this case has not
8 pled that those are not the required electronic documents
9 contemplated by the Freedom of Information Act and by the
10 public records preservation regulations. Their failure to
11 preserve -- to make any effort to preserve and protect for
12 production of those emails and texts in the conduct of
13 official business by the county administrators primarily
14 and by other officials or functionaries in the county
15 government.

16 The second leg of the stool is the manner in which
17 Newberry County has consistently continued and failed for
18 years to state the purpose of executive session. There
19 have been several cases, there are not a whole lot of
20 Freedom of Information cases, Your Honor. We got copies of
21 them for you. But two come to mind, Donahue and -- gosh, I
22 forget the other now. But Donahue and Quality Towing v.
23 Myrtle Beach are the two cases that outline in some great
24 detail and find that the stated -- the purposes as stated
25 for the executive sessions in those cases were not

1 adequate. And, interestingly, in this case we believe that
2 you'll find that the manner in which Newberry County
3 council went into executive session tracks only the statue
4 without specifying the purposes required by the statute.
5 And the third part is, as we believe, that a secret vote
6 took place in executive session. Discussions about votes
7 can clearly occur in executive sessions, but South Carolina
8 does not permit votes to take place in executive session
9 and requires those votes occur in the public. And we
10 believe, as Ms. Ballard will outline in her testimony, the
11 vote, that's the third problem in this case. I would say
12 that the general assembly enacted with these laws
13 recognizing that the records of how government works is
14 very important. It is that historical record that is
15 essential to the public's understanding of how people who
16 they vote upon and trust with the authority to do their
17 business how that sausage gets made. Should that not be
18 made in secret. And that's the problem here we believe.

19 Your Honor, we will, after Ms. Ballard's testimony and
20 during her testimony, we'll walk you through a series of
21 exhibits which are an imposing pile, but I'm going to ask
22 her to very simply summarize for you what that exhibit
23 represents so that you've got that understanding and ask
24 her the significance of why that is presented to you in
25 exhibits.

1 And then after that we will offer up the series of
2 excerpts from the single deposition taken in this case, and
3 the gentleman's name I always forget. Tothacer. My
4 apologies, Your Honor. Thank you, Mr. Tothacer. That was a
5 single deposition. And what we attempted to do, both the
6 Plaintiff and defense, is to excerpt from his deposition.
7 But in order for you to begin this case with a context, I'd
8 like to just zip through a few of these excerpts to
9 illustrate what we believe to be the problem that will
10 result in a verdict for Plaintiff.

11 Mr. Tothacer is the city attorney -- the county
12 attorney for the County of Newberry. His, and the excerpts
13 will show, there was no effort by Newberry County to link
14 computers used by county council members together in any
15 fashion. There was no effort to provide for a backup or
16 retention of these emails. There was absolutely no thought
17 given to the thought that funds, whether provided or
18 whether personal funds, a la Hillary Clinton in a
19 sense that these things -- when you're doing the county's
20 business the law requires that there be some method for
21 retention for memorializing the business of the county
22 as it's being done by whatever mechanism. We're way past
23 the postal service. We are in that new age of emails and
24 texts, which is the manner of business dealings by
25 everyone. The Court can take judicial notice of that.

1 There was no -- according to Mr. Tothacer there was no
2 backup, there was no cloud, which is that -- whatever
3 the hell that is up there that everything I do seems to be
4 memorialized in that. And the only email archiving, to the
5 knowledge of the county attorney, was whatever the
6 individual used. There is no policy for the retention and
7 preservation that could be acknowledged or produced, no
8 study committees. No nothing. No effort, really, to
9 recognize the legal obligations under the statute. And we
10 believe that is a significant failure that has led to the
11 backup of these documents that we've asked for not being
12 provided. There was no policy, according to this county
13 attorney, for the purging of electronic data. In fact, the
14 county attorney didn't believe, apparently and in the
15 transcript and this is in one of the excerpts, that the
16 county attorney doesn't believe the county administrator is
17 subject to document preservation, which is an astonishing
18 revelation.

19 As regard to these lost emails, what we call the lost
20 emails, as Ms. Ballard will outline, there was a request
21 for emails from the county administrator, which we were
22 told could not be provided by reason of a computer crash,
23 computer failure, laptop computer. Part of what we seek is
24 a remedy relative to those lost emails. It appears, again,
25 from the county administrator and the Request for

1 Production and other documents that will be introduced,
2 that there's really no documentation of that failure. And
3 certainly no real effort to reclaim those by any
4 significant method, though we will have the testimony of
5 the IT, a gentleman, Mr. Snyder at some point who will, I
6 guess, talk about that.

7 In the deposition of Mr. Tothacer, as his excerpts
8 will indicate, that he had not much concern about the
9 loss of historical documents contained on the county
10 administrator's computer. Whatever business had been done
11 on that computer was lost, and that loss was not
12 significant enough for there to be significant effort to
13 try and reclaim it. And for each of these deficiencies in
14 trying to comport and be consistent to your duties or
15 responding duties under the Public Records Act and
16 archiving regulations and the FOI, it didn't just -- it
17 didn't seem to be much concern about obeying the law. And
18 that's why this lawsuit -- that's why we're here.

19 And, lastly, that third leg, Your Honor, the executive
20 session problem. During Ms. Ballard's testimony we'll
21 illustrate to you how some of the same executive session
22 problems, failures and inadequacies are exactly those
23 addressed in Donahue case and the other couple of Freedom
24 of Information cases. And that there really has been
25 nothing done even through today, that we're aware of, to

1 recognize these admitted inadequacies, to address them and
2 to do something about them. In the normal course of
3 events, Your Honor, we can't really talk about remedial
4 actions, but there seems to be no concern. Newberry County
5 appears to be -- to have a kind of a horse-and-buggy
6 attitude about the preservation of historical records in a
7 space age. I guess we're even beyond the space age today.

8 And, lastly, Your Honor, the issue of a secret vote.
9 Ms. Ballard will explain to Your Honor about documents
10 produced during discovery that seem to be inconsistent that
11 seem to clearly suggest, we believe, the evidence
12 we'll present the documents will suggest by a
13 strong convincing inference that a secret vote did occur on
14 something that should have been a vote in a public session.

15 So, Your Honor, that really is the case we will
16 present. And the remedies are attorneys fees, which are
17 always near and dear to attorneys, but also some
18 injunctive relief that Ms. Ballard will explain. And the
19 attorneys fees are always desirable by attorneys, but here
20 we would suggest to you that that may be the only way to
21 instruct the mule. That may be the two-by-four that it
22 takes to instruct the mule in this case. Thank you.

23 THE COURT: Thank you, sir.

24 MR. NICHOLSON: Thank you, Your Honor. If it may
25 please the Court? I'm Nick Nicholson representing Newberry

1 County. With me at counsel table is Wayne Adams, the county
2 administrator and Jay Tothacer who is the county attorney.
3 As an initial matter, I would say the county takes this
4 very seriously, Your Honor. The documents you'll see will
5 demonstrate that. As an initial matter, I'd like to raise
6 a point, and again I said this back in chambers, and I'll
7 stick to that. This is a non jury matter so
8 virtually everything is going to come into this case, but
9 Mr. McCulloch referenced an allegation of a secret vote in
10 executive session. I don't recall reading that in the
11 Complaint. Could be wrong. I went back to look for it,
12 but that's not anything we've been alerted to. And so to
13 the extent that's testified to, we're going -- I'm going to
14 put on the record right now we're going to object to that.
15 Now, again, if it's in the Complaint and I've just missed
16 it, that's fine. I don't recall that being in the
17 Complaint. That's a completely new allegation and we would
18 object to anything like that coming in. So I just want to
19 put that on the record now. We can obviously deal with
20 that when Ms. Ballard testifies.

21 There's a lot documents been put into the evidence,
22 Your Honor. Some of them just show the voluminous nature
23 of what was produced. Ms. Ballard, on December 2nd,
24 submitted a FOIA request of 16 items, I believe, some of
25 which dated back -- asking for records dating back to 1995.
26 At the end of the day, Your Honor, Newberry County produced

1 at least 1800 documents. And I think the total is more
2 like 2,000 when you add in some documents that
3 were produced after litigation started.

4 They reference emails of Wayne Adams. They said --
5 they talked about the failure to preserve the emails of
6 Wayne Adams. His computer did crash. It happened. It
7 crashed in March 2004 and the data that was on that
8 computer was lost. It happened. Nonetheless, Newberry
9 County produced 139 emails either to or from Mr. Adams with
10 respect to the relevant request. 139 emails that took that
11 I think 376 pages. We put that in Exhibit number 4, our
12 Defendant's Exhibit number 4, and we collated them from all
13 the production and put them in order, in date order, and we
14 have them. We have those emails. Those emails came from
15 Mr. Adams' computer after the crash and they also came from
16 the emails of other people who had received them. So to
17 say that the County somehow was just willy-nilly out there
18 and not preserving documents or just violating the Records
19 Act it's just not true. Again, 1800 documents which
20 include 376 pages of emails.

21 Mr. McCulloch talked about being here in the new age.
22 Talked about computers and what needs to be -- what sort of
23 system needs to be into place. And he talked about the
24 Records Act, and I believe that's the standard. The
25 Records Act says that is it the duty of the archives --
26 state archive's authority and then the government should

1 have an economical and reasonable and document management
2 system. Economical and reasonable document management
3 system. What that tells me, Your Honor, is that that's a
4 broad standard that's given to all of government. And, as
5 we know, local government is different in this state. They
6 differ widely. They differ from Richland County to
7 Charleston County to Jasper County to Newberry County.
8 There are different resources, different population,
9 different sizes of government. And so obviously one size
10 doesn't fit all. That's one of the reasons why this state
11 has its long held tradition of home rule. Home rule says
12 to take a general law of the state is up to the local
13 government to apply that and say it should fit and as long
14 as it's not an arbitrary and capricious application of that
15 law then the way I read home rule, Your Honor, and the
16 Constitutional provision of governing the statutes there
17 under is those statutes can be liberally construed in favor
18 of the County. So you're going to see evidence of what the
19 County does with regard to -- with regard to email, with
20 regard to production.

21 We also look at the minimum requirements that the
22 state has to restoring documents and to the facilities that
23 we have. They're pretty minimum standards, Your Honor. I
24 have found nothing in either the statute or in the
25 regulations that say, okay, if you have a computer this is
26 what you have to do. It talks about minimum problems for

1 billing. You need to be well ventilated They need to be
2 free of vermin. They need to be stored properly so that
3 they're safe from being exposed to damage. Those types of
4 minimum standards. And I don't think there's going to be
5 any evidence shown here today, Your Honor, that says that
6 those standards were not met.

7 Again, Your Honor, the facts with documents you'll see
8 what happened to -- you'll hear about the crashed computer.
9 You'll hear about these text messages. And the fact of the
10 matter is Newberry County, they did not preserve text
11 messages. You'll see how text messages are used in
12 Newberry County. You'll see how emails are used and you'll
13 see what was done to preserve those. And you'll see also
14 what was done to provide those to Ms. Ballard.

15 Finally, Your Honor, as it relates to executive
16 session, Mr. Tothacer's deposition talks a lot about
17 executive session that is at issue in this case. Newberry
18 County has done what it's always thought as proper under
19 the law. It has cited the specific exemption under the
20 statute. And it has quoted that exemption. It's
21 listed that as the specific purpose of the statute. This
22 is more of a legal argument of what I'm getting ready to
23 say. It will be in my brief. But we believe that's what
24 the statute required. The statute says that for purposes
25 of this provision, the term specific purpose means the
26 exemptions that are listed above in that statute. And

1 that's what the county has done. So we believe they have
2 complied with the executive session statute and with the
3 state statute.

4 Again, with regard with this secret vote, I don't know
5 what's going to be said. And so I'm a little at a loss
6 there. And I'll raise that when we get to it.

7 THE COURT: All right, sir.

8 MR. NICHOLSON: And, Your Honor, that's all I have.

9 THE COURT: All right.

10 MR. MCCULLOCH: Just some housekeeping matters.

11 THE COURT: Yes, sir.

12 MR. MCCULLOCH: I think Mr. Nicholson said 2004 was the
13 day of the crash. It actually was 2014.

14 MR. NICHOLSON: Yes.

15 MR. MCCULLOCH: Not a big deal.

16 THE COURT: 2014, right.

17 MR. MCCULLOCH: Just to let you know.

18 MR. NICHOLSON: March 3, 2014.

19 THE COURT: March, yeah.

20 MR. MCCULLOCH: And just so it's a little more current
21 than 2004. The other matter is my error, which is I now
22 understand this "secret vote" was not pled. Mr. Nicholson
23 was correct. So the Court will strike that from your
24 memory tapes. We'll try to stay away from that.

25 THE COURT: All right, sir.

1 MR. MCCULLOCH: And, Your Honor, at this point we would
2 call Ms. Ballard as our first witness.

3 THE COURT: All right. Ms. Ballard, if you please come
4 around to be sworn, ma'am.

5 DESA BALLARD, having been first duly sworn,
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. MCCULLOCH:

9 Q Ms. Ballard, for the court reporter's edification,
10 would you identify yourself?

11 A I'm Desa Ballard. I'm a South Carolina lawyer.

12 Q And you are the Plaintiff in this action?

13 A I am.

14 Q Can you explain to his Honor when and why this request
15 was submitted by you?

16 A I will. I was retained by a gentleman who was the
17 chief magistrate in Newberry County. His name was Arthur
18 Jayroe. And he'd received communication from the county
19 attorney that a portion of his salary was being --
20 these are my words, not his. But was being eliminated and
21 that there was belief that his position was being
22 eliminated. So I did what I thought any good lawyer would
23 do. I sent a FOIA request to try to find the document that
24 would explain what was happening. I submitted a FOIA
25 request. I spent several months researching both the

1 Public Act and the FOIA, both the statutes in the case law.
2 And I formulated a Freedom of Information request that I
3 sent to Mr. Adams. My research indicated that Newberry
4 County had a council administrator form of government. So
5 based on the Public Records Act the county administrator,
6 as I read it, was the one responsible. So sent my FOIA
7 request to him on December 2, 2014. That's Exhibit number
8 1.

9 Q Now, by prearrangement and agreement, we have a series
10 of exhibits. Is that correct?

11 A That's correct.

12 Q And the Court's copy is there?

13 A Yes. The notebook in front of Judge Russo.

14 Q And, if I may, can I ask you to begin with Exhibit
15 number 1 and give a group description of what that is? And
16 do you have -

17 MS. BALLARD: Do you know how to open that notebook,
18 Judge?

19 THE COURT: Well...

20 MS. BALLARD: If you close the clip and then flip that
21 silver thing the other way then you can turn the
22 pages more easily.

23 THE COURT: Thank you.

24 A Exhibit number 1 is the FOIA request that I sent to
25 Mr. Adams on December 2, 2014.

1 Q And Exhibit number 1A?

2 A Exhibit number 1A is a letter that Mr. Tothacer,
3 who is the county attorney, sent to me on December 22nd.
4 After I sent the FOIA request to Mr. Adams I received a
5 phone call from Mr. Tothacer who introduced himself and
6 said he was the county attorney. And we discussed my
7 request. We narrowed it somewhat. And his initial
8 response regarding what was going to be forthcoming was set
9 forth in his December 22, 2014 letter that we've marked as
10 Exhibit number 1A.

11 Q Now, in your Exhibit number 1, you outlined a series
12 of request for information. Was there one request that was
13 of special interest to you?

14 A Well, yes. Number seven was a request for all email
15 messages to and from the county administrator, Mr. Wayne
16 Adams, related to county business. And then we agreed to
17 limit that to as it related to the magistrate's court.

18 MR. MCCULLOCH: And, Your Honor, for your edification,
19 and I've given Mr. Nicholson a copy, this is just an
20 excerpt. I'm not making this an exhibit because it isn't
21 in full, but it's just the excerpt the paragraph she's
22 speaking about right now.

23 THE COURT: Yes, sir.

24 Q Why was that important, Ms. Ballard, in your mind?

25 A It was important to chronicle the events which led up

1 to the decision that Mr. Jayroe, or Judge Jayroe, was going
2 to have a change to his salary and have his position
3 eliminated. And I asked for texts as well. Because I was
4 aware Judge Jayroe's wife is the mayor of Little Mountain.
5 So she had exchanged texts with Wayne Adams on county
6 business. So I was aware that he used his text for county
7 business.

8 Q Was there a point -- and you have said this, but I may
9 have missed it. Was there a point when you learned of the
10 crash?

11 A I did.

12 Q And when we say the crash, it's been referenced by
13 both attorneys in our brief openings, but can you elaborate
14 on that how you came to learn of that?

15 A Well, Mr. Tothacer told me about it in our telephone
16 conversation. But in Exhibit number 1A in answering
17 number seven, he confirmed the computer crashed in March
18 2014. And he said that Mr. Adams could only produce his
19 emails from March 2014 forward when he got a new computer.

20 Q Why was that -- was that a relevant period, that
21 crash, in terms of this time?

22 A It was a relevant period, as far as I was concerned,
23 because based on the timing of which when things occurred I
24 believed that earlier emails would have been relevant to
25 the questions I was trying to answer. That's why in

1 Exhibit number 1A Mr. Tothacer told me they did not have
2 any ability to archive emails. And I'm quoting from his
3 paragraph seven, "We do not have archiving capabilities of
4 email of any documents stored on personal computers beyond
5 what is still available on that individual personal
6 computer."

7 Q And what with regard to the County's policies on the
8 retention or preservation of emails did you learn?

9 A In the course of this litigation we've learned they
10 have no policies regarding the preservation of emails.
11 They have no policies regarding archiving of emails. They
12 have no policies regarding when you can purge your
13 computer. They have no backups, no form of backups. And
14 they leave archiving to the individual employee. Their
15 computers are not networked, so each individual user has
16 their option to whether they keep things or delete things.

17 Q Now, upon your receipt of the letter from Mr.
18 Tothacer, which is Exhibit number 1A, you mentioned, did
19 you respond to that in any fashion?

20 A I did. I sent Mr. Tothacer a letter on December 30,
21 2014. It's in the record as Exhibit number 2. And I asked
22 him -- well, I said, you know, you can give me these things
23 electronically. And he had said, no, he had to produce
24 paper. So I asked him to reconsider that. In paragraph
25 two I also said it might be wise to have your IT person

1 assist you with the search for requested information. And
2 then in the third paragraph I said I'm not convinced that
3 the crash of Mr. Adams' computer prevents production of his
4 emails. And I said I thought there was an obligation to
5 retrieve documents that involved county business. And
6 simply saying that a crash was not sufficient. So I
7 suggested that they get the IT person involved, not just
8 for my FOIA but because they need to have those records.
9 The state Public Records Act requires it. And I didn't get
10 a specific response to that other than -- well, I got
11 documents produced.

12 Q To your knowledge, based on whatever research you've
13 done, is it possible to reclaim emails possibly from
14 crashed computers?

15 A It's happened in other cases I've been involved with.

16 MR. NICHOLSON: Your Honor, she can't --

17 A I'm not an expert on it.

18 MR. NICHOLSON: -- not an expert --

19 MR. MCCULLOCH: And not offering her as an expert.

20 A And one of my own employee's computers crashed, and we
21 were, of course, able to resurrect it. It cost us a little
22 bit, but we were able to resurrect it.

23 Q But with regard to the request you made in Exhibit
24 number 2, for there be some heightened effort to reclaim
25 these emails do you know what, if anything, was done?

1 A From the discovery we've received of his case,
2 nothing.

3 Q Your Complaint alleges three areas of concern. Is
4 that correct?

5 A That's correct.

6 Q And what are those?

7 A The failure of the county to have any archiving of
8 emails, which are clearly public documents and texts as it
9 relates to county business, which are also clearly public
10 documents. Secondly, as I began receiving the documents
11 from the FOIA production I became concerned about the
12 inadequate, in my mind, description of the purpose of
13 executive sessions in county council meetings. The agenda,
14 of course, list that they will go into executive session if
15 needed. And the minutes when executive session did occur
16 did not specifically identify what was going to be
17 discussed or what was discussed in executive session. We
18 deposed Mr. Tothacer and he said there's no way to know
19 what was discussed in executive session unless there's a
20 public vote taken afterwards, in which case you can try to
21 figure it out from that. My understanding is that the
22 notification of what's going to be discussed in executive
23 session has to be a little clearer than just something that
24 might fall within the permission granted to us by the
25 statute.

1 Q And are there examples that you determined --

2 A We've introduced as Exhibit number 12 some of the --

3 Q What examples did you find in your review of the
4 things produced? And we're specifically talking about the
5 larger Exhibit number 12 and what you have there are some
6 excerpts that you have brought to our attention.

7 A Yes. First of all, when we were narrowing what they
8 were going to produce the agreement was that anything I
9 could get off the website they didn't have to produce. So
10 the minutes that I was able to get off the website, I got
11 off the website. The first one is an excerpt of county
12 council meeting on August 20, 2014. Item ten is the
13 executive session. It indicates that Mr. Adams
14 reported the staff would like an executive session for the
15 receipt of legal advice where the legal advice relates to a
16 pending, threatened or potential claim or other matters
17 covered by the attorney-client privilege. They then went
18 into executive session. Came back out. They said no
19 action was taken. And then they voted to send a letter to
20 Senator Cromer, which had nothing to do with what the
21 purpose of executive session was.

22 Q And just a couple more examples, if you don't mind.

23 A Yes.

24 Q With the date. And each of the excerpts are within
25 the larger Exhibit number 12? Is that correct?

1 A Yes, they are. Exhibit number 12 contains the minutes
2 from the county council meetings 2014 forward. And these
3 are just some examples from those. From the July 16, 2014
4 minutes, Mr. Adams reported staff would like an executive
5 session under the statute for discussion of negotiations
6 incident to proposed contractual arrangements and proposed
7 sale or purchase of property, the receipt of legal advice
8 where the legal advice relates to a pending, threatened or
9 potential claim or other matters covered by the attorney-
10 client privilege, settlement of legal claims with or the
11 position of public agency and other adversary situations
12 involving the assertion against the agency of a claim.
13 And then there's an extraneous sentence -- portion of the
14 sentence for the receipt of legal advice where the legal
15 advice relates to pending. I think that sentence was
16 supposed to be earlier. But in this particular one, they
17 went into executive session and we don't know what they did
18 because there's no report out and no vote taken afterwards.
19 Same thing with May 21, 2014. Number eight, they read from
20 the statute as to what was going to be discussed in
21 executive session. They went into executive session and
22 there was a report that no action was taken in that
23 session. So we don't know -- we have no idea what they
24 discussed in executive session because the summary of what
25 the discussion was going to be was simply an excerpt from

1 the statute.

2 Q And without going through the rest, you found
3 other instances?

4 A It's almost constant. All of their -- their agenda
5 items they say executive session is needed, but then the
6 minutes just quote from the statute and they don't tell you
7 at all what they're going to be discussing.

8 Q Was there a meeting that concerned you or an executive
9 session that concerned you more --

10 A There was.

11 Q -- more than others, I guess, is one way to put it?

12 A Yes. In the FOIA production they had produced an
13 agenda, which we have marked as Exhibit number 16. This is
14 the agenda for the August 20, 2014 county council meeting.
15 This was produced to me during a FOIA production. And if
16 you look on the fourth page -- I'm sorry, the third page at
17 the bottom of it -

18

19 MR. MCCULLOCH: And, Your Honor, if you'll permit, this
20 is another excerpt of that Exhibit number 16..

21 MR. NICHOLSON: One point of clarification. This
22 answer says these are the minutes. Exhibit number 16 is an
23 agenda.

24 MS. BALLARD: Exhibit number 16 is the agenda. You are
25 correct.

1 MR. MCCULLOCH: You are correct. But it is an agenda,
2 not the official minutes.

3 MS. BALLARD: The exhibits are in Exhibit number 12, I
4 believe. Yes, the minutes are Exhibit number 12.

5 A The agenda, what was interesting about this one was
6 the bottom of page three on Exhibit number 16 they said
7 what the purpose of executive session was going to be, if
8 needed. And then if you go back to the excerpt of Exhibit
9 number 12 of the minutes of August 20, 2014, it's not the
10 same thing. Number ten, Mr. Adams reported the staff would
11 like executive session for the purpose of receipt of legal
12 advice where the legal advice relates to a pending,
13 threatened or potential claim or other matters covered by
14 the attorney-client privilege. Then they go in, they come
15 out and they make a vote to send this letter to Senator
16 Cromer. The agenda simply cites the statute, but it's much
17 broader than what they're going to be discussing. And on
18 page four of Exhibit number 16 they redacted whatever the
19 materials were that were going to be discussed in executive
20 session. And then the next page just goes back to eleven.
21 So they knew they were going into executive session,
22 according to this agenda. And they obviously knew what
23 they were going to be talking about because the materials
24 were there. But the minutes give a different reason for
25 going into executive session, and we now know from the

1 letter that subsequently that was sent to the Senator that
2 this is the executive session meeting where Judge Jayroe's
3 position was discussed. And this apparently was the
4 executive session meeting where elimination of his position
5 was discussed.

6 Q Now, as a consequence of your Freedom of Information
7 request, were you require to pay money?

8 A Yes.

9 Q Can you explain what you were required to pay?

10 A I paid an initial -

11 MR. MCCULLOCH: This would be Exhibit number 9.

12 A Let me see what that is.

13 MR. MCCULLOCH: In the Court's notebook.

14 A Exhibit number 9 is an email from Mr. Nicholson, I
15 believe, transmitting 370 pages of documents that I have
16 requested in the FOIA, but had not received until after I
17 filed the lawsuit. There's the correspondence that we're
18 going to go through I think with Mr. Nicholson will show I
19 said might you check with outside counsel to see if there
20 are actually documents responsive to my request. So after
21 the lawsuit was filed, we did do that. We received
22 electronically the information from attorney Dirk Aydlette
23 who had represented the County in some unrelated
24 litigation. And they would not produce that to me until I
25 paid for Mr. Aydlette's time in reviewing and producing the

1 material, and they rounded it off to \$1,000. So I paid
2 \$1,000 to the County initially. I think I got 50 something
3 dollars back. And then the second 1,000 was for the
4 production of Mr. Aydlette's materials, again, after the
5 lawsuit was filed.

6 Q And those bills are in Exhibit number 10?

7 A All but the payment, the \$1,000 for Mr. Aydlette's
8 production, yes. That's a summary that was provided to me
9 by Mr. Tothacer.

10 Q Now, can you tell us what Exhibit number 13 is?

11 A Yes. This is part of the research that I did before
12 requesting the FOIA request. Exhibit number 13 is a
13 handbook from the State Department of Archives and History.
14 It contains, among other things, the regulations that
15 they've enacted pursuant to the Public Records Act, which
16 is 30-1-10. And it mandates the state archives to create
17 archive records requirements for different public entities,
18 including, as set forth on page one of the memo -- page one
19 of the Exhibit number 13. The schedules are designed to
20 make sure counties retain for as long as necessary the
21 records they will need for administrative legal, fiscal,
22 and other uses and make sure counties retain records for as
23 long as state and federal laws, regulations, policy and
24 procedures require. It then goes on to -- on page two it
25 says that -- well, like any agency they have their statutes

1. that enable them and then they enact the regulations which
2. fill in the detail, so they enacted all these regulations.
3. And it says on page two that the schedules establish
4. minimum retention periods and also that it applies
5. specifically to county council and administration forms of
6. government. But it contains also the actual regulation,
7. beginning on page nine. At the top of the page on page
8. nine of Exhibit number 13 this is the mandate for the
9. county to retain documents "regardless of physical format,
10. i.e., paper, microfilm, electronic storage, digital imaging
11. . . ." and it goes on to say that before any of this is
12. destroyed you have to make contact with the Department of
13. Archives.

14. Q But, essentially, Exhibit number 13 is just simply the
15. law.

16. A It's the law. And the most important part for this
17. lawsuit I think is on page 18. And that's regulation 12-
18. 503.15 which talks about how long they have to keep
19. correspondence. And they divide it into different types of
20. correspondence. And the top of page 19, correspondence
21. regarding policy and program records are permanent, they
22. cannot be destroyed. Documents regarding
23. general administrative records five years and then general
24. housekeeping files until no longer needed. The documents
25. that I was seeking would have fallen into either subsection

1 one, policy and program records, or general
2 administrative records, both of which include
3 correspondence related to county business. So the state
4 archives mandated the county to retain those, and they did
5 not.

6 Q Now, we discussed Exhibit number 12. So let's start
7 with Exhibit number 14 and just very expeditiously work our
8 way so the Court understands the significance of each
9 exhibit.

10 A Okay.

11 Q Starting with Exhibit number 14.

12 A Exhibit number 14 through Exhibit number 23 are
13 documents that I received in my FOIA -- in response to my
14 FOIA request. Exhibit number 14 was an email -- or, excuse
15 me, a letter from Mr. Adams to the members of county
16 council summarizing a decision that had been issued in a
17 lawsuit filed by a different magistrate against the county.
18 Judge Addy had ruled on a request for additional
19 compensation by that magistrate. His name was Tom Abraham.
20 And Mr. Adams sent this summary to county council to tell
21 them what the judge had said. And opined on page two of
22 the memo the Order raises the cost of funding part-time
23 magistrates. And he talks about we're risking our status
24 with the state employee health insurance program by
25 claiming a greater number of hours worked by part-time

1 magistrates that is actual in order to retain coverage for
2 them. And then he points out that you could petition your
3 senate delegation to change the types of magistrates that
4 you want. So, in reviewing the FOIA responses, this seemed
5 to me to be the seed where the abolition of Judge Jayroe's
6 position was born. And I was right, because Exhibit number
7 15 is an email sent by Mr. Adams to several different
8 people. The to line, Your Honor, those are all the members
9 of county council and then it's copied Mr. Tothacer and I
10 think clerk to counsel. And Mr. Adams indicates that he's
11 going to be requesting executive session at two meetings.
12 One the public safety and courts committee meeting. And
13 he talks about what he's going to ask for that. And then
14 he says the second document is a draft letter to Senator
15 Cromer that I am asking council to consider sending him.
16 That letter request -- excuse me, that letter asks the
17 Senator to change from the current mix of full-time and
18 part-time magistrates to full-time magistrates. My
19 intention with the committee's approval is to proceed with
20 the letter from Monday night's meeting to the next meeting
21 of the full county council which is Wednesday, August 20th.
22 The discussion with full council would also be in executive
23 session. However, council, if it so desires, could vote
24 after the executive session to proceed with the letter to
25 Senator Cromer. And attached to the email, the second

1 attachment is a proposed letter to Senator Cromer dated
2 August 20, 2014. We know from the minutes that are handed
3 up as Exhibit number 12 that that's exactly what they did,
4 but they didn't tell us. They went into executive session
5 to discuss the receipt of legal advice where the legal
6 advice relates to a pending, threatened or potential claim
7 or other matters covered by the attorney-client privilege.
8 They then came out of executive session and voted to send a
9 letter to Senator Cromer, which they did send the following
10 day, Exhibit number 18.

11 Q Let me stop you there.

12 A Yes.

13 Q You've explained Exhibit number 15 as an email from
14 county manager Adams to the council.

15 A Yes.

16 Q Explaining that the executive sessions were going to
17 be desired in the specific areas you mentioned.

18 A Yes.

19 Q In your review of all of the Freedom of Information
20 documents produced, did you find any agenda stating
21 specifically those matters addressed in his email?

22 A There is no agenda that discusses that will
23 be discussed. There is no minutes that discuss that
24 they're changing the complement of magistrates. The only
25 thing the minutes actually say is they voted to send the

1 letter to go to three full-time magistrates and no part-
2 time magistrates. So he told them on August 6th this is
3 what we're going to be discussing in executive session.
4 That's not what the agenda said and that's not with the
5 minutes said.

6 Q And, again, agenda is produced for the Court in
7 Exhibit number 16?

8 A Yes.

9 Q And Exhibit number 16, can you talk about that for
10 just a moment?

11 A Exhibit number 16 was produced in FOIA.

12 Q What's significant about it?

13 A What's significant about it is the agenda packet had
14 in it on page four apparently the contents of this email
15 from Mr. Adams, but they don't say in the agenda that
16 that's what they're going to be discussing. And they don't
17 say in the minutes that's what they discussed. But that's
18 clearly what they discussed because they sent the letter
19 out the next day.

20 Q Can you specifically address page four of that
21 exhibit?

22 A Yes. It contains a sticky that says this page and a
23 portion of the next were redacted as it related to the
24 executive session matters. So they -- I guess they
25 redacted from the copy they produced to me the documents

1 that were part of the agenda for county council. Those
2 under the Document Retention Policy enacted by the archives
3 have to be retained permanently. So presumably they still
4 have it.

5 Q And does that raise or is that exhibit in that page ,
6 four that you just mentioned does that -- does the relief
7 that you seek today relate to that?

8 A I want to know what that says. I want to establish
9 that I'm right, that this is the meaning that they had when
10 they voted to abolish my client's judicial position,
11 despite the fact that their agenda and minutes don't say
12 that.

13 Q Now, Exhibit number 17 is a part of the record.
14 That's an affidavit of a witness we'll hear from in just a
15 few minutes, Mr. Snyder.

16 A Yes. Exhibit number 17 is an affidavit of Mr.
17 Snyder who was at one time the IT person for Newberry
18 County.

19 MR. MCCULLOCH: Excuse me one second.

20 Q And Exhibit number 18 I believe you have already
21 mentioned?

22 A Yes. Exhibit number 18 is the letter that was sent to
23 Senator Cromer on August 21, 2014, the day after this
24 executive session. Which it's exactly the same letter that
25 is attached to Exhibit number 15, which was Mr. Adams'

1 proposed letter to Senator Cromer. The only difference is
2 the date. The proposed letter had the date the 20th and
3 the letter that was actually sent was sent on the 21st.
4 And, of course, my client received a copy of it. So that's
5 when he realized something was afoot.

6 Q Now, Exhibit numbers 19, 20 and 21 are offered to the
7 Court for what reason? What's the importance of those
8 exhibits?

9 A Exhibit numbers 19, 20 and 21 relate the decision by,
10 it appears Mr. Adams, to change the method by which Judge
11 Jayroe was compensated for certain on-call hours. Exhibit
12 number 19 is an email from Mr. Adams to Dirk Aydlette who
13 was outside counsel for the County. This was produced to
14 me in the FOIA response. Mr. Adams says he's drafting a
15 letter to the part-time magistrates concerning the
16 reporting of hours worked and he asks Mr. Aydlette to
17 include in the letter that we are discontinuing the on-call
18 stipend that council currently has in place. Well, that's
19 significant because that was my client's salary. That was
20 part of my client's salary. We have no evidence county
21 council ever authorized that. There's nothing in the
22 public documents to say county council -- this was every
23 brought up with county council, decided by county council.
24 Exhibit number 20 is Mr. Aydlette's response saying my
25 recollection is the stipend was paid by resolution, so you

1 can discontinue it. But that's not true because it was a
2 1995 vote of county council to include that stipend and it
3 was appropriated annually by county council in the budget
4 for each year. It was allocated as salary to my client in
5 the budget. So Mr. Aydlette's answer that it was paid by
6 resolution was incorrect. But, again, this is changing his
7 salary without any vote to do so. And Exhibit number 21
8 from Wayne Adams to my client, here's the letter saying we
9 might not have been fully compliant with overtime as a
10 result of the Abraham decision and we want to settle this
11 matter with you by paying you some money. So none of this
12 went before council.

13 Q Was there -- you talked about in these exhibits about
14 the effect on Mr. Jayroe.

15 A Yes.

16 Q He was the magistrate in the county?

17 A He was the chief magistrate in the county. He was a
18 part-time magistrate.

19 Q And was there an impact on the magistrate's system
20 above and beyond whatever impact on Mr. Jayroe individual?

21 A As a result of the change from part-time and full-time
22 magistrates, which was in effect at the time, the creation
23 of three full-time magistrates has created a problem in
24 that they're all centralized in Newberry and the outlying
25 areas don't have a magistrate -- a part-time magistrate

1 available to them like they used to.

2 MR. NICHOLSON: Your Honor, this is where we're sort of
3 getting far afield. Those were other cases that were being
4 litigated or had been litigated.

5 THE COURT: All right.

6 MR. MCCULLOCH: And, Your Honor, we're not going to go
7 into the other cases.

8 Q But with the final question in that arena is, in your
9 opinion, did these matters have a public effect and
10 public interest issue?

11 A Of course they did. Of course they did. People have
12 to drive to Newberry to see a magistrate, and they used to
13 not because the part-time magistrates were in Whitmire, in
14 Newberry and Little Mountain and a couple of other small
15 communities.

16 Q Now, the next exhibit we talked about, we're through,
17 what Exhibit numbers 21 or 22?

18 A Exhibit numbers 21 and 22 are essentially the same
19 thing. Exhibit number 21 is the email version of
20 the letter. Exhibit number 22 is what appears to be a
21 mailed version of the letter.

22 Q Exhibit number 23?

23 A Exhibit number 23 is, again, Mr. Adams talking to --
24 in this case it looks like Mr. Tothacer, the county
25 attorney, asking if he can explain to Judge Jayroe, my

1 client, why -- not why but confirming that his salary was
2 being reduced.

3 Q Now, Exhibit number 24 and Exhibit number 25 are what
4 and why are they are offered?

5 A Exhibit number 24 is the County's answers to our
6 interrogatories. And the reason we've included those is to
7 establish that they admit they don't have any of these
8 records. Starting with interrogatory number nine we ask,
9 Describe all computer programs and data that are backed up.
10 And they said Newberry County does not use end user
11 backups. We asked to describe the media for backing up
12 computers. See number nine, we don't have any. Eleven,
13 identify the program. Answer, see number nine, we don't
14 have any. And then the next page, interrogatory number 13,
15 we asked them to describe any policy they had regarding
16 purging of electronic data from their computers. And they
17 said Newberry County has no written -- has written no
18 policy concerning the purging of electronic data. And so
19 interrogatory 19 we asked by chance do they have any cloud
20 storage. And their answer was none, they do not have any
21 cloud storage. So if it's gone from the computer it's
22 gone.

23 Q How about Exhibit number 25?

24 A That's --

25 Q What is it and why is it --

1 A This is the response to our request for production.
2 Request number two we asked them to produce all FOIA
3 policies rules or guidelines in use or relied upon
4 by Newberry County from 2013 to the present, and their
5 answer was none. We asked for documents in number six. We
6 asked for documents evidencing the computer crash of Wayne
7 Adams' computer. None located. We asked for documents
8 that evidence the last known location in efforts to locate
9 FOIA responsive documents on the computer at issue. None
10 located. We subsequently received Mr. Snyder's affidavit,
11 which contradicted that. So the purpose of the discovery
12 responses is to establish that the County does not comply
13 with the mandated document retention policies that are
14 promulgated by the general assembly through the State
15 Department of Archives. They have no backups. They don't
16 even try to have backups. So while they produced a lot of
17 stuff to me, they have no idea if it's complete. The
18 emails of Mr. Adams that they produced to me was a stack
19 about half an inch thick. And it was with the letter,
20 Exhibit number 7, I believe. But what they
21 subsequently what have introduced into evidence, and
22 I think have to date two, the one with the blue things,
23 they went through all of the other documents that were
24 produced pursuant to FOIA and pulled out emails from Mr.
25 Adams. So there are some of his prior emails, but they

1 came from other locations. They didn't come from his
2 computer.

3 Q So is the production of 1800 pages of material an
4 accurate figure?

5 A Well, his emails were about half-an-inch thick. I can
6 show you if you'd like to see it.

7 MS. BALLARD: Your Honor, I have the documents that
8 were produced on the corner of my table over there, but I
9 didn't want to burden the Court with all of those.

10 THE COURT: Sure.

11 A The actual emails that were produced for Mr. Adams
12 were obviously on his newer computer after the crash, march
13 2014 forward, and they were half-an-inch thick. What
14 they've done to show these large production of emails is
15 they've pulled emails out of the other things that were
16 produced. And they've assembled them all together as
17 emails. But that's not what they produced to me. They
18 produced half-an-inch of emails and they were only from the
19 time of his new computer forward.

20 Q Emails are to and from?

21 A Yes.

22 Q Do you know how many -- do you know what effort was
23 made to comply with the Freedom of Information request to
24 the people, the recipients, of emails from Mr. Adams? Do
25 you know whether an effort was made?

1 A They've produced, and we deposed Mr. Tothacer. A copy
2 of my FOIA request sent out to a number of employees of the
3 county. And Mr. Tothacer assembled what he received and
4 sent them to me.

5 Q And that's also excerpted?

6 A I'm sorry?

7 Q It's excerpted in the deposition?

8 A Yes.

9 Q That?

10 A The whole process of how he gathered it is in his
11 deposition.

12 Q And the last exhibit is Exhibit number 26. What is
13 that and why have you offered that?

14 A Just to make sure I wasn't crazy, I wanted to see what
15 other public bodies did about announcing the purpose of
16 executive session, so we pulled up the Columbia City
17 Council meeting agenda where they say they're going into
18 executive session. And under number five they specifically
19 talk about the items they are going to be discussing.

20 Number five says receipt of legal advice relating to
21 matters covered by the attorney-client and then it tells
22 you the tree removal policy or the ethics bill. And
23 number six tells you they're talking about the Bull Street
24 development. That's what you're supposed to tell the
25 public is going to be discussed or was discussed in

1 executive session.

2 Q Ms. Ballard, you know, apparently I leap-frogged. Can
3 you very concisely go back to Exhibit numbers 3 through 8
4 and just tell us what those are?

5 A I will.

6 Q Tell the judge what those are and why they're thick in
7 his notebook?

8 A Let me find my list. I'm sorry. Oh, yes, Exhibit
9 numbers 3 through 8 are some of the letters that Mr.
10 Tothacer and I exchanged when we were receiving the --
11 exchanging the document production, the FOIA document
12 production which is stacked up there. But we've
13 introduced actually only the letters where he explains what
14 he's producing in each one.

15 Q Now let's conclude with the relief that you have
16 requested in the Complaint.

17 A First of all I want to know -- I want the minutes of
18 what was discussed in that executive session of August
19 20th, because they didn't properly notice the session. We
20 know they have the documents that were discussed because
21 they produced the agenda with the documents. I'm
22 requesting an injunction that they be ordered to comply
23 with the Public Records Act in the future by properly
24 notifying the public what is going to be discussed in
25 executive session and properly documenting in their minutes

1 what was discussed in executive session. I'm asking that
2 they be ordered by injunction to comply with the document
3 retention policies that are established by state law for
4 counties, which they obviously have not done yet. And I'm
5 asking for attorneys fees for having to go through this
6 process.

7 Q Now, you are an attorney?

8 A I am.

9 Q We've agreed to submit to the Court at a later time
10 the timesheets of attorneys involved in this case on the
11 Plaintiff's side. Those will not include any of your time,
12 I assume?

13 A That's correct.

14 Q Regarding Mr. Adams and the computer crash there, did
15 you learn or were you provided in the Freedom of
16 Information request information about any other computer
17 issues, computer problems?

18 A None. No, I didn't receive anything about that.

19 Q About that specific -- about other instances?

20 A The only crashed computer that was mentioned was Mr.
21 Adams' crashed computer.

22 MR. MCCULLOCH: That's all we have, Your Honor. Thank
23 you.

24 THE COURT: Let's just take about ten minutes.

25 (Off the Record)

1 (CROSS EXAMINATION)

2 BY MR. NICHOLSON:

3 MR. NICHOLSON: May it please the Court, Your Honor?

4 THE COURT: Yes, sir.

5 MR. NICHOLSON: Good morning, barely good morning.

6 Your Honor, I was talking to Plaintiff's counsel and
7 we think we did this, we know we talked about it in
8 chambers but just for the purpose of the record we want to
9 all the exhibits that have been marked up in here move into
10 evidence for the Plaintiffs and Defendants.

11 THE COURT: All right. And we did talk about that in
12 chambers. But so the record's clear we've got -- now,
13 these are Plaintiff's Exhibit numbers 1-28? Is that
14 correct?

15 MS. BALLARD: Exhibit number 26.

16 THE COURT: Exhibit number 26.

17 MR. NICHOLSON: Yes, Your Honor. And I pre
18 marked Defendant's Exhibit number 1-4, and I'll just
19 show counsel Defendant's Exhibit numbers 5 and 6. I'll
20 move all those Exhibit numbers 1-6.

21 THE COURT: Any objection?

22 MR. MCCULLOCH: No objection, Your Honor.

23 MR. NICHOLSON: And, Your Honor, Ms. Schillachi, she
24 wanted me to hand up as well. This is the deposition of
25 Jay Tothacer which already has been filed with the court,

1 the original. But this is the marked up version that both
2 counsel for the Plaintiff has marked up and that I've
3 marked up. My designations are underlined. If you want
4 us to go back and do a different color, we're happy to.
5 But this is the deposition. If you want to mark it as an
6 exhibit number we can, but we just wanted to put that into
7 evidence.

8 THE COURT: All right.

9 MR. MCCULLOCH: Your Honor, we have marked that as
10 Plaintiff's Exhibit number 27.

11 THE COURT: Okay. We'll mark it as Plaintiff's Exhibit
12 number 27.

13 MR. MCCULLOCH: That really give you the understanding.

14 THE COURT: All right.

15 Q Ms. Ballard, this being cross examination we are by
16 necessity going to jump around a little bit, but I'm going
17 to try to stay a little bit on track.

18 A That's fine.

19 Q I do want to start where you ended. You're asking
20 for four things, I believe you said. You want the minutes
21 from an executive session from the August 20, 2014 meeting?
22 Is that correct?

23 A I want the notes that are redacted from Exhibit number
24 -

25 THE COURT: Exhibit number 16, isn't it?

1 A No. Yes, the notes that were redacted from Exhibit
2 number 16 because the executive session was not properly
3 identified and we couldn't tell what was discussed.

4 Q That document was produced pursuant to the FOIA
5 request, correct?

6 A It was, with the pages redacted.

7 Q That's right. This is the first time you've made that
8 request to see those materials, right?

9 A I don't remember what's in the Complaint about that.

10 Q The second thing you want is, we talked about, you
11 state that the County has not been properly stating the
12 specific purpose of executive session?

13 A Correct.

14 Q The third thing is statement that the County comply
15 with a document retention policy?

16 A The one mandated by the State Archives.

17 Q Yes.

18 A Correct.

19 Q And you made a claim for attorneys fees?

20 A Correct.

21 Q Those are your claims?

22 A Unless I've forgotten something, yes.

23 Q Let's go back to the beginning. Let's go back to your
24 -- and we can just use your Exhibit numbers 1 and 1A.

25 A I've got it.

1 Q And really all I want to do is just establish some
2 time lines here.

3 A Okay.

4 Q Your request is dated 12/2/14, right?

5 A Exhibit number 1 is 12/2/14, correct.

6 Q And I believe the document, as produced by the County,
7 shows it was stamped on the 3rd, they received it the next
8 day? You may need to look at my Exhibit number 1. I
9 apologize.

10 A It says received on the 3rd, yes.

11 Q So they received it on the 3rd?

12 A Yes.

13 Q And your Exhibit number 1A, my Exhibit number 3, has
14 Mr. Tothacer's response that you eluded to earlier today,
15 December 22, 2014?

16 A Correct. And we were on the phone between those two
17 times.

18 Q And, first of all, my question, just looking at the
19 calendar, first of all, FOIA requires that a response be
20 made within fifteen business days of receipt of a request,
21 right?

22 A I believe that's right, yes.

23 Q And, of course, when I mean business days, weekends
24 and holidays are not counted.

25 A Right.

1 Q Okay.

2 A And the response, of course, came in over a period of
3 time.

4 Q That's right. And I just want to establish from the
5 date of your letter, Mr. Tothacer's 12/22 letter was
6 fourteen business days from the date of that letter.

7 A It was timely, yes, absolutely.

8 Q And if you take from receipt, it was thirteen business
9 days?

10 A Well, I haven't calculated that, but I'll take it.

11 Q It's just the next day, okay. Now, I believe you
12 eluded to the fact that when Mr. Tothacer got it he placed
13 a call into you right shortly after he received the
14 request?

15 A He first talked to my law partner and then he and I
16 talked.

17 Q I believe you had gone out of town shortly after
18 making this FOIA request? Is that right?

19 A I have no idea.

20 Q But, suffice it to say, fairly soon after receiving
21 your FOIA request Mr. Tothacer was on the phone with you or
22 your partner to discuss the request?

23 A Oh, he was timely, yes, absolutely.

24 Q All right. And, as you've discussed, you have a lot
25 of correspondence going back and forth primarily to narrow

1 the scope of your request, right?

2 A We did that initially as to subject matter, and then I
3 think later as to date and anything I could get on the
4 website I just agreed to get on the website.

5 Q I don't want to just say that's all you talked about,
6 because as you discussed there were other things in the
7 correspondence that you talked about substantively, not
8 just narrowing the scope. But, again, to sum up you two
9 had had a fair amount of discussion to again tighten up or
10 narrow your request?

11 A We did.

12 Q Over a several week period?

13 A I'm sure, yes.

14 Q And just for the record, Exhibit number 1 that I've
15 given you, but for exhibit were tabbed two. The remainder
16 of the those tabs, would you agree, are correspondence
17 going back and forth between you and Mr. Tothacer?

18 A With the exception of Exhibit number 24, that's
19 correct.

20 Q That's right. Exhibit number 2?

21 A And Exhibit number 24.

22 Q You're right. That's a recap of --

23 A Right.

24 Q Thank you. Now, thankfully for you and for the Court
25 and for even myself, I'm not going to ask you to read all

1 these documents. But I just want, as a visual, pull
2 out what we've marked as Defendant's Exhibit number 2 which
3 is what was produced to you pursuant to the request.

4 A That's the same stack I have on my table.

5 Q That's an even better visual.

6 A Yeah. That's the original. I put my rule book
7 on top, but that's the stack of what was produced in FOIA.

8 Q So this is what was produced.

9 A Yes. Those are the originals.

10 Q Then later after, and you talked about this too, after
11 the lawsuit was filed you received some documents.

12 A 370 pages electronically. I didn't receive the hard
13 copies, just electronically. Correct.

14 Q Now you asked Mr. Aydlette in, I believe if you look
15 at tab 23.

16 A I have tab 23.

17 Q Look at the -- got to go down a little bit. It's the
18 third email there from the bottom. I guess it's the second
19 -- or the first full email. It's one from you dated
20 February 26, 2015 at 1:49 p.m.

21 A I see it.

22 Q And you said County or its attorneys, Aydlette, will
23 have a great deal of information on item six that's not
24 privileged. So basically you're asking the County to
25 produce those materials?

1 A Right. They were included within the original FOIA
2 request, in my mind, and my suggestion to him was ask your
3 outside counsel for the stuff that you don't seem to have.

4 Q Now, do you agree or not that there were materials in
5 the original FOIA production that related to the Abraham
6 case?

7 A Absolutely.

8 Q You do?

9 A Yes. Absolutely.

10 Q And thereafter February -- and then that same day Mr.
11 Tothacer said I will review my files and speak with Mr.
12 Aydlette as to number six, correct?

13 A Yes.

14 Q Now, the second thing he said is that we talked about
15 your correspondence going back and forth. You'd also had
16 correspondence going back where you said that regarding Mr.
17 Adams' emails and texts. You said I don't think you
18 complied -- fully complied yet, correct?

19 A Correct.

20 Q And here Mr. Tothacer says I think I have?

21 A Correct.

22 Q So this is February 26th. The lawsuit gets filed
23 March 20th thereabouts, correct?

24 A That sounds right.

25 Q And then just so we can close the loop on Mr.

1 Aydlette.

2 A Those are the documents I got in June, I think.

3 Q I'm going to show you Exhibit number 5. This is dated

4 --

5 A I have that.

6 Q Okay. It's dated April 9, 2015?

7 A Yes.

8 MR. NICHOLSON: Your Honor, I'll hand you a copy.

9 A Yes, I've seen this.

10 Q And I'm not going -- I don't want us to read it, but

11 one thing I did want to clarify a little bit is we talked

12 about the charge there. The charge from the County or from

13 Mr. Aydlette to the County was lower than 1,500 bucks,

14 right?

15 A It says for 6.75 hours would be \$1,500.

16 Q He spent a total of 13.5 hours, correct?

17 A According to this email, yes.

18 Q But some of those were for searching for privilege,

19 which we couldn't charge, right?

20 A Correct.

21 Q Under FOIA. And so what the County based the charge

22 on was the 6.5 hours for basically searching the documents

23 and getting them ready to produce, correct?

24 A I haven't done the math but I'll take your word for

25 it.

1 Q But at the end of the day the County charged you
2 \$1,000?

3 A That's correct.

4 Q And, again, by way of simply closing the loop, I want
5 to show you Defendant's Exhibit number 6. Mr. McCulloch
6 had shown you earlier in one of your exhibits an email
7 exchange between Ms. Schillachi and me and where I had
8 produced or provided her the documents from Dirk Aydlette.
9 Do you remember testifying about that?

10 A Yes.

11 Q Does it appear to you that Defendant's Exhibit number
12 6 is basically just an email correspondence that led up to
13 that?

14 A Yes. My understanding is you sent an invoice to Kathy
15 and we requested that it be broken down so we could tell
16 what was searching and what was not searching.

17 Q Okay. You reference some emails that in the -- in the
18 FOIA production you received documents from several
19 different sources, correct?

20 A Yes. Mr. Aydlette -- excuse me, Mr. Tothacer sent my
21 request to the HR person and the financial person and a
22 number of different employees within the County, and each
23 one of them gathered their files and directed them to him
24 and he then produced them all to me.

25 Q Including Judge Jayroe.

- 1 A Correct.
- 2 Q And included with that was Mr. Adams. He submitted
- 3 some emails that he obtained from his computer, correct?
- 4 A Yes.
- 5 Q And I think we can stipulate it's about that thick,
- 6 the emails that Mr. Adams sent you. Is that right?
- 7 A Correct.
- 8 Q Okay. And it's in this box.
- 9 A I can pull it out if you want to see it, but half-an-
- 10 inch is fair.
- 11 Q Sure. Let's do that.
- 12 A Okay. (COMPLIED)
- 13 Q And, again, the number is what it is. I counted about
- 14 50. And you eluded to in your testimony but you said there
- 15 was some other emails from a production from other people
- 16 from Mr. Adams in response to your request, correct?
- 17 A Right. And I think that's what you've compiled there.
- 18 Q That's what we compiled. And therefore we basically
- 19 collated those from everything that was produced, including
- 20 this exhibit.
- 21 A Correct. That's what I understand them to be.
- 22 Q You talk about a text message that -- you talked about
- 23 text messages between Mayor Jayroe and Mr. Adams.
- 24 A Correct.
- 25 Q She's the mayor of Little Mountain?

1 A She is.

2 Q Did you submit a FOIA request to Little Mountain?

3 A No.. She gave me that. I didn't make it an exhibit,
4 but I have it.

5 Q Okay. Now, when you -- going back to the way you
6 entered your testimony. You wanted the County to comply
7 with the Record Retention Act?

8 A I did.

9 Q And we've been talking about emails here. We've been
10 talking about the fact that a computer crashed and -- but I
11 believe one of your arguments is that those should have
12 been backed up somehow?

13 A Yes.

14 Q Can you point to me in the Archives Act where that's
15 required?

16 A Yes.. It's on page 18 of the manual.. The manual is
17 Exhibit number 13.

18 Q Oh, your Exhibit number 13, okay.

19 A Yes.

20 Q Okay.

21 A Section 12-503.15 over onto the next page. It says
22 what the retention policy is.

23 Q Okay.

24 A It doesn't specifically say you have to have a backup,
25 but you have to have a program so that you can

1 maintain these things. And the Department of Archives
2 provides you with assistance to do that.

3 Q It says you have to have a system or program, right?

4 A Correct.

5 Q It doesn't tell you how.

6 A No, it doesn't tell you how. You can request a
7 specific -- under the regulations, you can request a
8 specific program for them and they'll design one for you.

9 Q Or you can just opt out and use -- can use the
10 archives retention system, right?

11 A No. What it says -- I have to find that part. County
12 government -- this is in 12-500. It says, "County
13 governments may opt out of these general schedules and
14 request the continuing use of existing schedules." This is
15 page nine, Your Honor. "County governments may opt out and
16 use their own specific retention schedule when appropriate,
17 necessary or in order to avoid conflict with other laws and
18 regulations."

19 Q That's my question. This is the retention schedule,
20 right? This is how long you've got to keep stuff, right?

21 A Well, that presumes you keep it, yes.

22 Q Right. But it doesn't tell you how. Well, if you
23 have a fire -- if a fire would have swept through here and
24 burned down the administrative office, burned everything
25 down, would the County have violated the Records Act?

1 A If there was no backup, maybe. I don't know.

2 Q So maybe. So in your theory the County has to copy
3 its entire catalog of documents and ship it offsite
4 somewhere?

5 A No. What page three of the manual says if you're
6 maintaining permanent records as digital images special
7 requirements apply and you contact the State Archives for
8 them to tell you how to archive them.

9 Q Aren't they talking about microfiche there?

10 A Well, the definition is broader than microfiche. It
11 says electronic storage and digital imaging. That's a
12 quote from regulation 12-500.

13 Q Again, the copy of the Exhibit number 13 is retention
14 schedule, right?

15 A Document 13 is the manual from the State Archives
16 which includes the regulations.

17 Q Ms. Ballard, now this is not executive session. It's
18 a regulation -- This is South Carolina regulations. And it
19 from chapter 12 Department of Archives and History.

20 A Yes.

21 Q So this is the definitions of the general requirements
22 1201. And this sets out -- the first section related to
23 minimum standards for facilities which house South Carolina
24 public records, right?

25 A Which subsection are you talking about?

1 Q I'm just looking at the top at the title.

2 A Yes. Article ten.

3 Q I'm going to hand you another one that is the reg
4 right after it. It's 12-1002. It's titled Required
5 Minimum Standards for all Record Storage Facilities. Is
6 that right?

7 A Required Minimum Standards for all Record Storage
8 Facilities, correct.

9 Q Okay. This is the standard for you house the
10 documents, right?

11 A Physically house them, yes.

12 Q Okay. Exhibit number 13 is the schedule by which you
13 retain them, how long you're going to retain them, correct?

14 A It's how and in what format.

15 Q Okay.

16 A And it sets a schedule for depending on what the type
17 of document it is, how long you have to keep it. Certain
18 documents have to be kept permanently. Some have to be
19 kept five years and some have a very short retention
20 policy.

21 Q Yeah, let's talk about those while we're on there.
22 Turn to page 19 of Exhibit number 13.

23 A I have it.

24 Q And this is section 12-503.15(b)iii. We talked
25 earlier in your testimony about a retention schedule here

1 for the administrative work. Had policy and program
2 records keep those forever, right?

3 A That's what this regulation says, yes.

4 Q And then general administrative records five years and
5 destroy, right?

6 A Correct.

7 Q And then we got this thing called general housekeeping
8 files until no longer needed for reference and destroyed?

9 A Correct.

10 Q That's basically the discretion of the record keeper,
11 right?

12 A I don't think so. I think if you read subsection A it
13 gives you specific definitions and examples of what falls
14 within number one, policy and program records, number two
15 what constitutes general administrative records.

16 And communication between correspondence with government
17 officials regarding policy and procedures, development of
18 programs or administrations, those all fall under category
19 one. They have to be kept permanently.

20 Q But my question is if you have a document that is a
21 general housekeeping, that can be destroyed at whenever the
22 keeper of the record believes that he or she no longer
23 needs that record for reference, correct?

24 A Correct. But that doesn't include, if you'll look at
25 number two, correspondence of a routine or repetitive type

1 falls within number two which has to be kept for five
2 years.

3 Q I understand. Let's go back to the reg that I gave
4 you, regulation 12-1002 require a minimum standards for all
5 record storage.

6 A I have it.

7 Q We have some requirements for construction. You see
8 that?

9 A Yes.

10 Q We have some requirements for the environment. You
11 see that?

12 A Yes. I remember reading these.

13 Q You can't have rats anywhere is one of the things it
14 said --

15 A And you can't smoke around your files.

16 Q You can't smoke.

17 A Right.

18 Q And --

19 A And you must have fire extinguishers.

20 Q So you've obviously read these?

21 A Yeah.

22 Q I see nothing in here about backup data storage, do
23 you?

24 A No. That would not be considered a facility. A
25 computer would not be considered a facility.

1 Q Don't they talk about shelving in here in this reg?

2 That's not a shelf.

3 A If your computer's on a shelf. The archives require
4 that correspondence be maintained. And it applies
5 regardless of whether it's in paper format or electronic
6 format or digital format.

7 Q I'm looking on a reg, Ms. Ballard.

8 A Okay.

9 Q I think you said this. I want to make sure I'm
10 clear for the records. It's a little hard for me to hear.
11 You talked about a crash at your office. You're not a
12 computer expert, are you?

13 A By any means, no.

14 Q Okay.

15 A We pay people for that.

16 Q The document you want that's been redacted from the
17 minutes that you referenced earlier, again that relates to
18 when you say you believe Arthur Jayroe's position was
19 fundamentally changed, correct?

20 A It was, yes.

21 Q That was a system-wide change. It didn't relate just
22 to Mr. Jayroe, correct? It was -- affected all magistrates
23 in Newberry County, correct?

24 A There was another part-time magistrate and he would
25 have -- his position would have been abolished as well.

1 Q So you went from a certain amount of part-time
2 magistrates to all full-time magistrates, correct?

3 A Yes.

4 Q And as you eluded to, you litigated one issue
5 about part-time versus full-time, correct? That's another
6 case?

7 A I've litigated several different, and I have several
8 pending.

9 Q The one related to the part-time versus full-time,
10 that was -- you took that to the South Carolina Supreme
11 Court in its original jurisdiction, correct?

12 A I filed an original jurisdiction action to request an
13 interpretation from the Supreme Court as to whether the
14 County had the authority to abolish part-time magistrates
15 positions.

16 Q And we got an opinion?

17 A And the Court said they don't have the authority to
18 abolish the positions but they didn't abolish the
19 positions.

20 Q Suffice to say, you had an opinion on that, correct?

21 A On that, yes.

22 Q And you also have a case related to, in essence, some
23 wage and hour issues involving Mr. Jayroe?

24 A That case is on appeal to the Court of Appeals, yes.

25 Q And you've asked about -- you've stated -- you've

1 complained about the specific purpose, or to use your
2 Complaint, the lack thereof stated in Newberry County's
3 council meetings as it relates to executive session,
4 correct?

5 A They're just excerpts from the statute, yes.

6 Q Right. And let's assume -- for purposes of my
7 question, let's assume that the specific purpose was
8 stated.

9 A Okay.

10 Q Okay. Whether it was stated or whether it was not,
11 you have no right as citizen to go into an executive
12 session of county council, do you, if you're not invited?

13 A I think the court has to fashion a remedy when there's
14 been a violation. When they didn't properly go into
15 executive session it was not by definition an executive
16 session. So it -- if it wasn't executive session it should
17 be public.

18 Q So under your remedy any time there was an attorney-
19 client privilege asserted, for example, that would be
20 abolished in all circumstances?

21 A No. No, you're not understanding what I'm saying.
22 What I'm saying is if they don't identify the specific
23 purpose of the executive session as they're required to do.
24 And if they then go into executive session and have a
25 discussion, that discussion is not properly protected by

1 the executive session folder.

2 Q So you're remedy would be to basically pierce whatever
3 there are relative to that discussion then you get to
4 become privy to those discussions?

5 A If it wasn't properly noticed, I think that has to be
6 the remedy.

7 Q Okay. That's your remedy, correct? That's what you
8 say?

9 A Yes.

10 Q But, otherwise, executive sessions are clearly allowed
11 in the statute, correct?

12 A If properly noticed and properly identified.

13 Q Does it say that? I mean, it says you state the
14 specific purpose, right?

15 A Let me find exact language. I can't find it in that
16 statute, but the statutes of the case laws say that the
17 specific purpose of the executive session has to be set
18 forth before you go into executive session so during the
19 county council meeting before you go into executive session
20 you have to announce the purpose of it and then your
21 minutes would have to reflect what that announcement was
22 and so you go into executive session. And according to Mr.
23 Tothacer you don't know what was discussed unless they take
24 a public vote because their definition stated is so vague
25 you have no idea.

1 Q The statute says that for purpose of this section the
2 exemptions that are stated in the statute are the specific
3 purpose, right?

4 A I'm not following you.

5 Q Okay. Well, the statute says what the statute says.

6 A I'll certainly agree to that.

7 Q Judge Russo will interpret that for us, I'm sure.

8 A Yes.

9 MR. NICHOLSON: Judge, may I have a moment?

10 THE COURT: Yes.

11 Q You referenced Exhibit number 17.

12 A Let me see if I have it.

13 THE COURT: Talking about Plaintiff's Exhibit number
14 17?

15 MR. NICHOLSON: Yes, sir. Exhibit number 17 in the
16 Plaintiff's exhibits, yes, sir.

17 A I don't have that one in front of me. I have it now.

18 Q Now, do you believe to be this was what was discussed
19 at the meeting in question?

20 A I do.

21 Q So you have the substance here?

22 A I have the letter that was subsequently sent that is a
23 public document, yes. I don't have any idea what was
24 discussed or why. The only thing I do know is from the
25 August 6th email from Mr. Adams to county council. He

1 basically said he wanted to abolish the part-time
2 magistrates, so I assume that's what was discussed.

3 Q The real letter, or the final letter, is set forth in
4 the Plaintiff's Exhibit number 18, right?

5 A Yes.

6 Q And then again, Exhibit number 22, letter was sent to
7 Judge Jayroe discussing the same thing, really?

8 A Well, this was discussing the -

9 Q The pay?

10 A -- the pay. The order Judge Addy in the Abraham case
11 determined that -- well, it's kind of strange, but there
12 were questions about whether he had been properly
13 compensated for his on-call service. So what we know from
14 the Freedom of Information Act is that Mr. Adams sent
15 letters to each of the part-time magistrates with a
16 proposed release proposing that they accept whatever that
17 amount was and release the County.

18 Q In fact, if you look at Plaintiff's Exhibit number 14,
19 there's a memo from Mr. Adams to county council about the
20 Abraham decision, right?

21 A Yes. That's dated July 16, 2014.

22 MR. NICHOLSON: Your Honor, just one more look so I can
23 make sure I'm good. Thank you.

24 THE COURT: Re-Direct? Anything? Re-direct?

25 MR. MCCULLOCH: I'm sorry.

1 THE COURT: Is there anything on Re-direct?

2 MR. MCCULLOCH: I'm sorry, Your Honor. I'm not sure
3 where I was. I'll be brief.

4 RE-DIRECT EXAMINATION

5 BY MR. MCCULLOCH:

6 Q Three matters on redirect.

7 A Okay.

8 Q You were asked about I guess was referred to generally
9 as piercing the veil of the executive session.

10 A Correct.

11 Q But you would describe your issue as the failure of
12 notice?

13 A The notice was insufficient, yes.

14 Q Failure to state the purpose.

15 A Yes.

16 Q Is there a criminal component to the Freedom of
17 Information Act?

18 A There is.

19 Q In your opinion, would the failure to comport in that
20 respect be a basis for the Court to pierce the veil?

21 A That is -- let me find it. I think it would be, yes.

22 Under -- I mean, compare it to negligence, per se, by
23 violation of the statute. If the public entity violates
24 the statute there has to be a remedy. And the way I look
25 at it, if they attempted to but insufficiently notice of

1 executive session then it wasn't an executive session, and
2 we get to know about it.

3 Q Now, the second issue on reply, if I could get you to
4 look at Exhibit number 13.

5 A Okay.

6 Q And back to the page -- I guess pages which were
7 referenced by counsel, page 18 and 19.

8 A I have it.

9 Q Now, you were asked about this issue of general
10 housekeeping files, which apparently -- well, let's look at
11 that first, page 19.

12 A Yes. There's a definition under A(iii) of what a
13 general housekeeping file is.

14 Q And it defines general housekeeping files as what?

15 A Created by an office which do not relate directly to
16 the primary program responsibility of the office.

17 Included are such records as charitable fund-raising drive
18 materials, custodial services requests, emergency

19 evacuation and procedures, notices of holidays, parking
20 space assignment list, telephone installation information
21 requests, and lists showing the distribution of keys. I
22 didn't ask for any of that.

23 Q If you flip back to page 18 there are other types
24 of documents for which there are specific
25 retention schedule.

1 A Correct. Yes, the bottom of page 18.

2 Q So is it your position that the documents you
3 requested but did not receive fall into which category?

4 A Some of them --

5 Q General housekeeping?

6 A -- into Ai and some of them fall into Aii, but either
7 way they disappeared before they should have.

8 Q And that's their record keeping.

9 A Yes.

10 Q Lastly, you were asked about -- I don't know whether
11 -- to your knowledge, in the discovery throughout this
12 litigation, did Newberry County communicate on any level
13 with state archives to have their either lack of policy or
14 policies, if you would consider a lack of policy a policy,
15 did they ever contact or communicate, provide you the
16 information and discovery that there was no --

17 A No.

18 Q -- communications?

19 A We asked Mr. Tothacer about it in his deposition and
20 he seemed unfamiliar with it.

21 MR. MCCULLOCH: Thank you.

22 RECROSS EXAMINATION

23 BY MR. NICHOLSON:

24 Q Ms. Ballard, we didn't talk about it before, but the
25 County's not required to have their own policy, right?

1 They can follow the Archive's retention schedule, correct?

2 A They can or they can have their own.

3 Q Right.

4 A They have neither.

5 Q All right.

6 MR. NICHOLSON: Thank you. That's all I have, Your
7 Honor.

8 MR. MCCULLOCH: That's all. Thank you.

9 THE COURT: Thank you very much, ma'am, you can step
10 down.

11 MR. MCCULLOCH: Your Honor, I guess at this point we'll
12 call Mr. Snyder, unless you'd like to take a short break.

13 THE COURT: I'm ready to continue. This is the IT?

14 MR. MCCULLOCH: I'm sorry?

15 MR. MCCULLOCH: Is this the IT specialist?

16 MR. MCCULLOCH: Yes, sir.

17 DYLAN SNYDER, having been first duly sworn,
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MR. MCCULLOCH:

21 Q Mr. Snyder, you were previously employed with Newberry
22 County? Is that correct?

23 A Yes, that's correct.

24 Q Can you tell us when your last day with the County of
25 Newberry was?

1 A The 5th of July.

2 Q Of this year?

3 A Of this year, 2016.

4 Q Now, you were employed with Newberry County for how
5 long?

6 A Since August 1, 2011. So roughly about five years.

7 Q Five years. And you were employed in what capacity?
8 Same capacity throughout or --

9 A Yes, yes. I was the Director of Information
10 Technology. I was hired in on and that's where I left as.

11 Q So Director of Information Technology. Would that
12 place you in charge of computers and computer systems?

13 A Yes, sir.

14 Q How long have you been involved in -- I think we've
15 seen some information about your education, and just --

16 MR. MCCULLOCH: We have, Your Honor, and I would offer
17 for identification first by our witness as identification
18 in Plaintiff's Exhibit number 28, which is an affidavit of
19 this gentleman. And, Your Honor, I apologize. I
20 referenced it during -- or at a point as Exhibit number 17.
21 But that, in fact, is not Exhibit number 17. This just has
22 not been marked until now. So we would move it into
23 evidence without objection, I believe.

24 MR. NICHOLSON: No objection.

25 THE COURT: Without objection.

1 Q So, Mr. Snyder, that Exhibit number 28 is an affidavit
2 completed by you? It's not the original one, understand
3 it's a copy.

4 A Yes, this is a copy of the one I --

5 Q So it goes into some explanation about your background
6 and your education. You have formal education in the area
7 --

8 A Yes.

9 Q -- of intellectual, whatever the hell --

10 A Informational Technology.

11 Q -- stands for. There you go. Computers?

12 A Yeah, computers.

13 Q Stuff. All this aggravating stuff we deal with. Now,
14 is it your experience that business does business by email?

15 A I would say that, yes.

16 Q You think it's probably increasing as opposed to
17 diminishing?

18 A Oh, 100 percent, yes.

19 Q And how about text message? Do people do business by
20 text messaging?

21 A Probably not as much as through email messaging, but,
22 you know, it definitely does occur.

23 Q And during your five years with Newberry County did
24 you learn, understand, know for a fact that members of
25 county council were doing business -- the County's business

- 1 by email?
- 2 A Yes.
- 3 Q And by text messaging?
- 4 A Text message I wasn't completely aware of, no.
- 5 Q Would it surprise you?
- 6 A It would not surprise me.
- 7 Q You communicate with county council members by email
- 8 and text?
- 9 A My correspondence with county council normally would
- 10 go through our clerk to council, Lori Renwick, for the most
- 11 part.. I didn't really have too much direct contact with
- 12 councilmen..
- 13 Q Now, you're employed now with Southeastern Trucking
- 14 Line?
- 15 A Yes. Southeastern Freight Lines.
- 16 Q Freight Lines?
- 17 A Yes.
- 18 Q And you're there in the capacity as their IT person?
- 19 A Yes. System administrator.
- 20 Q You have your own computer?
- 21 A Yes.
- 22 Q You're a computer guy. You probably have a bunch of
- 23 them?
- 24 A I've got several computers, yes.
- 25 Q Got a cell phone?

- 1 A Yes.
- 2 Q Now, do you backup your personal computer?
- 3 A Yes.
- 4 Q How do you do that?
- 5 A Various methods. At my house I have a file
- 6 server that stores all pertinent information and I also
- 7 have external hard drives.
- 8 Q How about text messages, are those preserved, backed
- 9 up anywhere?
- 10 A If it's something I deem important I will take a
- 11 screen shot of it and send it to an email which was backed
- 12 up through the Cloud. Using Google accounts it was backed
- 13 up through the Cloud.
- 14 Q Now, just so the Court fully understands, although he
- 15 may know, what's the Cloud?
- 16 A The Cloud is essentially a software service that is
- 17 offered by various different companies, meaning that you
- 18 don't have digital hardware that you touch. It's hardware
- 19 that is virtualized. I hate to get too technical here --
- 20 Q No, you're doing great.
- 21 A But it's a virtualized environment essentially like,
- 22 you know, you have a server physically located in your
- 23 business office. What the cloud is a server that is being
- 24 offered by a hosting service, be it Google, Amazon.
- 25 There's millions of different providers.

1 Q And it's not expensive is it?

2 A No.

3 Q And how about the backup server you're talking about,
4 or the backup method, is that expensive?

5 A No.

6 Q Now, in your work for Southeaster Freight Lines, have
7 you recommended to the company that they backup their
8 information?

9 A We have a pretty severe backup policy there. Before I
10 came in we run probably 75 to 100 backup jobs a day there.

11 Q And is that backed up off site?

12 A Yes. We do a DR backup which is distributed back up.
13 So, yes, one is taken -- one is left onsite and one is
14 taken off site.

15 Q And that's because in case there's a catastrophe like
16 a fire --

17 A Fire, tornado, hurricane, flood, anything like that
18 that could potentially wipe out a whole facility then you
19 would want the meat and potatoes to be located somewhere
20 away from there.

21 Q Well, backups are for computer crashes too, aren't
22 they?

23 A Yes.

24 Q Computer crashes in your business aren't unusual, are
25 they?

1 A No.

2 Q You think it's a good practice or even a best practice
3 to backup?

4 A Yes.

5 Q Is that the standard in the industry?

6 A Industry standard would be maybe not to backup end
7 user devices but critical server, switches, anything like
8 that you would want to back up critical things. You don't
9 really normally see -- even at Southeastern Freight we
10 don't back up end user machines. Like, for instance, my
11 computer or even my boss' computer at Southeastern is not
12 backed up through our backup policy. We back up virtual
13 servers, physical servers, things that are infrastructure
14 based.

15 Q Are the personal computers linked in to your server?

16 A Yes. We are a mesh network, yes.

17 Q So wouldn't they backup automatically as part of it
18 all anyway?

19 A No. Because the server has its individual -- I'm
20 sorry, the end user computer has its own individual
21 storage.

22 Q A hard drive?

23 A Hard drive, exactly. So through our backup policies
24 we have to tell what things get backed up. We put an agent
25 on the machine. It relays the information back to the

1 backup platform and the backup platform backs up from there
2 to physical tape, virtual tape, solid state hard drives.
3 There's plenty of different ways to do it. But the
4 industry standard does not normally dictate that end user
5 machines get backed up.

6 Q But the industry standard, we're talking about private
7 business, aren't we?

8 A Yes.

9 Q There are not any government regulations that require
10 Southeastern Freight Lines to backup and retain and
11 preserve their communications by email are there?

12 A No, there's not.

13 Q Well, you know that's not exactly the case for
14 government communications. They are required to be backed
15 up.

16 A Right.

17 Q And the public -- the business of Newberry County is a
18 matter of public interest, isn't it?

19 A I would say so, yes.

20 Q Now, during your five years with Newberry County were
21 there -- did you attend meetings, seminars, have
22 discussions about the retention of the public records of
23 Newberry County?

24 A I did not.

25 Q Anybody ever talk to you about the law requiring the

1 preservation and the retention of public records required
2 to be kept?

3 A No, sir.

4 Q Was that anything -- you ever heard of the archive
5 regulations for the retention and preservation of public
6 records?

7 A No, I have not.

8 Q No conversations with your county administrators in
9 that regard?

10 A No, sir.

11 Q What about the county attorney?

12 A No, sir.

13 Q Have you ever talked with any member of council about
14 backing up their computers?

15 A County council has no computers.

16 Q I'm sorry?

17 A County council does not -- we do not furnish a machine
18 for county council members.

19 Q Do you know Mr. Adams?

20 A Yes.

21 Q Do you know whether he -- was he provided a computer?

22 A Yes, he was.

23 Q So that would have been what, a desktop?

24 A Yes. To my knowledge, he uses a Mac desktop.

25 Q Did he have his own laptop or notebook portable

1 computer or anything?

2 A I think that was his personal property, yes.

3 Q Do you know whether he did County business on that
4 personal computer?

5 A I'm not aware of any.

6 Q Was that a matter of any discussion with anybody, to
7 your knowledge, within Newberry County?

8 A No, sir.

9 Q Now, so during your five years you recall no
10 discussions about the preservation of records or backing up
11 or any of that? Is that correct?

12 A No, sir.

13 Q Are you aware of there being any policy, any
14 ordinance, any email setting forth, even suggested best
15 practices in the area of preservation retention and
16 protection of public records?

17 A No, sir.

18 Q Now, in your affidavit, which would be Plaintiff's
19 Exhibit number 28 -

20 MR. MCCULLOCH: And I think I moved that into evidence,
21 Your Honor. I want to make sure.

22 THE COURT: Yes, sir.

23 Q That is your affidavit, correct?

24 A Yes, sir.

25 Q Your signature on the second page?

1 A Yes, sir. That's mine.

2 Q It references, in the fifth paragraph, a crash of Mr.
3 Adams' computer. Was that his personal computer or his --

4 A That was his work desktop.

5 Q Okay. And that would not have been backed up by any
6 method?

7 A No, sir. Mainly, oh, also like I said previously, and
8 we didn't back up any end user machines. And, secondly, it
9 was a Macintosh operating system, Apple operating system,
10 which semantic backup exec which we currently, I'm assuming
11 they still use, is our backup platform does not support
12 Macintosh.

13 Q Mac is Apple?

14 A Yes. Mac is Apple, yes.

15 Q Apple is the cloud. Do you use Apple?

16 A No, sir.

17 Q You have friends that use Apple, I presume?

18 A Phones, yes, but usually in the IT industry you don't
19 see a lot of Apple based computers. They're more for
20 digital and audio kind of stuff like that actually.
21 Working with art is what they're pretty much known for.

22 Q But Apple is kind enough to provide that cloud
23 mechanism of backing up you mentioned, right?

24 A Yes. The iCloud.

25 Q That's an inexpensive method that could have been

1 applied. There was no reason why Mr. Adams' computer could
2 not have been programmed, or whatever you would call it in
3 your lexicon, to instantly backup every communication in
4 the cloud?

5 A Right. In 2014, I'm not quite sure if iCloud was
6 actually available service. Like I say, I'm not an Apple
7 user. But it's somewhere in and around that time is
8 when it starting getting some notoriety. I'd say in
9 the last year or year-and-a-half, maybe two years we've
10 seen a rise in cloud solutions.

11 Q Had you been aware, had you been made aware, of the
12 law that requires the preservation and retention of
13 official public documents and correspondence and
14 communications, would you have taken steps, would you have
15 made recommendations for the preservation for the somehow
16 to achieve a backing up of the computers of Newberry
17 County?

18 A Yes.

19 Q And that could have easily been accomplished in the
20 instance of Mr. Adams' computer with this cloud thing?

21 A Yes.

22 Q Do you have any -- the awareness that Apple is kind
23 enough to aggravatingly send you a message that you haven't
24 backed up in the last whatever?

25 A I know the cell phones do that. And iPad tablets and

1 stuff like that, but I'm not sure if the desktop operating
2 system is annoyingly doing the backup, you know, pushing
3 that on you. I think that's more of a mobile device kind
4 of antic.

5 Q Now, in your affidavit you indicate that Mr. Adams'
6 computer crashed. When did you -- when were you advised or
7 when did you first learn of his computer crash?

8 A The day it happened. Somewhere in the spring of 2014.
9 I think it was somewhere around March or April.

10 Q And you went -- were you summoned?

11 A Yes. He pretty much called me down there to take a
12 look at it. And being like I said that I'm not an Apple
13 user, so I took the computer from his desk, took it back to
14 my old office, the old Sheriff's Office at that point in
15 time, and ran some diagnostic testing with it and
16 determined that both the motherboard and the hard drive had
17 essentially crashed.

18 Q Were you able to determine a reason for the crash?

19 A No, I was not.

20 Q And you're not a Mac Apple guy?

21 A Right. And there's completely different platforms of
22 the way the computers are built. So, for instance,
23 motherboard types and processor types, all that stuff
24 differs greatly in an Apple versus a Windows environment.

25 Q So would it be fair to say to say this wasn't your cup

1 of tea?

2 A That would be 100 percent correct.

3 Q But this is the county manager for Newberry County,
4 right?

5 A Yes.

6 Q This is his computer?

7 A Right.

8 Q So what steps, in addition to your effort, did you
9 take to out source it to someone more skilled and schooled
10 in Apple technology, if any?

11 A Well, the main thing is I pulled the hard drive out.
12 The hard drive is what contains all of the data. I mean,
13 the motherboard crashing is here nor there. It's the hard
14 drive crashing which is literally what caused this issue.
15 I pulled the hard drive out, put it through an external
16 hard drive reader and the hard drive doesn't even spin.
17 The hard drive is completely toasted. We have no written
18 policy on what to do with -- in the event of data failure.
19 It's happened several times, and this is one of the few
20 times where we were unable to recover that data. We
21 actually looked at a company in Asheville to recover the
22 data and it was several thousands of dollars just to even
23 try.

24 Q Now, are you talking about Mr. Adams' computer?

25 A Yes.

1 Q So you sent off his hard drive?

2 A No. We did not send the hard drive off. I made a
3 call to the company and then requested, you know, what was
4 the likelihood of us being able to gather the data back.
5 And it was like, you know, five thousand -- I'm just
6 throwing rough figures out as it being two years ago, but
7 there was a large number for a small percent chance of
8 getting the data back.

9 Q But for a price you could have made an additional
10 effort to recover --

11 A Yes.

12 Q -- it?

13 A I mean, we could do that with every machine that
14 crashes, too, but then the cost analysis comes in and is it
15 worth, say, \$40,000?

16 Q Well nobody suggested to you on the phone it was going
17 to be \$40,000 to recover Mr. Adams' hard drive.

18 A Right. But being like I said that it's a Mac hard
19 drive it goes through a whole different type of file system
20 that goes on there. So the success rate on those are slim
21 to none.

22 Q Did you provide that information to Mr. Adams or to
23 the city attorney?

24 A I provided that to Mr. Adams and at that point is
25 whenever he went out and purchased a brand new computer and

1 we started from scratch again there.

2 Q Were there any notes, memoranda, documents about
3 those efforts that you just mentioned?

4 A I do not believe so.

5 Q Did Mr. Adams seemed concerned or upset about the loss
6 of everything on his computer?

7 A I really can't remember. I don't have anything that
8 stands out to me as being overly upset or underly upset.

9 Q And where is that hard drive today?

10 A All of our computers are disposed through a company
11 that we use, a recycling company. So they're taken to the
12 dump and put in a special area and a recycling company
13 comes and takes those to recycle and destroy the rest of
14 it.

15 Q So we can assume that the hard drive of Mr. Adams'
16 desktop is safely nestled in some landfill?

17 A Yeah. Probably compacted and...

18 Q Now, were you -- you were asked by whom to provide
19 this affidavit? Do you know?

20 A I can't quite remember. I think maybe Nick I think
21 maybe. Well, actually, I can't quite remember.

22 Q Nick being the legal counsel?

23 A Yes.

24 Q Do you know whether -- well, we all know him as Nick.
25 But were you aware at the time you wrote this affidavit

1 that Ms. Ballard had suggested that an expert be engaged
2 for the purpose of trying to recover emails? Were you
3 aware that she had sent a written request for that to be
4 done?

5 A Yes.

6 Q And your phone call to whoever about that, was that
7 because of her request or was that on your own initiative?

8 A About looking into the data restore?

9 Q Or the data reclamation, I guess I'd call it?

10 A That would have been on my own accord.

11 Q So in response to her, you were aware that she had
12 requested that?

13 A Yes.

14 Q The out sourcing? Had the hard drive then been sent
15 to the landfill at that point or was it sent after that?

16 A Oh, the hard drive was sent to the landfill in the
17 spring of 2014, literally.

18 Q Do you know when her request was?

19 A I do not.

20 Q Was it possible that it was sent to the landfill after
21 her request?

22 A No, it's not possible.

23 Q How do you know? You don't know when her request was
24 made.

25 A Yes, but I know the computer was taken the same day

1 that we deemed -- I mean, the day I pulled the hard drive
2 out and couldn't do anything with it, it was taken to the
3 landfill that day. There was no wait time, there's no
4 grace period before I took it.

5 Q Well, when did you contact this Apple expert?

6 A The same day the computer crashed.

7 Q So all this happened on the same day?

8 A Yeah.

9 Q And then it went straight away to the landfill?

10 A Yes. That's what we do with all of them. I don't
11 have storage -- didn't have storage space here, so I had
12 a small, little office so you can imagine that if every
13 that computer crashed in Newberry County I kept around then
14 I wouldn't be able to fit in my office.

15 Q Was there any insurance or warranty claim about the
16 failure of this computer?

17 A No.

18 Q Can you explain to me why you mentioned earlier that
19 the County IT setup was not compatible, shall we say, with
20 Mac, which Mac and Apple, I guess, are interchangeable?

21 A Uh-huh.

22 Q So was there a policy -- why did Mr. Adams have a Mac
23 Apple computer then if it's not compatible with your whole
24 -- the rest of the county's computer system?

25 A He had that computer before I came in and took this

1 position. He's always, to my knowledge, always had a
2 Macintosh Apple machine. I believe his wife is -- that's
3 what she uses and therefore that's what he uses. It's just
4 some people, you know, . . .

5 Q Do you have any idea from any discussion with anyone
6 within the Newberry County bureaucracy why there is no
7 concern about backing up their public documents, backing up
8 computers in the County's business?

9 A Yes.

10 Q You do? All right. What is it?

11 A We talked with several persons at the Sheriff's
12 Office. We've implemented backups on certain machines out
13 there. It's almost -- it's really -- I didn't backup an
14 end user machine until there was a request to do so. And,
15 really, there was only two that ever got backed up.
16 For the most part, what we did is it was up to the end
17 user, like it says in the employee handbook, to back up all
18 their documents with a provided external hard drive. So we
19 didn't have an automated system to do that. It was deemed
20 by the employee or end user to back up their data.

21 Q So the employee manual requires back up?

22 A Employee manual states that if you want to -- that
23 your computer is not backed up by us, but being the system
24 that if you want a backup of your documents then you have
25 to do it yourself?

1 Q Was there any method of auditing among your employees
2 to determine if they as end users were backing up their
3 computers?

4 A No.

5 Q And no interest by the County administration in
6 knowing whether that was occurring by end users?

7 A No.

8 Q And may I safely assume Mr. Adams did not back up to
9 your knowledge?

10 A That is correct. After the computer crashed is
11 whenever we bought the external hard drive and started the
12 back up process.

13 Q But if you've been aware of the law requiring
14 preservation you would have recommended or implemented,
15 right?

16 A A hundred percent, yes.

17 Q Just so I'm clear about all this Macintosh Apple
18 stuff, and yes I am a dinosaur just as I look. That young
19 lady up there probably could tell us, you two could talk
20 turkey, but the ways that Mr. Adams' Macintosh desktop
21 could have been backed up included the Cloud?

22 A At this current time, yes, the Cloud is a viable
23 option..

24 Q But if the Cloud existed then that would have been a
25 backup method?

1 A The Cloud is insecure also.

2 Q Insecure?

3 A You probably heard of all the times that people's
4 private photos get leaked to the internet, and the Cloud is
5 notoriously not a solution for business practice.

6 Q So you know a little bit more about the Apple thing
7 than you thought. But an insecure method is a whole lot
8 better than no matter, right?

9 A Yeah, I would agree.

10 Q And there are other methods of backing up. You can
11 download into a server?

12 A Yes, you could. You could script out, you know.
13 There's multitudes of different ways to back up things.

14 Q Thumb drives?

15 A Thumb drives, exactly. External hard drives, CDRs.

16 Q And like the most primeval method, you could just
17 print out an important email exchange and put that in a
18 file, right?

19 A That's correct.

20 Q None of those are terribly expensive methods?

21 A No.

22 MR. MCCULLOCH: Thank you.

23 THE COURT: Yes, sir.

24 CROSS EXAMINATION

25 BY MR. NICHOLSON:

1 Q Mr. Snyder, I want to make sure I'm clear. When you
2 talk about backup, isn't that just a fancy word for another
3 copy or another version?

4 A Yes.

5 Q So when we have an email on somebody's computer, its'
6 there, right?

7 A Right. It's physically stored on the disk.

8 Q That's right. And unless somebody physically deletes
9 or unless there's something that causes a computer to be
10 destroyed and it crashes or somebody takes an axe to it or
11 something, that email is going to be there, right?

12 A Yes. As long as the hard drive still spins the email
13 is still there.

14 Q And I believe you said that your new -- Southeastern
15 Freight Lines?

16 A Yes.

17 Q That's a pretty big outfit, right?

18 A Yes.

19 Q Okay. You don't back up your end user --

20 A We don't back up any end user, no. We're using an
21 exchange server which is quite different than what the
22 County uses, which is a hosted pop 3 email system.
23 Exchange server essentially stores everything locally in
24 our facility whereas the pop 3 service that we use is one
25 of things when you buy an email account for \$1 a month and

1 there's a file stored on your computer called a PST file
2 which it holds all your contacts, your -- all your emails,
3 your calendar entries, the whole nine that everybody's used
4 to in the Outlook suite..

5 Q And that's where you can -- and I'm actually familiar
6 with those. You can actually have a little PST file and if
7 you want to you can sort your emails on that, you can drag
8 and -

9 A Correct. Yes.

10 Q And a lot of people store their emails that way,
11 right?

12 A Yes.

13 Q And I believe you said that at the County there are
14 people who need or who want one can get an external hard
15 drive, correct?

16 A Yes.

17 Q And is that because they just need more space?

18 A Well, it's needing more space and having a separated
19 system. You know, if your computer crashes it has nothing
20 to do with that external hard drive. So it takes that
21 central point of failure out of the equation.

22 Q And, again, you're making another copy?

23 A Exactly. Yes.

24 Q And I believe you said you talked about the Cloud, and
25 you said you were a little unsure about what the status of

1 the Cloud was back in the middle part or March of 2014,
2 right?

3 A Right.

4 Q The Cloud is an ever evolving whatever you call it?

5 A Right.

6 Q Thing, entity, system, right?

7 A Right. Yeah.

8 Q And you said it's insecure?

9 A Extremely, yes.

10 Q Would you recommend sensitive government documents
11 being placed in the Cloud?

12 A I would never.

13 Q Now, we talked about servers. The County had servers,
14 right?

15 A Servers, yes. Email servers, no.

16 Q Right. No email server, but they have multiple
17 servers?

18 A Oh, yeah, there's -- I think our last count before I
19 left was 18.

20 Q Eighteen servers, okay. Now, you talked about calling
21 the people up in Asheville to see if they could resurrect
22 the hard drive. Did you yourself believe that there was
23 any decent chance of resurrecting the data?

24 A No.

25 Q Is that why you made the decision not to pay that

1 money?

2 A Right. Yeah. So, if I remember correctly, Mr. Adams
3 requested that I at least look into it so we could find out
4 the feasibility on that and then after we had myself and
5 that company that I had called both said the likelihood of
6 recovering the data was very slim that we just decided to
7 start from scratch again.

8 Q And this was after you had run a series of diagnostics
9 on --

10 A Oh, yes, this is after I had already pulled the hard
11 drive out of the machine, put in an external hard drive
12 reader, used the Linux machine to query to see if the drive
13 would spin. I put the drive in a freezer, which is a
14 common technique to free up a locked disk, because, you
15 know, a hard drive is a magnetic platter that spins. What
16 happens is if there's too much heat sometimes it can seize
17 up and as, you know, metal heats up it expands, it causes
18 the platters to stick together and then that's why putting
19 it in a freezer sometimes for a couple hours will cause
20 everything to contract back down to normal operating state.

21 Q But it didn't?

22 A No. I've only had that happen -- I've only had
23 success with that one or two times.

24 Q And for the purpose of looking at hard drive really,
25 am I right, that the difference between and a Mac and, say,

1 a PC is really not that much?

2 A Internally there are some key differences. Mainly the
3 architecture of the platform that the processor runs off.
4 Usually the same hard drive, it's just a different file
5 system that's stored on the hard drive.

6 Q Right. It's the same piece, basically?

7 A Yes. It's the same Western Digital 200 gig drive goes
8 in each machine, it's just how is it formatted to work with
9 the machine is the difference between Windows and Mac.

10 MR. NICHOLSON: May I have a brief moment, Your Honor?

11 THE COURT: Yes, sir.

12 MR. NICHOLSON: Thank you, Your Honor.

13 MR. MCCULLOCH: Right quick.

14 RE-DIRECT EXAMINATION

15 BY MR. MCCULLOCH:

16 Q You were asked by counsel about how things might be
17 not retained, I guess. And you were asked specifically
18 about unless deleted. Let me ask you to take a look at
19 what has been introduced as Plaintiff's Exhibit number 1.
20 You may or may not have seen that before. Is that anything
21 you've seen?

22 A No, I've never seen this.

23 Q It's a letter signed by whom?

24 A Mr. Tothacer.

25 Q It's dated when?

- 1 A December 22, 2014.
- 2 Q And it's addressed to whom?
- 3 A To Ms. Ballard.
- 4 Q Would you read paragraph eleven on the second page.
- 5 A "When Judge Abraham left the employ of Newberry County
- 6 in February 2012, the email account was deleted and our
- 7 system does not have archiving or backup ability."
- 8 Q Now, if we assume there is a legal obligation to
- 9 retain public documents, is deleting departing employees
- 10 email accounts a good practice?
- 11 A Yes.
- 12 Q That's a good practice? Is that calculated to
- 13 preserve public documents?
- 14 A Well, the documents aren't stored on the email
- 15 account. The email account is just a central point for
- 16 somebody to get through the servers. All the emails are
- 17 stored in the PST file locally on the machine. So deleting
- 18 the account doesn't delete the emails. The PST file is the
- 19 container. That's why whenever an email comes in, if you
- 20 delete that email it deletes it from the PST file, not from
- 21 -- the server only is a middle man. It's an agent that
- 22 just pushes the mail to you. So it's kind of like the same
- 23 thing as, you know, the mailman bringing you mail and
- 24 putting it in your mailbox. If you take that mail and
- 25 throw it in the trash, the mailman has still done his job.

1 Q But, again, paragraph eleven reassures us that nobody
2 is archiving or backing up in Newberry County.

3 A Yes. From an email system standpoint that would be
4 correct.

5 Q Or Mr. Adams?

6 A Right.

7 MR. MCCULLOCH: I think, Your Honor, that's all I have.
8 But I have a check for you that I owe him which is a bounty
9 for your mileage.

10 CROSS EXAMINATION

11 BY MR. NICHOLSON:

12 Q One thing. Let me show you what we've marked as
13 Defendant's Exhibit number 1, tab 2 there.

14 A I've got it.

15 Q And you see that's an email from Jay Tothacer?

16 A Yes.

17 Q It's dated December 4th?

18 A Yes.

19 Q And do you see you're an addressee there?

20 A Yes.

21 Q Do you recall getting this email?

22 A This email I do recall getting, yes.

23 MR. NICHOLSON: That's all I have, Judge. Thank you.

24 THE COURT: I have a question. Do you have a question?

25 MR. MCCULLOCH: I am finished, Your Honor.

1 THE COURT: I'm not a computer guy, either, but if I --
 2 I have an email account for the court administration and I
 3 have a laptop computer. If my computer crashes or dies I
 4 can still go to another computer, access my email account
 5 and my emails are all there.

6 MR. SNYDER: That's the benefit of an exchange server.
 7 That's in-house hosted email, yes.

8 THE COURT: So under the scenario here in this case, if
 9 Mr. Adams' computer crashes he can't go to another computer
 10 and logon to his email and pull up his email?

11 MR. SNYDER: He can log onto his email, but he's only
 12 going to see the past I think 30 days worth of email.
 13 That's what the local server stores is 30 days worth of
 14 emails. So let's say that you're looking for an email from
 15 2015, the email server will not have that because your
 16 local computer that -- your email client that brings in the
 17 email, it has that. Like I said, the POP 3 server, the
 18 email server, is just a pretty much a delivery agent to
 19 deliver it to an inbox. It's up to the inbox to store, or
 20 delete, move.

21 THE COURT: So my personal email account at home, if my
 22 home computer were to crash and die, even though I could go
 23 to another computer and access that email account, it would
 24 only be, say, the last 30 days?

25 MR. SNYDER: Exactly. Correct. That's why we have,

1 you know -- with an exchange server you actually -- your
2 mailbox floats between, but we were never able to get
3 there. That's something I wanted to do and several years I
4 had actually put on the budget to have that implemented,
5 but it neither here nor there never came to fruition.

6 THE COURT: All right.

7 MR. MCCULLOCH: Your Honor, that does cause me to ask
8 one question.

9 RE-DIRECT EXAMINATION

10 BY MR. MCCULLOCH:

11 Q You say it only saves the previous 30 days, but you
12 can, I don't know what you call it, calibrate, tell your
13 computer to save every email forever, can't you?

14 A Well, that's what the PST file does. That's what
15 Outlook in native mode will do. Once an email is delivered
16 it's stored in the file.

17 Q But, you know, this 30 day business can be told to
18 command it to save longer than 30 days?

19 A No. Because that's the hosting person, they're
20 providing that service for us. There's nothing that we can
21 do as far as how much is actually stored on their server.
22 Because you have a quota, a limit, of size, say five gigs.
23 Once your size hits that point it starts deleting from the
24 back end. First in, first out.

25 Q But if you have been asked to set up a system to

1 retain these things, you would have?

2 A Yeah. I actually asked three years in a row to do
3 that.

4 Q You asked who?

5 A I'm sorry. I asked county council during the budget
6 process to actually upgrade our email system to an exchange
7 server which is what is industry standard. And that
8 would have allowed for archiving. I wanted to do a
9 seven archiving policy.

10 Q That was being even unaware of the legal requirements?

11 A Exactly, yeah.

12 Q Because it's a good thing to save your emails?

13 A Yes. From a management standpoint, it's once an email
14 is deleted it's deleted in a type of environment that
15 Newberry County runs.

16 Q Did you make those requests in writing?

17 A Yeah.

18 Q And to whom were those requests made?

19 A Those would have been going to -- during budget time,
20 so that was going to Debbie --

21 Q Cromer. And since you left in 2016 and you were
22 making these requests the three years you would have made
23 those requests prior to Mr. Adams' crash, the first --

24 A I think the first year was actually 2014. It would
25 have been right around this point in time, yes.

1 Q And the council determined not to follow your expert
2 advice?

3 A Yes.

4 MR. MCCULLOCH: Thank you.

5 RE-CROSS EXAMINATION

6 BY MR. NICHOLSON:

7 Q Even if you get the exchange server you're still just
8 maintaining the 30 days unless you back up to another --
9 yet another server, correct?

10 A Yes. Now, what we were going to do -- what I had
11 planned on doing was implementing an exchange server with a
12 Barracuda NAS box, a network attached storage, which says
13 that seven years worth of email would have been stored. So
14 essentially what would happen is one email would be
15 delivered to the end user's inbox and one email would be
16 delivered to the network attached storage agent. So
17 essentially what it's doing is splitting the feed giving
18 one to the original recipient and one for archiving
19 purposes. So it takes the end user out of the equation.
20 It's, you know, a system mandated backing up.

21 Q But to use Judge Russo's example, you would have to
22 use yet another server for him to be able to go back and
23 archive his personal emails?

24 A That would be correct.

25 DIRECT EXAMINATION

1 BY MR. MCCULLOCH:

2 Q But you've got 18 servers or something, didn't you
3 say?

4 A Yeah, but they all do different things.

5 Q And, to your knowledge, when you left employment had
6 the County followed your advice, installed the system that
7 you suggested?

8 A No. To my knowledge, they still have not moved from
9 the POP 3 system to the exchange system.

10 Q As of today they haven't?

11 A As of today I do not believe so. I have not been...

12 Q Okay. Thank you, sir.

13 MR. MCCULLOCH: Nothing further.

14 THE COURT: Thank you.

15 MR. MCCULLOCH: I have it. Come and get it, as they
16 say.

17 THE COURT: You may step down. Thank you.

18 MR. MCCULLOCH: Your Honor, I think the Plaintiff is
19 prepared to rest other than, I'm told, housekeeping
20 matters. And I have to find out what those are.

21 THE COURT: All right. Yeah.

22 MR. MCCULLOCH: Your Honor, would you take five?

23 THE COURT: Sure. We'll be in recess for a few
24 minutes.

25 MR. MCCULLOCH: Thank you.

1 THE COURT: Why don't we break for lunch? When we get
2 back I'll take up any motions or anything, if you have
3 anything. And then we'll proceed with your case.

4 (Whereupon, the Court was in recess from 1:02 p.m.
5 until 2:00 p.m.)

6 THE COURT: Mr. Nicholson.

7 MR. NICHOLSON: Yes, sir. May it please the Court?

8 THE COURT: Yes, sir.

9 MR. NICHOLSON: Defense calls Wayne Adams.

10 WAYNE ADAMS, having been first duly sworn,
11 testified as follows:

12 DIRECT EXAMINATION

13 MR. NICHOLSON: Your Honor, as a housekeeping matter
14 before we get started, we stated this before, I want to
15 make sure it's on the record. I'm going to hold over any
16 motions that I have until the end of the case.

17 THE COURT: Sure.

18 MR. NICHOLSON: Thank you, Your Honor.

19 BY MR. NICHOLSON:

20 Q Mr. Adams, you've already stated your name. What do
21 you do, sir?

22 A I'm the county administrator for Newberry County..

23 Q Let's back up just a hair. Tell the Court about your
24 educational background.

25 A I have a bachelor's degree from USC Aiken and a

1 master's degree in public administration from USC Columbia.

2 Q How long have you been the county administrator for
3 Newberry?

4 A Ten years.

5 Q Prior to that what did you do?

6 A I was Edgefield County administrator.

7 Q How long did you do that?

8 A Eleven years.

9 Q Just one step back. We're not going to go all the way
10 back to high school days, but after you worked for -- but
11 prior to going to Edgefield County what did you do?

12 A I worked for US Congressman Butler Derrick.

13 Q Very briefly but for everybody's edification could you
14 just explain what the role of a county administrator is?
15 What is your role?

16 A Yes, sir. I developed the budget for the entire
17 county government. I only supervise those departments that
18 do not answer to an elected official. I develop personnel
19 policies. I also help council develop policy and implement
20 the policy that counsel adopts.

21 Q And it's the county that sets the policy?

22 A It's the council, yes, sir.

23 Q I mean, sorry, county council?

24 A Uh-huh.

25 Q Talk briefly about the budgeting process. How does

1 that work, the interaction between you, your office and
2 county council?

3 A Well, the staff and I began developing a budget in
4 approximately February by looking at the revenue numbers.
5 After about a month of that we get into interviewing
6 department heads and considering the spending requests.
7 And, of course, in the end we have to balance out the two,
8 the spending and the revenue.

9 MR. NICHOLSON: And, Your Honor, we've already marked
10 as -- we've pre marked for identification -- I'm handing
11 Mr. Adams a document we've marked for identification,
12 Defendant's Exhibit number 7, which is a capital
13 outlay request for fiscal year 2014-15. And then also a
14 document we've marked as Defendant's Exhibit number capital
15 outlay request fiscal year 2016-17.

16 THE COURT: Thank you, sir.

17 Q Mr. Adams, you were here when Mr. Snyder testified?

18 A I was.

19 Q He talked about a request for capital outlays.

20 A Yes.

21 Q Is that the type of form?

22 A Yes. This is the form that any department head would
23 use to make a budget request.

24 Q Do those appear to be forms that he would have put
25 forth for the fiscal year stated on them?

1 A Yes.

2 MR. NICHOLSON: Your Honor, I would move those exhibits
3 into evidence.

4 THE COURT: Any objection?

5 MS. SCHILLACHI: No objection.

6 (Whereupon, Defendant's Exhibits 7, 8 were entered
7 into evidence.)

8 THE COURT: Defendant's Exhibit numbers 7 and 8 are in
9 evidence without objection.

10 Q Mr. Adams, just briefly, could you describe what
11 Defendants' Exhibit number 7 is?

12 A Exhibit number 7 is a request for Cisco 2500 wireless
13 controller. The purpose, I believe, was to allow the IT
14 director to be able to do more of the work in a central
15 location rather than going from building to building to
16 building.

17 Q Now, you heard -- again, you heard Mr. Snyder's
18 testimony. He talked about a request for an email exchange
19 server.

20 A Yes.

21 Q Does Exhibit number 7 relate to that?

22 A No, it does not.

23 Q Now, look at Exhibit number 8. What does that show?
24 What does that ask for?

25 A That is a budget request, and it does ask for the

1 Microsoft exchange server.

2 Q So that's what Mr. Snyder was talking about?

3 A I believe so.

4 Q And the estimated cost there to be \$27,000?

5 A Yes.

6 Q And I know this is for fiscal year 2016-2017. Is this
7 budget cycle going on right now?

8 A This budget -- the budget for this cycle has
9 already been adopted. It was adopted in June.

10 Q So this request would have been considered for this
11 year's budget cycle which has been adopted?

12 A Yes.

13 Q Was this budget request accepted?

14 A No.

15 Q Can you tell us why?

16 A Well, it's basically a question of resources. It's,
17 you know, it would be great to have this sort of thing. We
18 agree and all the backups that would be necessary to ensure
19 there's no way we would ever lose information. But it's
20 just a question of resources. And coupled with that, it's
21 an issue of what have been the problems in the past by not
22 having it. That's the kind of thing you have to
23 balance against whether you want to do this or hire another
24 deputy or buy body armor for deputies or patrol cars for
25 deputies or Defib machines of ambulances and an infinite

1 list of wishes and requests that we get.

2 Q Had you personally ever had any email or problems with
3 your email in your personal computer with -- at Newberry
4 County?

5 A Not with losing anything.

6 Q And after the crash did you take any steps to try to
7 make sure that didn't happen again?

8 A Yes. We put in an external hard drive backup.

9 Q Now, let's talk about some of the types of records
10 that may be on your computer and that you just deal with on
11 a daily basis. I mean, are all the records that you work
12 with are they stored just solely on your computer?

13 A Perhaps in the drafting form, but when we talk about
14 the kinds of records that are mentioned in the Public
15 Records Act we're talking correspondence, we're talking
16 about policies and proposals and reports. Those generally
17 have sort of a finality about them. And once they -- and
18 also a distributive element, because once they're done they
19 get distributed to multiple people such as the clerk of
20 court, the various department heads, also to county
21 council.

22 Q Now, one of the things -- we saw an email -- or
23 excuse me, we saw a memo that the Plaintiffs included as
24 one of their exhibits. And it was a memo you wrote to
25 county council regarding the Abraham case.

- 1 A Right.
- 2 Q Do you recall that memo to that you made?
- 3 A Yes.
- 4 Q Where would have -- would that memo, would it be
5 stored in a place maybe on your computer, but would it be
6 stored elsewhere as well?
- 7 A Yes. The clerk of council would have it.
- 8 Q Would that be in a hard file? Would it be -- where
9 would that normally be stored?
- 10 A Both, typically.
- 11 Q Let's go back to the crash. You heard Mr. Snyder's
12 testimony about what he did. But when -- so tell us what
13 happened -- how did you first notice this computer crash
14 occurring?
- 15 A The screen was sort of going berserk. And, you know,
16 it was clear that the machine was failing. Of course, I'm
17 not an IT person, so I don't know -- I did not know
18 what was going on specifically with it. And, you know,
19 soon it shut down completely and that's when I called Dylan
20 Snyder.
- 21 Q Mr. Snyder.
- 22 A Uh-huh.
- 23 Q Did he basically take it from there?
- 24 A He did.
- 25 Q Did his testimony comport with your understanding of

1 what happened?

2 A Yes.

3 Q Mr. Snyder mentioned -- we've been talking about
4 servers. He said that when he left there 18 servers --

5 A Right.

6 Q with the County. How many do you have, servers?

7 A Now we have 14.

8 Q Why is that? Why is it 18 to 14?

9 A Well, with Dylan's departure we began to
10 reevaluate how we were going to deliver our IT services.
11 And one of the things we did in the interim, because it's
12 not easy to source these types of employees. You have to
13 pay a very extremely competitive wage, but it's also -- it
14 was a one person shop, and that bothered us. So we
15 brought on, under an emergency basis for four months, a
16 managed IT services company. They suggested that we
17 consolidate some of these servers so that there would be
18 better -- so we could better manage them, in terms of off
19 site monitoring. Was also the replacement cost. You know,
20 if you have fewer -- these things have a life cycle, and if
21 you have 18 of them, eventually you've got 18 you have to
22 replace. So it was an issue of economy and monitoring.
23 Q But prior to Mr. Snyder, did you have an IT person?
24 A We did. The county's first go of having an IT
25 director was a fellow who had worked with our emergency

1 preparedness division who was self taught, and was really a
2 brilliant guy and did a great job getting us started. He
3 put together our first website. When he retired, Dylan was
4 the person the county had ever hired who had a formal
5 background in information technology.

6 Q So you went from someone who was self taught to
7 someone with training. And now you're going with somebody,
8 I think you said, that's basically an IT outsourcing
9 company.

10 A Well, now we're at a sort of a dividing point in the
11 road. The question is do you have just one IT person and
12 if that person is out then you have a problem. Or do you
13 have managed IT services where there are several engineers
14 who work for the company and they're always responsible for
15 providing you the person that you need and the responding
16 to an emergency. They deal with the personnel issues, and
17 they have multiple people. We are still advertising for an
18 IT director, but my guess is we are likely to go the route
19 of IT managed services.

20 Q Okay.

21 MR. NICHOLSON: Your Honor, I'm handing up to Mr. Adams
22 regulation 12-1002. This is the minimum standards.

23 THE COURT: This is what you handed up earlier?

24 MR. NICHOLSON: And I'm sure we will get together and
25 provide to you electronically, if you wish, afterwards,

1 all the relevant statutes.

2 THE COURT: Okay.

3 Q Mr. Adams, I've handed you the South Carolina
4 regulation 12-1002, required minimum standards for all
5 record storage facilities. Are you generally aware of this
6 regulation?

7 A Generally, yes.

8 Q I'm going to direct your attention to the first
9 paragraph. It says any facility or area thereof in
10 which the records of a South Carolina public body maintain
11 shall meet the following minimum standards. And it says
12 sub a, construction. It says the building shall be a sound
13 construction. It shall be maintained with a roof. Do you
14 find that the County typically stores its record in a
15 building of sound construction that's well maintained?

16 A Yes.

17 Q The second -- item two under sub a says that if a
18 facility is located off site and this part of the structure
19 is used for other purposes a firewall shall separate the
20 records away from any area which might present a hazard to
21 the record. Do you store any records off site?

22 A We do, and we actually have a facilities director who
23 is a construction professional who guides us through the
24 codes and requirements, as far as the construction of
25 offsite facilities.

1 Q So, to your knowledge, does it have an appropriately
2 coded, if you will, firewall?

3 A Yes.

4 Q Under sub b environment the regulation states that the
5 facility shall be kept free -- kept clean to avoid
6 accumulation of dust and dirt. In general, if you're
7 understanding that dust falls pretty much constantly, do
8 you try to keep the facilities in a clean manner?

9 A We do. We provide the facilities, in the case of,
10 let's say elected officials, they have custody of those
11 records, but we assist them in meeting these standards if
12 there are any problems.

13 Q Item two there says the facility, paraphrasing a bit,
14 should either be climate controlled or be well ventilated.

15 A Yes. We understand that to be the case.

16 Q Going to the next page, item 3, the facility should be
17 free of vermin and shall have a pest control program to
18 guard against insects and rodents. Does the county do
19 that?

20 A Yes, we do.

21 Q Item four, facilities shall be well lighted, the
22 records shall not be exposed to direct sunlight. Do you
23 think you comply with that requirement?

24 A Yes, we do.

25 Q Five, records shall be protected from the threat of

1 damage caused by smoking, eating, and drinking. Do you
2 comply with that standard?

3 A Yes.

4 Q Item six, records shall be placed a minimum of three
5 inches from the floor on sturdy, well-supported shelving
6 units, file cabinets or wooden pallets. How do you
7 normally store your records?

8 A We take care to make sure that they aren't exposed to
9 any water into basements or other areas such as that.

10 Q Item seven, records shall not be placed in areas
11 subject to flooding or excessive moisture in the air such
12 as exposed water or steam pipes subject to leaking or in
13 areas that are adjacent to furnaces or boilers unless
14 separated. You believe you comply with that requirement?

15 A I do.

16 Q Next sub item c, security and protection, a facility
17 shall not be located in area with the risk of natural or
18 man made disaster pose a significant threat to the facility
19 and its content. You think you comply with that
20 requirement?

21 A Yes.

22 Q Item two, the facility shall be located in a coverage
23 area of a fire station and near a regularly patrolled
24 police route. Are fire and police around?

25 A Yes.

1 Q Item three, facility shall be secured at all times and
2 in the case of off site storage facility that is not
3 normally open to the public access shall be restricted to
4 authorized persons.

5 A Yes. Access is restricted.

6 Q Number four, a facility shall have an operational fire
7 and protection mechanism. Do you have that?

8 A We do have fire protection and extinguishing services.

9 Q And that's item number five, well distributed portable
10 fire extinguishers.

11 A Yes.

12 MR. NICHOLSON: Judge, may I have a moment to sort my
13 notes?

14 THE COURT: All right.

15 MR. NICHOLSON: Your Honor, Mr. Snyder talked about
16 some budget requests that he made, so we went back and
17 pulled those. And so that's what these are. And we're
18 going to have make copies of these after the fact because I
19 don't have one to give to counsel or to you right now.
20 These are just the exhibits. And I think they're okay, but
21 I'm going to move them into evidence and we'll just go from
22 there and ask Mr. Adams briefly about it. I just want to
23 put it in the record.

24 THE COURT: Okay.

25 Q Mr. Adams, I've marked as Defendant's Exhibit number 9

1 and Defendant's Exhibit number 10. These were some
2 documents related to -- Exhibit 9 is related to the 2013-
3 2014 fiscal year budget. Is that right?

4 A Yes.

5 Q And then Exhibit number 10 is 2014-2015 fiscal year
6 budget?

7 A Correct.

8 MR. NICHOLSON: Your Honor, at the risk of leading,
9 just to sort of speed things up, I was going to direct Mr.
10 Adams to the document I am talking to him about.

11 Q I'm showing you from Exhibit number 9, Mr. Adams, a --
12 this is another capital outlay request like we've seen in
13 Exhibit numbers 7 and 8, and that's for fiscal year 2013-
14 14?

15 A Uh-huh.

16 Q Is that a "yes"?

17 A Yes.

18 Q What is that? What's the request?

19 A Request is for a Microsoft active directory server and
20 a Microsoft exchange server. This one for two servers, one
21 will be used as a backup redundant link in case of failure
22 for the first server. The quote also includes an email
23 archiver which will allow the County to keep a local
24 store of all County employee's emails which will allow for
25 easy retrieval of lost or deleted emails.

1 Q And what's the amount of that request?

2 A The amount of the request is \$96,369.33.

3 MR. NICHOLSON: Judge, I would move Exhibit number --

4 I'm sorry. This page was broken out. You're

5 Q You're looking at a page called approved capital
6 outlay.

7 A This shows, Your Honor, that actually the Microsoft
8 active directory exchange server were actually approved to
9 the budget in the amount of \$68,2 -- 420 for the two
10 servers and 35,000 for equipment replacement.

11 Q Okay. That was 2014-15.

12 A This is 13-14.

13 Q Now, he asked for the same thing again in 16-17,
14 right? Let's go back and look at that.

15 THE COURT: This is asking for a computer to use with
16 that exchange server.

17 MR. NICHOLSON: What's that say, Your Honor?

18 THE COURT: Defense Exhibit number 8?

19 MR. NICHOLSON: Yes, sir.

20 THE COURT: That's to purchase a Dell R730 server to
21 use with Microsoft exchange server.

22 MR. NICHOLSON: That's correct. Okay.

23 Q That's an additional server?

24 A Yeah.

25 MR. NICHOLSON: I'm going to move Exhibit number 9 into

1 evidence, Your Honor.

2 THE COURT: Any objection?

3 MR. MCCULLOCH: I don't -- I just haven't had much of a
4 chance to look at it.

5 MR. NICHOLSON: I just gave it to him, Your Honor,
6 because Mr. Snyder talked about it in his direct.
7 I thought it would be nice just to have it.

8 THE COURT: I don't have -- I've got Exhibit numbers 7
9 and 8 here.

10 MR. NICHOLSON: We need to make copies of that.

11 THE COURT: Yeah.

12 MR. MCCULLOCH: So to answer your question, I don't
13 think we object --

14 THE COURT: But you don't know.

15 MR. MCCULLOCH: I don't think we have a basis to
16 object --

17 MR. NICHOLSON: we've been a little informal here,
18 Judge. I'm fine to -- we can deal with that later.

19 THE COURT: Can you make us some copies of that? Then
20 you can look at it and know what you're looking at.

21 MR. MCCULLOCH: It looks like I might be able to tuck
22 it under my pillow tonight. I don't think we're going to
23 get finished today.

24 (Off the Record)

25 MR. NICHOLSON: I have one more witness left after

1 that. And what I would propose to do is hold him over
2 until the morning. But I know --

3 THE COURT: We can do that.

4 MR. NICHOLSON: I don't know about the time issues we
5 talked about when we were all back in chambers.

6 THE COURT: Okay.

7 MR. NICHOLSON: If counsel wants time to look at that
8 now so they can be ready to cross examine in the morning,
9 that's fine with me too.

10 (OFF THE RECORD)

11 CROSS EXAMINATION

12 BY MS. SCHILLACHI:

13 Q Mr. Adams, good afternoon.

14 A Good afternoon.

15 Q My name is Kathy Schillachi, and we haven't been
16 introduced, and I represent Ms. Ballard. Now, at the time
17 of the 2014 computer crash your county emails were not
18 backed up, correct?

19 A I guess only internal to the machine.

20 Q But you didn't have any copy anywhere else?

21 Everything was just on your computer that crashed, correct?

22 A There may have been emails that were copied
23 for specific purposes, but all of them, no.

24 Q And anything copied we assume if it would have been
25 relevant it would have been produced to Ms. Ballard,

1 correct?

2 A I'm not that familiar with her request, so.

3 Q Now, you designated the County attorney, Mr. Tothacer,
4 as the point person for handling Ms. Ballard's FOIA
5 request?

6 A Yes.

7 Q Since the March 2014 computer crash have you started
8 backing up your emails?

9 A I back them up to external hard drive.

10 Q When did you start doing that?

11 A It was shortly after the crash or after we installed
12 the external hard drive.

13 Q And how about text messages? Since -- have you
14 started backing those up anywhere? Printing them out?

15 A No, I have not.

16 Q And why is that?

17 A I generally don't do business of the county using text
18 messages.

19 Q But you have done business of the county using text
20 messages, have you not?

21 A If I have it's been very seldom. I'm not aware of an
22 example, so.

23 Q Have you ever sent a text to any mayors related to
24 county business?

25 A I may have.

1 Q Now, your IT person -- were you here for Mr. Snyder's
2 testimony?

3 A I was.

4 Q And according to him there are backup methods that are
5 not that expensive. For example, he talked about thumb
6 drives. And is that something that you've looked into, the
7 cost of thumb drives?

8 A I'm actually doing an external hard drive backup.

9 Q And how about for the County, have you looked into the
10 cost of thumb drives?

11 A No. I think generally the staff are aware of thumb
12 drives.

13 Q Looked into the cost of CDRs?

14 A No.

15 Q And, of course, there's always the backup, the archaic
16 method of paper, correct? You can always print out an
17 email or print out a text?

18 A You mean every single email and every single text?

19 Q Anything that would be -- that would fall within the
20 state archive document retention requirement.

21 A Yeah. Those seem somewhat vague in cases, though. So
22 you would have to, I think, by the method you're
23 describing, back up -- make a copy of everything, every
24 text and every email.

25 Q But as the county administrator you know which emails

1 are going to be more important than others, so you know the
2 difference between general housekeeping emails and those
3 that have historical value?

4 A I can make an informed judgement.

5 Q Now, as Mr. Snyder testified that he will sometimes,
6 if it's an important text, he will email it to himself or
7 he might print it out. Have you ever done that with a
8 text, emailed it to yourself or printed it out?

9 A I don't think so.

10 Q And it is correct that you produced no text to Ms.
11 Ballard in response to her FOIA, correct?

12 A I did not produce any texts. You are correct.

13 Q And I believe you testified that you are generally
14 aware of the state archive requirement, correct?

15 A Now, are we talking about the housing of records?

16 Q Yes.

17 A Yes.

18 Q And have you recently reviewed those?

19 A We just did on the stand, I believe.

20 Q Well, as the county administrator, under the Public
21 Records Act, you are the one that is ultimately charged
22 with protecting the public record for Newberry County,
23 correct?

24 A I don't know that that's definitive. I know that
25 there are, for instance, several elected officials who are

1 the definitive custodians of the records for their offices.

2 Q Well, don't you think it would be important that you
3 know that, whether or not you're responsible for the
4 document retention for Newberry County? Wouldn't that be
5 an important thing to know?

6 A Yes.

7 Q And are you familiar with the Public Records Act that
8 says that the chief administrative officer of the agency --
9 you would be the chief administrative officer for Newberry
10 county, correct?

11 A Correct.

12 Q That you were the legal custodian of records and
13 responsible for carrying out the duties and responsibility
14 of the Public Records Act. Are you aware of that?

15 A Generally, yes.

16 Q And Newberry County is required to follow the law? Am
17 I right? In general, Newberry County is not above the law.
18 It has to --

19 A You want me to say that Newberry County is lawless?
20 Is that what you're after? What's the question about?

21 Q No. I'm asking you -- Newberry County is a county
22 body --

23 A Everyone should follow the law. I think that should
24 be the case.

25 Q And I believe we have established that Newberry County

1 has no written policies on purging the electronic data,
2 correct?

3 A We default to the State Records Act.

4 Q And what is the State Records Act on purging of
5 electronic data?

6 A I'm not aware of any standards for that, in the State
7 Records Act.

8 Q So you're relying on it, but you're not aware of any
9 standards?

10 A I don't -- I'm not aware that any exist with respect
11 to emails and electronic data.

12 Q But you are aware of the Public Records Act and the
13 requirement to keep public documents in a --

14 A My understanding is that there are three major
15 categories and that one category, the -- I believe the
16 policy records requires that the records be kept forever,
17 essentially. There is another level of records that have
18 to do with correspondence and administrative documents that
19 require a five year retention schedule. And there are some
20 that -- they're housekeeping matters that can be evidently
21 purged at any time. But, as you've said, that, you know,
22 I'm relied upon to use my judgement about these things.

23 Q Well, you can certainly use your judgement, but you
24 also have to follow state mandates and requirements. Now,
25 the County has no document retention policy for emails or

- 1 texts. You would agree with that?
- 2 A I agree. Unless it has to do with something specific
- 3 to those categories.
- 4 Q And does Newberry County provide you with a phone or
- 5 do they give you a stipend?
- 6 A They provide me the phone.
- 7 Q And since 2010 how many phones has Newberry County
- 8 provided you?
- 9 A Two or three, I would guess.
- 10 Q And did you ever get a Blackberry?
- 11 A I've had a Blackberry in the past. I don't recall if
- 12 I have one here.
- 13 Q So you don't recall whether or not you had a
- 14 Blackberry with Newberry County?
- 15 A I don't recall.
- 16 Q How about an iPad? Has Newberry County ever --
- 17 A Yes.
- 18 Q -- provided you with an iPad?
- 19 A Yes.
- 20 Q They have. And just one iPad or several?
- 21 A I believe just one.
- 22 Q And is that iPad still in use?
- 23 A Yes.
- 24 Q And what do you use your iPad for?
- 25 A To read email.

1 Q And you've had that iPad since when?

2 A I'm estimating a couple years.

3 Q And did you ever search your iPad for documents that
4 might be responsive to Ms. Ballard's request?

5 A You would have the same email that my desktop computer
6 had.

7 Q So you did not search your iPad for any responsive
8 documents?

9 A No. I got the iPad after the crash of the hard drive,
10 so.

11 Q And how about the two or three phones that you had?
12 Do you know of any effort to go back and check those phones
13 for any text messages that may have been responsive?

14 A No.

15 Q And you currently have the iCloud capability on your
16 phone, iCloud?

17 A I'm not sure.

18 Q And one question. Why do you use Apple products when
19 it appears Mr. Snyder's testimony that everything in
20 Newberry County is more PC based?

21 A Two reasons. Probably the foremost is what I'm used
22 to and comfortable with. The other is I've always
23 understood that they were less subject to viruses.

24 Q Okay. And do you know what an unfunded mandate is?

25 A I do.

1 Q What is an unfunded mandate?

2 A It's when a higher level of government says you have
3 to do something programmatically or provide some equipment.
4 And it cost money but you don't get money from that higher
5 level of government to implement it.

6 Q And that would be what has been required with the
7 Document Retentions Act, correct? As Newberry County
8 you're supposed to retain those documents?

9 A I don't know that I can agree with that.

10 Q And how about body armor? Is that an unfunded
11 mandate?

12 A That is an issue that's sort of in flux at this point,
13 but there have been some sounding that the State will pay
14 for certain aspects of it. But I've also heard from law
15 enforcement that other things such as managing information
16 might not be paid for, so I'm not sure. I think that's
17 something that's still in the making.

18 Q But at this point body armor is not required by law?

19 A Yeah, I don't want to make a definitive statement
20 about that.

21 Q And in looking at Defendant's 8 -- do you have that in
22 front of you?

23 A I do.

24 Q Just so I'm clear, has that been approved or
25 unapproved?

1 A My initial reaction was that it had not been, but I
2 would be better served, perhaps, to look at a line item
3 budget that was passed subsequent to the budget ordinance
4 to make sure.

5 Q But at this time you don't know whether it's been
6 approved or not?

7 A I'm not certain.

8 Q Well, isn't that a pretty important thing to know from
9 the document retention aspect whether or not that's been
10 approved?

11 A Ma'am, we spend about \$30,000,000 a year, and a lot of
12 this case has been about the idea that the only thing the
13 county has to do is keep up with the most current email
14 backup policies. If it were that easy and that cheap it
15 would be an easier job to do.

16 Q And Mr. Snyder testified that there are inexpensive
17 backups, correct? Thumb drives, CDRs, paper?

18 A External hard drive. That's what I'm using.

19 Q And there was also a document, and I'm not sure the
20 exhibit number -- in Exhibit 8 and Exhibit 9, those are not
21 line items, correct?

22 A I don't have 9 in front of me.

23 Q Well, let's look at Exhibit 8. That is not line
24 itemed.

25 A Exhibit 8 is a request. The line item would evidence

1 whether or not the request was honored. It's in that level
2 detail if the line items are in that level of detail..

3 Q So if it's not line itemed we don't know the actual
4 cost of backup as opposed to everything else, correct?

5 A I'm not understanding your question.

6 Q Well, if you take a look at Exhibit 8, the \$27,000.
7 That doesn't give you a breakdown of what those cost are
8 related to because we don't have any kind of line item
9 breakdown.

10 A It only references a server to use with a Microsoft
11 exchange server.

12 Q And I believe that Mr. Nicholson took you through a
13 South Carolina Code Regulation. I understand he did not
14 make this an exhibit. It talks about the standards for all
15 records storage facilities. That doesn't do you much
16 good if there are no records. Would you agree with me?
17 You agree that having storage facilities just isn't much
18 good if you don't have those records to store?

19 A How is that applicable here? We have lots of records
20 -- what I'm saying is in our facilities where we store
21 records we have lots of records, so much that it's
22 difficult for us to find space for them.

23 Q With the exception of county emails.

24 A We wouldn't store county emails in records facilities.

25 MR. SCHILLACHI: I believe that's all we have.

1 THE COURT: Redirect?

2 MR.- NICHOLSON: Nothing, Your Honor.

3 THE COURT: Thank you, sir. You may step down. We
4 will reconvene until 9:30. Thank you, folks.

5 (Whereupon, court was in recess overnight.)

6 THE COURT: I believe when we left off yesterday, Mr.
7 Nicholson, we were on your case.

8 MR. NICHOLSON: Yes, sir. We would call Mr. Jay
9 Tothacer.

10 AUSTIN J. TOTHACER, JR. having been first duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. NICHOLSON:

14 Q Mr. Tothacer, what do you do right now? What's your
15 job?

16 A I am the Newberry County attorney.

17 Q How long have you been the Newberry County attorney?

18 A Since June 2008, so a little over eight years.

19 Q Let's back up just a hair and tell the Court where you
20 went to college, where you went to law school.

21 A I went to college at Clemson University and I went to
22 law school at USC School of Law.

23 Q Tell us about your legal career, where you've worked
24 and what fields of law have you worked in.

25 A After graduation in law school in '83 I went to work

1 at Berkeley County as the director of the legal department.
2 I was subsequently named county attorney. From there I
3 went to Greenville County. From Berkeley County I went to
4 Greenville County and then I was not employed as a county
5 attorney for a few years, although I assisted a friend who
6 works at McNair who was the Anderson County attorney. And
7 then in June 2008 I accepted an appointment here as the
8 county attorney. So in toto I've been county attorney in
9 three counties and assisted in county matters in all four
10 counties. Generally, as a county attorney I am responsible
11 to, the exception of Berkeley which has a different form of
12 government, the administrator in Berkeley, they have a
13 council/supervisor form of government. And I provide legal
14 advice to all county folks including elected officials
15 unless it's a conflict with county council who is the
16 legislative body that runs county council -- I mean runs
17 the county, I'm sorry. In that, I deal with contractual
18 matters. Well, actually, I deal with pretty much
19 everything except criminal matters. I'm very involved in
20 all four counties that I've assisted or been county
21 attorney. I've been involved in the Freedom of Information
22 Act matters as well as dealing with legislative matters
23 before county council. And I can expand on that if I need
24 to.

25 Q Specifically with regard to the Freedom of Information

1 Act, because I know you deal with other areas of the law.

2 But with regard to FOIA can you tell us about what any

3 CLEs, seminars you've attended over the years about that

4 area?

5 A I have attended many seminars on CLE, both in South

6 Carolina and involve with what the organization known as

7 the International Municipal Lawyers Association. In

8 addition to attending, I have spoken or made presentations

9 at several CLEs as well as to counties where I've worked to

10 officials or employees to make them aware of their

11 requirements under the FOI. And I have also made

12 presentations at organizations. One that stands out is the

13 South Carolina Public Records Association at regional

14 conferences they had as well their annual conference in

15 Myrtle Beach.

16 Q Are you a member of the South Carolina County

17 Attorneys Association?

18 A I am.

19 Q Okay. At those meetings have you discussed at various

20 times FOIA and FOIA related issues?

21 A Yes.

22 Q Are you also on a county attorney Listserv?

23 A I am.

24 Q From time to time do you all discuss FOIA issues in

25 that Listserv?

1 A It comes up from time to time.

2 Q Okay, just to get your perspective, Mr. Tothacer, I'm
3 going to hand you our Defendant's Exhibit 1.

4 MS. SCHILLACHI: The judge has it.

5 THE COURT: You need it?

6 MR. NICHOLSON: That's my next -- well, I don't need it
7 for a while. I'll go ahead and take it.

8 THE COURT: Go ahead and take it.

9 Q Mr. Tothacer, look at Exhibit 2 and Exhibit 1 there,
10 Defendant's Exhibit 1.

11 A Yes, sir.

12 Q Could you identify that document for us?

13 A That is an email that I sent out on December 4th after
14 receiving Ms. Ballard's FOI request to everybody that I
15 felt might have had information that would be responsive to
16 her many items in the request.

17 Q And was this the only communication that you had with
18 these individuals here?

19 A Oh, no, sir. I would touch base with them. If I
20 hadn't heard from them I would either contact them by
21 phone or by emails asking where their information was or
22 how much longer they expected it to be.

23 Q And Ms. Ballard talked about it as well, but when you
24 received the FOIA request did you put in a call to Ms.
25 Ballard's office?

1 A I did. Given the nature of the request, it's been my
2 experience if it's not a pretty straightforward simple one-
3 line request I usually contact the requestor and try to
4 make sure I understand what it is they want, the
5 parameters, the time frames and if they're any specific
6 items I try to address those. I did that, I believe, the
7 day that Mr. Adams handed it to me.

8 Q And when you talked to Ms. Ballard the first time was
9 she there and were you able to talk to her?

10 A She was not there. I spoke with her associate, her
11 partner, who indicated that she was out of the country but
12 he would pass the message on to her as soon as she
13 returned.

14 Q We talked a lot about computers yesterday. Do you
15 have a computer that the County has issued to you?

16 A I do.

17 Q We also talked about external hard drives yesterday.
18 Do you have an external hard drive?

19 A I do.

20 Q How long have you had that?

21 A I've had it mainly since before Dylan Snyder went to
22 work because the person who put it in was Tom that we spoke
23 about yesterday. The IT person at that time. I just don't
24 recall the day or the time, but it was before Dylan
25 arrived. So I think he said yesterday five years. So at

1 least six years.

2 Q Is it your practice to keep your emails on that
3 computer or on the hard drive, whatever exists?

4 A It is.

5 Q Now, again, we talked a little bit -- a lot about Mr.
6 Adams' computer yesterday about a computer crash. You were
7 asked about that in your deposition. And one of the
8 questions you were asked is whether you were concerned
9 about that. And so I'll ask you when you heard about the
10 crash that Mr. Adams had on his computer what were your
11 thoughts? Did you have any concerns over that?

12 A I was not initially concerned because I didn't know
13 the depth of the crash. But as we worked through it I
14 wasn't overly concerned because at least in my experience
15 with what Mr. Adams does and what I do final documents
16 don't end up in emails. There's a lot of drafts. I may be
17 involved, for instance, in an economic development and we
18 may go through five or six iterations of the ordinance.
19 But it's the ordinance that matters is the one that's
20 finally considered by council and passed. So, to my
21 thinking, even if my computer crashes we've got copies of
22 it in other places. And the significant copies would be,
23 you know, the clerk to council's office or, you know, in my
24 case if it's litigation it would be here in the clerk of
25 court's records. So I wasn't overly concerned with it.

1 Q And taking the economic development ordinance example
2 that you gave, would you and Mr. Adams sort of ping each
3 other back and forth with emails about varying drafts.

4 A It's possible, yes, sir.

5 Q Or other members of county --

6 A Right.

7 Q Now let's go to Plaintiff's Exhibit 16. Mr. Tothacer,
8 tell us what Exhibit 16 is, Plaintiff's Exhibit 16.

9 A At first glance it appears to be an agenda of council
10 but because it has notes on it. What this is it's a draft
11 agenda of the -- Mr. Adams, as the administrator, provides
12 what he calls it his annotated agenda so that he provides
13 it to council and uses it as a reminder when he has a
14 meeting. It's not the official agenda because it's got his
15 notes in it. This would not appear in the official agenda,
16 which is published on the web page and also provided to
17 council.

18 Q It's in many respects a working document to get ready
19 for the meeting?

20 A Yes, sir. It's a working document.

21 MR. NICHOLSON: Judge, just to give you a frame of
22 reference of what we talked about yesterday. (Hands up
23 document.)

24 THE COURT: Right.

25 MR. NICHOLSON: That's what we're talking about.

1 Q Now, this page four, it says that there's a note.

2 It's a copy of a note. This page and a portion of the next
3 will redact as it related to executive session matters. Is
4 that right?

5 A Yes, sir.

6 Q Whose handwriting is that?

7 A That's my handwriting.

8 Q And why were those matters redacted?

9 A Again, those were the notes that the
10 county administrator and I had prepared in anticipation of
11 matters that were going to be discussed in executive
12 session, which among other the purpose of matters covered
13 by the attorney-client privilege. And based on that we did
14 not feel that they were something that should be disclosed.

15 Q Did the matters that you redacted there in this
16 annotated working document, did it include your work
17 product?

18 A Yes, sir.

19 Q Now, the actual agenda, did Ms. Ballard have access to
20 the actual agenda?

21 A Yes, sir.

22 Q Tell us about that.

23 A Ms. Ballard's initial request, we had several
24 conversations, and she agreed as far as agendas and minutes
25 that if she could locate it on the web page she would find

1 those herself. So we provided everything that was not
2 available on the web page, which consist of documents I
3 think 2011 and back and then January meeting, which had not
4 yet been published to the web page. So since this is
5 August 2014 she would have had access to the agenda and
6 also the minutes.

7 Q So, to be clear for the record, the documents that are
8 in Defendant's Exhibit 2, this big box here, the FOIA, it
9 would not have any agenda or meeting items that would have
10 been on the web?

11 A Yes, sir. Unless they appeared in some other
12 document. But generally speaking responsive to that
13 request they would not have.

14 Q Now, Ms. Ballard mentioned that document yesterday and
15 the redaction. But before yesterday had you ever heard any
16 complaints or anything about that redacted page from Ms.
17 Ballard or any of her representatives?

18 A No, sir, I had not.

19 Q Let's talk a little bit about the States Record Act.

20 A Yes, sir.

21 Q Are you generally aware of the States Record Act and
22 the retention schedules that flow from it?

23 A Yes, sir. Generally aware.

24 Q You were asked in your deposition if you know about
25 any -- do you know about any requirements relative to a

1 county administrator concerning the -- concerning retention
2 schedules from the Records Act?

3 A No, sir.

4 Q What about any items specific to a county attorney in
5 the retention schedules?

6 A No, sir. I think the exact question in the deposition
7 was beyond what the bar may require. And, no, sir,
8 certainly not to a county attorney.

9 Q Let's talk about executive session and specifically
10 announcing the specific purpose of the statute. Are you
11 generally aware of that requirement?

12 A Yes, sir.

13 Q To your understanding, what is that requirement?

14 A Requirement is before you go into executive session
15 there are five reasons that a county council can go into
16 executive session. You have to fit within one of those
17 reasons to be able to go into executive session. You
18 announce the purpose, you vote going into executive
19 session. Once you enter executive session whatever you
20 discussed there is a closed session. If any action is to
21 be taken it is taken after you are out of the executive
22 session and you report out and then there could be a motion
23 made.

24 Q And typically, since you've been the county attorney
25 now, since you've been the county attorney in Newberry

1 County how does Newberry County announce the specific
2 purpose of a matter voted to go into executive session?

3 A Since I have been county attorney, we announce it by
4 if we know ahead of time what the executive session is
5 going to be about. We will name or list a specific one of
6 five reasons that you can go into executive session. We
7 quote the statute in its entirety, that section of the
8 statute. It's 30-4-708, 1 through 5, I think.

9 Q Was that your experience with other counties in which
10 you've worked at?

11 A Yes, sir. It's been my experience for quite some
12 time. Actually, when I was in Greenville having spoken at
13 that South Carolina Public Records Association annual
14 meeting I was on a panel with Jay Bender twice. And Jay
15 has become a good friend of mine, contrary to what a lot of
16 other county attorneys feel, and I actually asked Jay while
17 I was in Greenville if that would be adequate for the
18 purpose of entering an executive session. And he said yes
19 it would. He also, in fairness, said if we could add more
20 it would be good to add more. But he said that's adequate
21 to go into an executive session.

22 Q Well, look at Exhibit 26.

23 MR. NICHOLSON: I'm sorry, Judge. I need to get
24 Plaintiff's 26.

25 THE COURT: I'll get it.

1 Q So those are the minutes of a meeting from the City of
2 Columbia, I believe, plaintiff's Exhibit 26?

3 A Yes, sir. I don't think -- I think they're calling
4 them minutes but I believe they're actually an agenda. I
5 don't have the whole thing. I just have the last page.

6 Q It does say agenda, I apologize. Okay. It does say
7 agenda. So this doesn't really talk about the specific
8 purpose? It's just an agenda?

9 A Well, yes, sir, it's an agenda. I can comment on it
10 if you would like me to.

11 Q Okay. Well, --

12 A It shows discussion of negotiations incident to a
13 contractual arrangement, cites the code section. In
14 Newberry, we go ahead and cite the whole section and then
15 it list Bull Street Development agreement, which is not
16 required in my opinion. There are times when we can
17 disclose what the matter is and we do. But here, you know,
18 I'm not the City of Columbia's attorney, so I don't know
19 what was behind that.

20 Q Why are there times when you do specifically name the
21 manner at a time that you do not?

22 A I'll give you an example using economic development.
23 Quite often when we're using economic development the
24 company is not yet ready to be identified and sometimes
25 what economic developers will do is they will identify it

1 through the name. When I was in Greenville we had one that
2 was called Green Giant that actually turned out to be John
3 Deere. And so if the company's okay with being named some
4 name then you can identify negotiations incident to
5 economic development incentives provided to Green Giant
6 because it's not giving anything away. But we certainly
7 would never had done John Deere until after a transaction
8 had been consummated or not.

9 Q Just in your experience in economic
10 development matters, if the cat comes out of the bag early
11 what's going to happen to that project?

12 A Yes, sir. And as far as legal matters --

13 Q No, no, what happens if --

14 A It comes out?

15 Q If the cat comes out of the bag early what may happen
16 with that industry?

17 A In my experience, that's never happened, Mr.

18 Nicholson, so I can only suppose. I can tell you from an
19 experience in Berkeley County what we were doing with the
20 German company that made it abundantly clear that if their
21 deal got disclosed before both parties agreed it would not
22 be a deal.

23 Q Now, you talked about how you've done in other
24 counties and how you do executive session in Newberry
25 County. Have you had discussions with other, just in your

1 dealings with other county attorneys on the Listserv and
2 FOIA, seminars, etc. have you had general discussions with
3 other county attorneys about how they do it?

4 A Yes, sir.

5 Q Do you believe the way Newberry County announces their
6 specific -- announces for specific purpose of executive
7 session is consistent with the way other counties in South
8 Carolina do?

9 A Yes, sir. The counties that do it right, I should
10 say.

11 MR. NICHOLSON: One second, Your Honor. Judge, thank
12 you.

13 THE COURT: Cross.

14 CROSS EXAMINATION

15 BY MR. MCCULLOCH:

16 Q Mr. Tothacer, you have -- let's see. You graduated
17 in '83. You worked in three different counties in some
18 capacity either as county attorney or in a secondary role
19 in that capacity? Is that correct?

20 A Actually, four, Mr. McCulloch.

21 Q Four, all right. And those counties were, again?

22 A Berkeley, Greenville, I assisted county attorney in
23 Anderson and I'm here in Newberry, the fourth.

24 Q None of those counties have record retention policies,
25 I take it?

1 A I believe that we had record retention policies in
2 both Greenville and Berkeley. Since I was not the county
3 attorney in Anderson it never came up.

4 Q So you don't know whether they have one?

5 A Anderson County?

6 Q Right.

7 A No, sir, I don't.

8 Q And you certainly have no record retention policy here
9 in Newberry?

10 A We have, within our HR policies, we have some record
11 retention policies that talks about what you're supposed to
12 do and not do with your computer.

13 Q Well, that's a personnel file. That's not public
14 historical documents, is it?

15 A I differ with you. That's one of those policy
16 documents that's been approved by county council.

17 Q But there's no record retention policy that addresses
18 the public record statute that you mentioned or the --

19 A Not generally for Berkeley -- I mean, for Newberry
20 County.

21 Q Or the state archives preservation regulations that
22 are law? There's no addressing that in any policies in
23 writing in this county?

24 A I think someone responded yesterday, the clerk of
25 court certainly follows what's there and she may have

1 adopted her own record retention policies, as does the
2 elected Sheriff. So I can't comment on whether or not
3 there's any in the elected officials.

4 Q But you as county attorney have certainly never sat
5 down at your computer and prepared a policy and presented
6 it to the county administrator?

7 A No, sir.

8 Q And you've never been requested by the county
9 administrator to do so in any of these areas of public
10 record retention, right?

11 A No, sir.

12 Q Or archive regulation compliance?

13 A No, sir.

14 Q And you don't even have an FOI policy here in Newberry
15 County, do you?

16 A We do have an FOI policy. If you go on the website
17 and click on FOI it will tell you what's available and it
18 gives you a form to make the request and who responds to it
19 for the county. Each individual elected official handles
20 their own FOI.

21 Q But that's how I ask for it is what you're describing,
22 correct?

23 A Well, it tells you what the FOI is, I think. Actually,
24 it has a link to the FOI statute.

25 Q Let's not split hair here. Is there an FOI policy for

1 this county that directs the people who work for the county
2 who are charged -- well, actually it's correct that under
3 section 30-120 -- I think you mentioned that just a moment
4 ago so you have some familiarity with that. Chief
5 administrative officer is responsible as the custodian of
6 all of the county public documents, correct?

7 A Yes, sir. I'm sorry, I thought you were talking about
8 FOI. This is records.

9 Q Right. Well, I may be moving around on you. I'll
10 slow down. So looking at that statute the chief
11 administrative officer of Newberry County would be?

12 A Legal custodian of records.

13 Q Right. And that person would be Mr. Adams?

14 A Yes, sir.

15 Q So has he asked you to prepare a policy that directs
16 the employees, people working for this county, on what
17 documents they are to retain and how they are to retain
18 them and what documents must be retained?

19 A As far as I'm aware, other than what I mentioned with
20 the HR manual, and not talking about elected official
21 staff because they are, too, county employees, no, sir, he
22 has not.

23 Q Not at all?

24 A In fairness, the other three counties that I've worked
25 in, the two that have records retention policy, it did not

1 fall to the county attorney.

2 Q It did what now?

3 A It did not fall to the county attorney to draft that
4 policy. I wasn't directed in either Berkeley County or
5 Greenville.

6 Q But the other county -- at least two of the other
7 counties have policies?

8 A Yes, sir.

9 Q Well, it's not about whose fault it is. This is about
10 whether there is or there isn't compliance with the law,
11 isn't it?

12 A Yes, sir. But you asked whether or not I have been
13 directed by Mr. Adams as the administrator to create
14 policies. I wasn't asked in the two counties that have
15 retention records.

16 Q Okay. They must have asked somebody else because they
17 certainly had a policy?

18 A I believe that they consulted with the Department of
19 Archives.

20 Q You never did that, did you?

21 A Where?

22 Q Did you here in Newberry consult with the Department
23 of Archives?

24 A No, sir.

25 Q You were never directed to do so by Mr. Adams?

1 A No, sir.

2 Q You're aware of the archive on -- today, you're aware
3 there are regulations about from the Department of Archives
4 that require the retention of records?

5 A Generally speaking, yes, sir.

6 Q You recall being deposed?

7 A Yes, sir.

8 MR. MCCULLOCH: And this is marked, Your Honor, as 27.

9 Q I'm going to give you the unofficial copy of 27. Take
10 just a second and look at that. Make sure that looks like
11 your deposition.

12 A Yes, sir.

13 Q I'm going to ask you to look at page 58.

14 A Yes, sir.

15 Q And if you will go along with me here. I'm going to
16 read the question and you're going to then read me the
17 answer.

18 A Okay.

19 Q In the middle of that page at line ten, "Okay, do you
20 know whether or not you as the county attorney are under
21 any kind of county retention policy aside from the South
22 Carolina Bar?"

23 A "Not that I'm aware of."

24 Q "Do you know whether Wayne Adams is subject to any
25 kind of Newberry County document retention policy?"

1 A "Not that I'm aware of."

2 Q "And is the county governed by the State Archives
3 Document Retention Requirements?"

4 A "I really don't know. I know that they offer
5 guidelines. I don't know if there are requirements from
6 them."

7 Q "And as the point person on the FOI request have you
8 looked into whether or not Newberry County is subject to
9 the State Archives Retention policies?"

10 A "I have not."

11 Q Continuing on page 29, "Have you ever seen the State
12 Archives Document Retention requirements?"

13 A "Since I've been in Newberry I have not. I believe
14 either when I was in Berkeley County or Greenville I may
15 have seen parts of it."

16 Q So it's hard to know what the law requires if you
17 don't read the law, right?

18 A As it relates to record retention, I'd have to say,
19 yes, sir, I haven't read the law to its entirety.

20 Q Now, these associations that you mentioned belonging
21 to, I think one was the Association of County Attorneys.
22 What were the other? Association of Counties, I assume?

23 A Well, no, sir. The South Carolina Association of
24 County Attorneys used to be aligned with the South Carolina
25 Association of Counties. It is not. The other

1 organization I mentioned was the International Municipal
2 Lawyers Association which is a national organization. And
3 then I've given those presentations to the South Carolina
4 Records Association -- Public Records, I'm sorry.

5 Q You'd agree with me when I say that those associations
6 recommended to the audience in these seminars about FOI
7 that you have a policy that addresses what should be kept
8 in the broader scheme of public records and FOI request and
9 the ability to respond appropriately and to conform to the
10 legal requirements to the Freedom of Information Act those
11 associations recommend written policies, don't they?

12 A I'm sorry, Mr. McCulloch, you confused me again.
13 We're talking about FOI and we're talking about records
14 retention. They're two separate things.

15 Q Well, they are and they aren't. Wouldn't you agree
16 that you can't provide documents pursuant to the FOI if
17 you're not retaining and preserving the documents?

18 A I suppose you have to have the record to provide it.

19 Q Well, if you don't have anything you got nothing to
20 produce. Isn't that the simple answer?

21 A Yes, sir.

22 Q So if you want to avoid having to produce things you
23 just don't save them, right?

24 A I wouldn't agree with that. I would never recommend
25 to my client that they don't save something.

1 Q That's not my question. If you don't save them you
2 can't produce them. That's my question.

3 A Yes, sir. Your client asked for text messages that we
4 don't have, so I couldn't produce them.

5 Q And there was no effort to preserve them, whether or
6 not they came -- fell under the aegis of the law requires
7 to be preserved? There was no effort to study it?

8 A Actually, at the request of your client, I contacted
9 Verizon to see if we could recover those, and was informed
10 that no we couldn't unless we had asked for a service prior
11 to the time of the request.

12 Q And those request by Ms. Ballard were related to Mr.
13 Adams' cell phone?

14 A Yes, sir.

15 Q Did you go to Mr. Adams and say can I see your cell
16 phone so I can pull those text messages off if they
17 relate to county business?

18 A Yes, sir, I did.

19 Q And were there any or had they been deleted?

20 A There were none from what I reviewed that related to
21 the request.

22 Q Did you provide that information to Ms. Ballard?

23 A Yes, sir, I did.

24 Q And as to this -- let's go back to that question that
25 I asked you about the associations. Do you agree with me

1 that the associations recommend policies for the retention
2 that the counties have policies for the retention of
3 documents that satisfy their state laws?

4 A In my 30 plus years of attending those, I don't
5 believe I've ever seen them deal with records retention.
6 The default is to the State Department of Archives and
7 History. And the other part of your question was is it an
8 FOI policy. I'm pretty familiar with most of the FOI
9 policies in the state with state agencies. And I
10 don't believe any of those address records retention.

11 Q Well, how in the world will anybody ever satisfy the
12 legal requirement?

13 A You have two policies that you'd be dealing with. FOI
14 is responsive to a request under the FOI for meetings
15 and then the records retention as to what your records
16 retention is going to be. I know that you think they're
17 connected, but it's from policy standpoint they're not.
18 They would be promulgated separately. They're not
19 connected.

20 Q But you only promulgated the production side, no
21 policy as to the preservation side, correct?

22 A Yes, sir. You've already asked me if we have a
23 records retention policy.

24 Q And I recognize you don't think those are related in
25 any fashion?

1 A Oh, I think they're related. I would agree with you
2 if you don't have the record retained then you can't
3 produce them. But when you ask about an FOI policy, again,
4 I've never been in an organization that as part of its FOI
5 policy talks about the records retention requirements.

6 Q In your direct questioning you were asked your -- I
7 think it's Defense Exhibit 1 which is an email requesting
8 people provide responses to this FOI request?

9 A Yes, sir.

10 Q And that went to who? Everybody in the department?

11 A It went to everybody that I felt would have
12 materials responsive to Ms. Ballard's request.

13 Q Would be relevant or likely to have had some
14 involvement. All right. But those are the same people
15 who've never been told in any written policy or unwritten
16 policy what they're supposed to be keeping, right?

17 A With the exception of her client, Mr. Jayroe, I
18 believe the court administration has record retention
19 policy, so I would assume that he was familiar with those.
20 As to the four county employees there's no written policy.

21 Q And there's no unwritten policy is it? No instructions
22 given to them whatsoever on what they're supposed to keep
23 in the case of an FOI request?

24 A I'm sorry.

25 Q That's not a hard question. The people you sent the

1 email to don't know what they're supposed to be preserving
2 because you haven't told them, the county, not you. The
3 county has not given them a written policy in what they're
4 supposed to keep?

5 A I would agree they've not given a written policy, but
6 I would disagree with you because I think Lori Renwick, who
7 is the clerk to council, certainly keeps everything she's
8 supposed to keep. I think if you go there you can
9 see agendas and minutes and resolutions and ordinances that
10 county council has considered. Ms. Cromer, who is the
11 finance director, I'm sure keeps all sorts of information
12 with grants that we deal with, with payroll records. So
13 there's no written policy about record retention. But you
14 said unwritten. I think they're very well aware of what
15 they need to keep for their position.

16 Q But if there's no policy they certainly can't violate
17 it if they don't keep the records.

18 A Yes, sir. I'm not sure that violating the policy for
19 record retention is going to matter if the IRS comes in and
20 wants records about FAA grants that Ms. Cromer keeps.

21 Q They matter to this fellow right next to you. That's
22 what this lawsuit is all about.

23 A Yes, sir. And, I'm sorry, but I'm not aware of
24 anything that Ms. Ballard has suggested we haven't
25 provided, so I don't know how not having a written policy

1 has caused her not to receive the information that was in
2 her request.

3 Q Have you -- now, you mentioned that you have a backup
4 to your hard drive. You have a computer which is a county
5 computer?

6 A Yes, sir.

7 Q And you have I think an external drive?

8 A Yes, sir.

9 Q And the purpose of the external drive is what?

10 A The purpose is to backup my documents but also to
11 serve as an adjunct memory because the memory that's
12 provided in county computers is not adequate for me as an
13 attorney in the documents that I review and handle.

14 Q You ever heard of the old country expression what's
15 good for the goose is good for the gander?

16 A Yes, sir.

17 Q So why in the world you go to the protection that you
18 have for your own public business and not have a policy for
19 every other public employee?

20 A I'll give you an answer, Mr. McCulloch, because I'm
21 different than every other employee, just as the Sheriff's
22 Office uses a secure email system because it's required by
23 SLED and State Department of Public Safety. That's not
24 appropriate for every other employee in the county. What I
25 do as the county attorney is not handled by every employee

1 in the county. We have clerks who very infrequently would
2 have access to a computer, if they had access at all. And
3 so therefore there's not a need for every county employee
4 to have an external backup or external hard drive.

5 Q So it's not important for there to be backup for the
6 mundane county non lawyer employees?

7 A I think, Mr. McCulloch, what this is all about is it's
8 important to have backup to provide information if there's
9 an FOI request, which Ms. Ballard's sitting in front of
10 everything that we produced not including what she may have
11 produced herself. I'm not aware of any allegation that
12 says we didn't produce something or that somebody believes
13 there's something that's out there. So while backup is
14 certainly important, nice to have, the economic realities
15 are I don't know that everybody can afford backup,
16 understands backup. And also I don't believe there's
17 anything that hasn't been of significance that hasn't been
18 produced.

19 Q Well, would you agree with me that the public records
20 retention laws are really they don't exist just to respond
21 to FOI request? They exist to preserve important
22 historical records of counties doing business?

23 A Yes, sir.

24 Q That's so the public knows how the county is doing
25 their business?

- 1 A Yes, sir.
- 2 Q Because it is their business?
- 3 A Yes, sir.
- 4 Q It's their money?
- 5 A Yes, sir.
- 6 Q The results fall heavily on the public?
- 7 A Yes, sir.
- 8 Q So it's not just to figure out a way to satisfy the
- 9 FOI, is it?
- 10 A No, sir.. That's what I was explaining when I said to
- 11 separate it.
- 12 Q Now, with regard to the crash you were asked about.
- 13 You said mostly it's just drafts and that the finals -- the
- 14 final documents of, say, interaction with some business
- 15 that wants to locate in the county, those always go in a
- 16 file?
- 17 A Yes, sir. Those historical documents, to use your
- 18 words.
- 19 Q Well, preceding every final document there's a dance
- 20 of documents, right? There's an exchange of information,
- 21 documents -
- 22 A I wouldn't say every document. But it happens in many
- 23 cases.
- 24 Q And aren't those important enough to keep?
- 25 A They may be. They're not required to be kept.

1 Q Not in Newberry County they're not, correct?

2 A Not under the FOIA Act.

3 Q Well, we might differ on that.

4 A Yes, sir.

5 Q But you're not overly concerned about the lack of any
6 policy that indicates and dictates what must be kept and
7 what need not be kept?

8 A No, sir. I believe there are general policies in the
9 records retention and the Records Act that talks about it.
10 I believe that we meet all of those requirements.

11 Q And as to the executive session that you were asked a
12 series of questions about the executive session, in
13 particular the one on -- in August 2014, but which was
14 Exhibit 12, I believe, you believe that reciting the
15 statutory language is sufficient to satisfy the requirement
16 of 30-4-70, do you?

17 A Yes, sir. I'm familiar with it, Mr. McCulloch. I do.

18 Q So you think that where the statute says the presiding
19 officer shall announce the specific purpose of the
20 executive session that it is sufficient to simply
21 recite what is required by statute?

22 A Yes, sir. I believe based on my experience and my
23 conversation with Jay Bender, who whether you know or not,
24 has up until recently been the attorney for the South
25 Carolina Press Association, the strongest advocate for FOI.

1 And if you see in many of these FOI cases that go before
2 the Supreme Court, he generally appears as counsel in those
3 cases.

4 Q Well, Mr. Bender's not here, is he, to offer --

5 A No, sir.

6 Q -- his expert opinion?

7 A No, sir.

8 Q Did he give you that expert opinion in an email that
9 is not preserved?

10 A No, sir. He didn't give it to me in an email. He
11 gave it to me in a conversation while we were appearing on
12 a panel discussing FOI before the South Carolina Public
13 Records Association.

14 Q Did you pay him for that opinion?

15 A No, sir.

16 Q You know the old country expression about --

17 A Yes, sir, I do. But I'm inclined to believe when Jay
18 Bender says something, given his experience and knowledge
19 in the field.

20 Q Now, let's talk about your -- you participated in
21 this lawsuit, did you not?

22 A Which lawsuit?

23 Q The lawsuit that brings us here. This FOI lawsuit.

24 A Oh, yes, sir.

25 Q Did you participate, and I assume you participated, in

1 the preparing the Defendant's Responses to Interrogatories?

2 A Yes, sir. I reviewed those. We have an attorney who
3 prepared them.

4 Q Let me ask you to take a look at 24. I've got a copy
5 of it. The judge has the notebook there. Now, this is
6 marked, but it's not the official exhibit. Your Honor has
7 the official one.

8 MR. MCCULLOCH: And, Your Honor, if you'll indulge me
9 because we were, after much wrestling, were not quite able
10 to get to our stipulations which would have covered much of
11 this. I think it's important to jog through this.

12 THE COURT: Yes, sir.

13 Q Mr. Tothacer, would you look at interrogatory number
14 9?

15 A Yes, sir.

16 Q And in much the same fashion as we did with your
17 deposition, I'll read the interrogatory question if you'll
18 the answer, please. Number 9, "Describe all computer
19 programs and data that are backed up, the software used to
20 create the backups, and the timing or frequency of the
21 backups."

22 A "Newberry County does not use end user backups."

23 Q Interrogatory number 10, describe the media used for
24 backing up your computer programs, e.g. DAT tapes, burning
25 to CD or DVD, etc."

- 1 A "See interrogatory number 9."
- 2 Q And interrogatory 9 was?
- 3 A "Newberry County does not use end user backups."
- 4 Q "Identify the application programs, data and time
5 period for which you have backup media."
- 6 A "See interrogatory number 9.", which is "Newberry
7 County does not use end user backups."
- 8 Q Interrogatory number 13. We're not going to read them
9 all, just two more. Interrogatory 13, "Describe any policy
10 of purging electronic data from your computers if you have
11 published guidelines or handbooks which describe or dictate
12 this process. Identify all documents with sufficient
13 particularity to enable the Plaintiff to request production
14 of such documents."
- 15 A "Newberry County has written no policy concerning the
16 purging of electronic data."
- 17 Q And interrogatory 14, "Describe any files, data or
18 programs used by Newberry County that have been
19 archived since 2009."
- 20 A "See interrogatory number 9.", which is, "Newberry
21 County does not use end user backups."
- 22 Q How about flip over a page or so. Interrogatory 19,
23 "Identify a web based cloud storage locations used by
24 Newberry County to store electronic data."
- 25 A "None."

1 Q Now, were you aware of in October 22nd when the letter
2 of Mr. Nicholson. This is not an exhibit. I'm just going
3 to ask you to take a look at it and see if that's anything
4 you've seen. My question is --

5 A I don't recall it, Mr. McCulloch, and I say that
6 simply because if I had been copied on it I would feel
7 confident I looked it. I won't say I didn't see it.

8 Q Well, let me characterize this and read the specific
9 passage and see if you think it's a correct statement of
10 fact. This is a letter of Mr. Nicholson responding to Ms.
11 Ballard's continuing questions about her FOI request. And
12 it is specifically is responsive to several specific
13 interrogatory request. And it says as regards to
14 interrogatory 13, that we just read, Mr. Nicholson's letter
15 states, "Regarding interrogatory 13 Newberry County does
16 not have unwritten policies concerning the purging of
17 electronic data." Is that a correct statement as well?

18 A That's what's written. I don't believe it's correct.
19 I believe it's a typo, because if you look at the answer to
20 interrogatory 13 it says Newberry County has written no
21 policy, so I think it would have better said Newberry
22 County does not have written policies.

23 Q Well, it could also mean that there -- your lawyer was
24 indicating there were no written or unwritten policies
25 about purging data.

1 A It could.

2 Q That's another way to construe it?

3 A Yes, sir.

4 Q Now, Exhibit 25. We're going to look at Exhibit 25.

5 These are the Defendants' responses to request for
6 production in this litigation. And may I correctly
7 assume as county attorney you had some participation in
8 this?

9 A Yes, sir. I reviewed it.

10 Q And let me, as we have done previously, if you'll look
11 at request number 1, "All document retention policies,
12 rules or guidelines in use or relied upon by Newberry
13 County from 2013 to present are requested here." And the
14 response?

15 A "Please refer to answer to interrogatory 13. Newberry
16 County has written no policy concerning the purging of
17 electronic data."

18 Q Request number two, "All FOI policies, rules or
19 guidelines in use or relied upon by Newberry County from
20 2013 to present?"

21 A "None."

22 Q Now, these interrogatories or these request for
23 production, these don't require the production of policy
24 for executive -- the conduct of executive sessions. But if
25 they had, or let me just ask you, are there any written

1 policies for the conduct of executive sessions in Newberry
2 County?

3 A I would suppose it would be 30-4-7 which is the State
4 Code which talks about what executive sessions are for, the
5 practice to enter into them and how you report out of them.

6 Q We can agree there is a state law that is the umbrella
7 mandate for the conduct of executive sessions?

8 A Yes, sir.

9 Q We agree on that. My question to you is does this
10 county, whether by policy, ordinance, memo have anything in
11 writing that instructs its council how to conduct
12 themselves entering into an executive session?

13 A Mr. McCulloch, I'm not sure I know that. Council has
14 adopted rule and I believe it's part of their counsel
15 rules. They address functions of meetings. I couldn't
16 tell you whether it does or does to have anything to
17 address in executive session.

18 Q But you don't know?

19 A No, sir.

20 Q And do you know whether there is any policy, memo,
21 written thing that instructs council what they can do in
22 executive session, understanding there's a state law?

23 A Other than as it would exist in those council rules.

24 Q Would you flip over to the second page to request
25 number six? "All documents evidencing the alleged computer

1 crash of Wayne Adams' county computer in 2014 in the
2 efforts to locate FOIA responsive documents on the
3 computers at issue." And the response?"

4 A "None located."

5 Q Did you participate in the crash of that computer in
6 any fashion in March 2014 when -- I think it as March when
7 it occurred?

8 A No, sir.

9 Q Were you aware of it?

10 A I was only aware that Mr. Adams had to get a new
11 computer.

12 Q You were not aware there was a crash of that computer?

13 A Not in March 2014; no, sir. I have obviously been
14 made aware of it since this -- Ms. Ballard's --

15 Q Well, sure. But I guess my question is that nobody in
16 contemporaneous with the collapse and crash of the computer
17 have a potential loss of mandated document -- documents
18 that are mandated to be retained. Nobody brought that
19 situation to your attention at that time, that issue?

20 A I differ, Mr. McCulloch, mandated documents. But as
21 far as bring it to my attention, no, sir, they didn't. As
22 Mr. Adams indicated yesterday and Mr. Snyder indicated,
23 Dylan Snyder was our IT person. He was contacted when it
24 crashed and he attempted to get whatever information was on
25 the hard drive, which I think he referred to as toast.

1 Q Well, let me try my question again. Nobody came to
2 you expressing concern that a crash of the county
3 administrator's computer had occurred and that it might
4 have resulted in the loss of documents required by law to
5 be preserved and maintained?

6 A I'll go so far as to say nobody came to me about Mr.
7 Adams computer with a concern about documents that may have
8 been lost.

9 Q So that's a yes?

10 A It's not a yes to your question, because you keep
11 saying it's mandated documents, which I don't agree with.

12 Q Well, if we assume -- Okay. Now, let's look at
13 Exhibit No. 29, which will be a new exhibit. And let me
14 ask you if you can identify this.

15 MR. MCCULLOCH: Your Honor, let me -- this is the
16 Defendant's responses to request to admit. The affidavit
17 is already in as Exhibit 20. Judge, without -- I'll
18 scratch this out. These are my little notes. This is what
19 we're going to be talking about.

20 Q In fact, if you will pass that up to the judge. It's
21 an official document. That's a document that you can
22 identify?

23 A It appears to be our responses to the request to
24 admit.

25 Q Surely, you participated in the construction of these

1 responses?

2 A Yes, sir.

3 MR. MCCULLOCH: Your Honor, we would move to introduce
4 as Plaintiff's 29.

5 MR. NICHOLSON: No objection, Your Honor.

6 THE COURT: All right. Without objection 29 is in
7 evidence.

8 (Whereupon, Plaintiff's Exhibit 29 was entered into
9 evidence.)

10 Q We're going to, as we have done before, these are
11 Defendant's responses, that is the responses of Newberry
12 County to request to submit statements of fact, correct?

13 A Yes, sir.

14 Q Request number five, "Wayne Adams uses or used the
15 text function on 803-924-0980 to communicate regarding
16 county business during 2015."

17 A "Denied."

18 Q Now, that phone number, which occurs in that
19 interrogatory and the next two, is Mr. Adams' cell phone,
20 is it not?

21 A Yes, sir.

22 Q The one he would use, if it all, for personal and
23 county business?

24 A Yes, sir.

25 Q Request number six, "Wayne Adams used the text

1 function on the same number to communicate regarding county
2 business during 2014."

3 A "Denied."

4 Q Request number seven, "Wayne Adams used the text
5 function on the same number to communicate regarding county
6 business during 2013."

7 A "Denied."

8 Q Now, you were in the courtroom yesterday, were you
9 not?

10 A Yes, sir.

11 Q Do you recall Mr. Adams conceding that he probably had
12 at some point or other used text messaging for county
13 business?

14 A I believe I heard him say in a specific instance with
15 the mayor of Little Mountain that he advised her that the
16 information she was seeking was available on the website,
17 yes, sir, to that extent county business.

18 Q Now, in request number 8, text by Wayne Adams on that
19 number, which related to county business are public
20 documents. Now, there is a response there but I'm going to
21 call your attention, you may read the entire response, but
22 in particular let me ask you to begin with the highlighted
23 -- I think your copy is highlighted, is it not?

24 A Yes, sir. The next to the last sentence.

25 Q It begins with The county.

1 A Yes, sir.

2 Q What does that say, as the response?

3 A "The county does admit that text messages sent for the
4 purpose of conducting county business would be a public
5 document under FOI provided that such texts may be exempt
6 from disclosure pursuant to applicable exemption provisions
7 in FOI or other law."

8 Q And request number nine -- and you may read the
9 balance of it or counsel may have you read the balance of
10 it, but it's there. Request number 9, "Emails by Wayne
11 Adams on one or more of his personal email accounts which
12 relate to county business or public documents."

13 A You want me to start again at your highlighted
14 portions?

15 Q There is a response that is longer than what I'm
16 asking you to read, but if you'll just read the highlighted
17 portion.

18 A "The county does admit that email messages sent for
19 purpose of conducting county business would be a public
20 document under FOI provided that such emails text may be
21 exempted from disclosure pursuant to applicable exemption
22 provisions and FOIA or other law."

23 Q And, similarly, yesterday during Mr. Adams' testimony
24 he conceded that he used his computer email system for
25 public business, county business?

- 1 A His computer at work email.
- 2 Q Right.
- 3 A Yes, sir.
- 4 Q Is it also possible upon his cell phone to email? It
- 5 has that function as well. It's an old Apple Mac.
- 6 A I'm not familiar with his phone. He and I have
- 7 different phones. I know on my phone it is possible to
- 8 email or respond to an email.
- 9 Q So you can on your phone not only receive emails --
- 10 send and receive emails?
- 11 A On my phone, yes, sir.
- 12 Q Just as if you're sitting at your office in front of
- 13 the computer?
- 14 A Yes, sir.
- 15 Q Another good reason to have checked his cell phone for
- 16 emails so as to be responsive to the request for emails,
- 17 even though his computer had crashed?
- 18 A The way it works on my phone, I would assume it's the
- 19 same for his, Mr. McCulloch, any email transactions that I
- 20 have on my phone appear on my computer, so there's not an
- 21 email that would be generated, responded to or appear on my
- 22 phone that would not also appear on my computer Outlook
- 23 email file as with Mr. Adams, I would imagine.
- 24 Q But if your computer at the office crashes your one
- 25 backup is your cell phone, isn't it?

1 A If you still have those emails. Mine - unfortunately,
2 I clear my emails on my phone everyday.

3 Q You don't know what Mr. Adams' policy is, I presume?

4 A Do not have any idea.

5 Q And you don't know whether he used a cloud. Do you
6 use a cloud?

7 A I use a cloud. There's an app that with those
8 organizations I belong to called Dropbox, which I believe
9 is a cloud generated application. I don't use it for me.
10 I use it to get information.

11 Q So you don't use the Apple Cloud as a storage --

12 A Not at all, no, sir.

13 Q -- facility for photos --

14 A No, sir.

15 Q -- or emails or whatever?

16 A I don't have access to the Apple Cloud.

17 MR. MCCULLOCH: Excuse me, Your Honor.

18 Q You were nominated, maybe drew short straws is a
19 better word, to be the point person for collecting
20 information that would be responsive to Ms. Ballard's FOI
21 request. Is that correct?

22 A I'm the person. I wasn't nominated. That's what I
23 provide as part of my job.

24 Q Okay. And in the course of that it is correct that
25 you spoke with Mr. Adams about the FOI and about the

1 necessity to collect emails and so forth?

2 A Yes, sir. He was one of the recipients of that email
3 I sent out.

4 Q Is it correct that Mr. Adams told you that he was the
5 only one, that he wouldn't allow anyone else to review his
6 computer --

7 A No, sir. He did not tell me that.

8 Q That's not correct?

9 A He did not tell me that.

10 Q You didn't tell that to Ms. Ballard in a conversation
11 on the phone?

12 A I told her that I did not review it. I relied on him.
13 I have no reason to distrust him. He never instructed me
14 not to review it.

15 Q So just so we're clear, you did have a conversation
16 with her about his computer and his emails?

17 A I believe she asked me did I review it personally or
18 did I allow him to review it, as I did with all the other
19 people. She never asked me about her client, Judge Jayroe.
20 She never asked me about the finance director, whether or
21 not I relied on them providing it or I reviewed it. So as
22 I treated everyone else the same, I saw no reason to doubt
23 that he would provide it.

24 Q Just so we're clear, though, you have no recollection
25 of telling Ms. Ballard that Mr. Adams told you he would not

1 allow you to look at his emails the computer.

2 A No, sir. Not at all.

3 Q Now, what is an unfunded mandate? That's kind of a
4 bad work in the county business lexicon, isn't it?

5 A I think -- I was here yesterday. I think Mr. Adams'
6 response was a very good response. An unfunded mandate is
7 generally a requirement from a higher governmental
8 authority on a lower governmental authority. A good
9 example in our state is the general assembly to counties to
10 provide a service that is not funded by that higher
11 authority.

12 Q So the bad boys in the General Assembly will sometimes
13 hurl a lightning bolt at the county's direction to do
14 something, required or mandated by law, but they just don't
15 send you any money to do it?

16 A Generally speaking.

17 Q They are a lot of examples of that, correct?

18 A I'm sure there are. It's an issue that our
19 association -- the South Carolina Association of Counties
20 brings up every year. I don't stay in touch with it
21 because I'm not intimately involved in the budgeting
22 process.

23 Q And this public records retention and preservation
24 requirements, legal requirements, there's no money to your
25 knowledge that flows to the county to accomplish that? Is

1 that correct?

2 A To my knowledge there's not.

3 Q Now, we looked at defense Exhibit 9, which I think you
4 have up there. Right?

5 A It's a letter dated January 26, 2015. That's in
6 Exhibit 1 number 9. I'm not sure where. This is Defense
7 Exhibit 1.

8 Q Now, this document was produced yesterday for the
9 first time, so none of us has had a whole lot of time to
10 study on this.

11 A Yes, sir.

12 Q But at the top of this Exhibit 9 it says what?

13 A Approved budget fiscal year 2013-2014.

14 Q And down at the bottom it may be highlighted it
15 indicates capital one-time purchases.

16 A It's not highlighted, but it's \$68,420.

17 Q Now, the second page indicates that's entitled
18 approved budget capital outlay FY 13-14?

19 A Yes, sir.

20 Q Microsoft active directory and exchange server?

21 A Yes, sir.

22 Q Now, Mr. Adams, to my recollection, indicated that it
23 appeared to be the approval of a \$68,000 expenditure for an
24 exchange server which would be a backup method?

25 A I'm not familiar with what it would be for? There's

1 usually another page that talks about -- I'm trying to find
2 that. Yes, if you go maybe twelve pages in. It says
3 Microsoft. It's head of the county as Newberry County as
4 capital outlay request fiscal year 2013-2014.

5 Q Okay.

6 A It looks like this, Your Honor. That indicates that
7 the request was for a Microsoft active directory server and
8 Microsoft exchange server. I can read the rest but I think
9 that may answer what you were asking, or in part.

10 Q This is not a budget request -- or is it a budget
11 request that you participated in any way in 13/14?

12 A No, sir. The only --

13 Q You said you don't have much participation -

14 A No. The only budget request that I deal with is for
15 the legal department.

16 Q So you don't know whether this was ultimately funded,
17 even though it indicates approved budget?

18 A Based on what you presented to me, I would say since
19 it shows it's approved it was funded.

20 Q Now, you also were here yesterday during Mr. Snyder's
21 testimony.

22 A Yes, sir.

23 Q And you heard his testimony that he had gone to the
24 County three years in a row beginning, I think he said, in
25 the 13-14 cycle --

1 A Yes, sir.

2 Q -- requesting appropriations and expenditures to
3 implement a backup system. An end user backup
4 system, we've been calling it yesterday and today.

5 A Actually, I don't think this would be an end user.
6 I think this would be a server to back up emails. End user
7 would be like I have.

8 Q I'm with you.

9 A An external hard drive connected to my personal --

10 Q I'm showing my ignorance in the technology area, but
11 you're absolutely correct. So you heard Mr. Snyder about
12 that.

13 A Yes, sir.

14 Q Did Mr. Snyder ever talk with you about it directly?

15 A No, sir.

16 Q About the need for backup?

17 A No, sir.

18 Q And you never spoke with him about any concern about
19 public document preservation?

20 A No, sir.

21 Q And the issue of whether a backup would be a
22 good idea, a bad idea, whatever?

23 A No, sir.

24 Q And in conjunction with this approved expenditure of
25 \$68,420 were you asked by the county administrator or by

1 anyone to prepare a policy of any type relative to this
2 backup system?

3 A No, sir.

4 Q So the expenditure never -- are you frequently -- when
5 significant amounts of money are spent, are you advised of
6 this as it might implicate legal matters?

7 A No, sir. If it appears before council for approval
8 based on the size of the expenditure I would be aware of
9 it through that process. But I'm generally not involved in
10 the expenditures. That would be the finance department.

11 Q For the purpose of the backup system and the
12 expenditure would be to preserve documents?

13 A Yes, sir.

14 Q And nobody came to you about the preservation of
15 documents at any time about this expenditure?

16 A No, sir.

17 Q To your knowledge, is there any backup system
18 operating in the county?

19 A Other than individually external hard drives, and with
20 the exception of elected officials, no, sir.

21 Q To your knowledge, this approved budget item was never
22 implemented? To your knowledge?

23 A Actually, since you've asked, Mr. McCulloch, yesterday
24 we went back to review this. It was approved and it was
25 determined that Dylan never requested it. The expenditure

1 was never made for it.

2 Q Okay. I won't get into how all that got done, but so
3 this document doesn't mean what it says?

4 A No, it's the approved budget, but when we went back
5 yesterday we were concerned when the issue was raised and
6 we went back yesterday and looked with the finance director
7 and her assistant and they couldn't find where an exchange
8 server was ever purchased. I can't tell you why. That's
9 three years ago.

10 Q Can you tell me why Mr. Snyder continued in the next
11 two years to request the same thing, basically the
12 same thing --

13 A He didn't in the next two years. There was one budget
14 year he didn't even request a server. So I can't tell you
15 -- you know, again, I don't know about this. This was a
16 question that was raised after Mr. Snyder made his
17 testimony yesterday.

18 Q Now, we talked a little bit previously about the
19 executive session and we agree there's no written policy
20 about that, correct?

21 A Other than the state statute and what may be in the
22 county council rules.

23 Q So when a new member of council is elected, let's say
24 I get elected and I run the hardware store and I'm now on
25 county council, is there an orientation for new council

1 members?

2 A There may be. It's not an orientation that I provide.

3 Q You don't provide it?

4 A No, sir.

5 Q So a new council member would have no idea about

6 public records law unless they just stay up late and read

7 law books?

8 A I wouldn't know. I couldn't speculate what a council
9 member would have.

10 Q There is no beginning of each year session when you or
11 anyone briefs council on their legal responsibilities with
12 regard to executive session?

13 A No, sir. I know that there are sessions put on by the
14 South Carolina Association of Counties. It's called an
15 Institute of Government that several of our council members
16 have attended. And I would imagine part of that discussion
17 would deal with executive sessions, but I'm not privy to
18 that.

19 Q Well, imagine and you know are two different things,
20 right?

21 A Yes, sir.

22 Q Let me ask you about what Defendant's Exhibit 8. Now
23 that's another kind of surprise document, but take a look
24 at it and tell me what that appears to be.

25 A Yes, sir. I'm familiar with it. It appears to be the

1 request for fiscal year 2016-2017.

2 Q So that's the year that Mr. Snyder ceased to be
3 employed?

4 A Yes, sir. I believe. Well, he left whenever he said
5 yesterday. I don't recall, but it was this year.

6 Q So apparently on the way out the door he's still
7 requesting a back up system for this county?

8 A Actually, based on what I'm reading, Mr. McCulloch, it
9 says purchase a Dell R730 server to use with Microsoft
10 exchange server. This will allow the information
11 technology depart -- department, I think he meant, to
12 manage and maintain all Newberry County email addresses.
13 Currently we are paying PRTC, which I believe is Piedmont
14 Regional Technical College, to host each email address.
15 This will allow us to break away from PRTC. The company
16 that we use - I'm sorry it must not be Piedmont Regional
17 Tech. -- that we use to host our email and web mail
18 services. There will be no reoccurring cost for this
19 purchase.

20 Q So in your research yesterday when we adjourned is it
21 the case that no one in 2013-14 told Mr. Snyder that his
22 request had been approved?

23 A I can't say with all assuredness that nobody told him.
24 I believe -- I know personally as a department head that
25 when the budget is approved the finance director sends out

1 the approved budget to me. And I would imagine that Mr.

2 Snyder would have gotten that same provided response.

3 Q But we don't know?

4 A No, sir. I have no reason to doubt that he would have
5 gotten it. Everybody else gets theirs.

6 Q Well, would that exhibit showing that he's still
7 asking for that kind of equipment in 2016-17 cycle would be
8 something to suggest to you that maybe he didn't know he
9 had it approved in 13-14?

10 A I don't know.

11 Q But certainly it does tell us that the county could
12 afford a solution of a backup system because they approved
13 a budget for 68 grand.

14 A Yes, sir.

15 Q As long ago was 2013-14?

16 A Yes, sir.

17 Q But you still don't have it?

18 A You'd have to ask Mr. Snyder why we don't have it. It
19 was approved. And I can assure you most department heads,
20 when they have an approved budget, make sure their dollars
21 are spent.

22 Q Oh, I agree with you. I don't know anybody that
23 doesn't like to spend money. In your deposition - and I
24 apologize, I can find the page if I need to --

25 A I may remember.

1 Q You will probably remember. You indicated that email
2 archiving isn't done by the county. It's up to the
3 individuals.

4 A As far as the general county, yes, sir. Because as an
5 example the Sheriff's Office has their own unique system
6 and they may have archiving, just as any other elected
7 official may. But as far as general county employees non-
8 elected officials it would be left up to the individual end
9 user.

10 Q And in your deposition at several points you said the
11 reason that you hadn't implemented such a system was cost.
12 Isn't that true?

13 A No, sir. I think I was asked why we didn't get
14 text messages implemented.

15 Q So that was only as to text messages?

16 A Yes, sir.

17 MR. MCCULLOCH: All right. Thank you, sir. Sorry to
18 keep you up so long.

19 THE COURT: You have nothing?

20 MR. NICHOLSON: No, sir.

21 THE COURT: All right. Thank you very much, sir. You
22 may step down.

23 MR. NICHOLSON: Your Honor, that's the county's case.

24 THE COURT: All right.

25 MR. MCCULLOCH: Your Honor, can we take a short recess?

1 I don't know if we do have a reply, but if we do it will be
2 brief.

3 THE COURT: We will do that. Sure. All right. We'll
4 take about ten minutes.

5 (Off the Record)

6 THE COURT: I recognize Mr. McCulloch. Does the
7 Plaintiff have any reply?

8 MR. MCCULLOCH: Your Honor, we have no reply. I think
9 the Defense has rested and we have no reply. And subject
10 to our discussions in chambers we have requested and will
11 share those costs of an expedited transcript. As soon as
12 we get that we will all collaborate on what time it will be
13 necessary and communicate with Emily about a scheduling
14 order for the submission of proposed orders.

15 THE COURT: All right.

16 MR. MCCULLOCH: And, Your Honor, just because on the
17 chance that we might actually win we're going to submit
18 along with that proposed order the attorneys fee --

19 THE COURT: Attorneys fee schedule.

20 MR. MCCULLOCH: And obviously we'll provide a copy of
21 all that.

22 THE COURT: Sure.

23 MR. NICHOLSON: I'm fine with that, Judge. I would
24 just like to reserve the right if we need to have a
25 hearing.

1 THE COURT: Oh, yeah.

2 MR. NICHOLSON: And I'm happy to go when you are. No
3 problem.

4 THE COURT: All right. That sounds great. All right.
5 We'll then be at ease as far as this matter.

6 - - - END OF TRANSCRIPT OF RECORD - - -

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Certificate of Reporter

I, the undersigned, Tara T. Scott, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Newberry County, South Carolina, on the 6th and 7th day of September, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Tara T. Scott

Tara T. Scott, CVR

Circuit Court Reporter

September 24, 2016

ROA 002
IN THE COURT OF COMMON PLEAS

CASE NO. 2015-CP-36-00141

AFFIDAVIT OF ATTORNEY FEES AND COSTS

Vs.

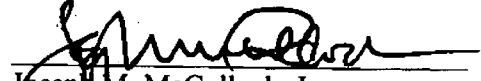
Defendant.

1

ROA 00296

4. I have reviewed the document attached as Exhibit A, and believe it to be a valid and accurate statement of reasonable attorney fees and costs related to the Ms. Ballard's costs and attorney fees in the above-captioned matter and this document has been prepared in support of her Motion for Attorney Fees and Costs, all pursuant to S.C. Code Ann. §30-4-100(b).

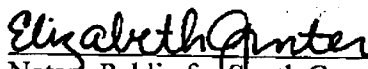
FURTHER AFFIANT SAITH NOT.


Joseph M. McCulloch, Jr.
McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623
Columbia, South Carolina 29211
(803) 779-0005
joe@mccullochlaw.com

This 12 day of October, 2016.

Columbia, South Carolina

SWORN to and SUBSCRIBED before me
This 12 day of October, 2016


Notary Public for South Carolina

My Commission Expires:

12/7/25

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Desa Ballard,

Plaintiff,

Vs.

Newberry County,

Defendant.

) IN THE COURT OF COMMON PLEAS

)

CASE NO. 2015-CP-36-00141

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AFFIDAVIT OF ATTORNEY
FEES AND COSTS

ROA 00298

THIS WITNESS, KATHY R. SCHILLACI, SWORN, DEPOSES AND STATES:

1. I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. I am an attorney at law licensed to practice before the Courts of the State of South Carolina. I have been practicing law in this state since 1999. I have practiced at McCulloch & Schillaci, Attorneys at Law, formerly Law Offices of Joseph M. McCulloch, Jr., for over a decade and before that time, practiced civil litigation at Nelson, Mullins, Riley & Scarborough, LLP. I graduated with a Juris Doctor *cum laude* from the University of Arkansas School of Law where I was a finalist at the National Vanderbilt First Amendment Moot Court Competition and a recipient of the Donald J. Adams Memorial Scholarship for Trial Advocacy. My litigation experience includes trials in the Courts of Common Pleas, General Sessions, Family Courts, Magistrate Courts, and Administrative Law Court. I have appeared before both the South Carolina Court of Appeals and South Carolina Supreme Court. I hold an "AV" Martindale Hubbell rating.

3. I, along with Joseph M. McCulloch, Jr. represent Ms. Ballard in the above-captioned matter. My usual and customary fee for civil litigation is \$250.00 per hour.

ROA 00298

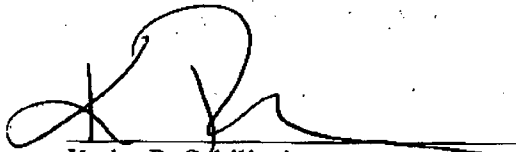
ROA 00299

4. I have reviewed the document attached as Exhibit A, and believe it to be a valid and accurate statement of reasonable attorney fees and costs related to the Ms. Ballard's costs and attorney fees in the above-captioned matter and this document has been prepared in support of her Motion for Attorney Fees and Costs, all pursuant to S.C. Code Ann. §30-4-100(b).

FURTHER AFFIANT SAITH NOT.

This 12th day of October, 2016.

Columbia, South Carolina



Kathy R. Schillaci
McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623
Columbia, South Carolina 29211
(803) 779-0005

SWORN to and SUBSCRIBED before me
This 12 day of October, 2016

Elizabeth Ginter
Notary Public for South Carolina

My Commission Expires:

12/7/25

ROA 00299

ROA 00300

EXHIBIT A

ROA 00300

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Desa Ballard,

Plaintiff,

Vs.

Newberry County,

Defendant.

) IN THE COURT OF COMMON PLEAS

)

)

CASE NO. 2015-CP-36-00141

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ROA 00301

TOTAL ATTORNEY FEES: \$ 24,667.50

TOTAL LITIGATION COSTS: \$ 2,604.88

TOTAL CHARGED BY DEFENDANT \$ 1,000.00
FOR LATE PRODUCTION:

ROA 00301

Law Offices of Joseph M. McCulloch, Jr. d/b/a

Invoice

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

ROA 00302 Invoice #	
3/30/2015	1547

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	3/18/2015	Review and revise Complaint; discussion with Ms. Ballard	0.7	250.00	175.00
KRS #3	3/20/2015	Review emails regarding service, sign and review pleadings	0.2	250.00	50.00
Paralegal I postage	3/27/2015	File Affidavit of Service	0.1	75.00	7.50
	3/27/2015	postage	1	0.98	0.98
				Total	\$233.48

ROA 00302

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00303	Invoice #
4/29/2015	1565

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	4/16/2015	Teleconference with D. Ballard regarding FOIA; review emails & Answer	0.2	250.00	50.00
KRS #3	4/21/2015	Draft, revise, and finalize letter to B. Nicholson; send email to D. Ballard	0.2	250.00	50.00
KRS #3	4/28/2015	Teleconference with B. Nicholson regarding FOIA Item #6; email to D. Ballard regarding same	0.1	250.00	25.00
KRS #3	4/30/2015	Review and finalize Interrogatories and Request to Admit for service	0.3	250.00	75.00
copies	4/30/2015	Copies	76	0.10	7.60
postage	4/30/2015	postage		2.45	2.45
				Total	\$210.05

ROA 00303

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00304 Invoice #	
7/7/2015	1589

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	5/6/2015	Teleconference with Attorney Nicholson; review email from same, respond to same	0.1	250.00	25.00
KRS #3	5/8/2015	Email to/from Attorney Ballard	0.1	250.00	25.00
KRS #3	5/9/2015	Email to/from Attorney Ballard	0.1	250.00	25.00
KRS #3	5/27/2015	Emails to/from Attorney Ballard	0.1	250.00	25.00
KRS #3	5/28/2015	Teleconference with Attorney Nicholson; forward email to Ms. Ballard regarding same	0.2	250.00	50.00
KRS #3	6/2/2015	Emails to/from Attorney Nicholson and Attorney Ballard; respond to same	0.1	250.00	25.00
KRS #3	6/4/2015	Review Answers to Request to Admit; teleconference with Attorneys Nicholson and Aydlette; emails to Attorney Ballard regarding same and Attorney Nicholson	0.7	250.00	175.00
KRS #3	6/5/2015	Emails to/from Attorney Ballard and Emails and calls to/from Attorney Nicholson regarding document production	0.3	250.00	75.00
KRS #3	6/29/2015	Emails from Attorney Ballard; email to Attorney Nicholson and review response to same	0.2	250.00	50.00
				Total	\$475.00

ROA 00304

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00305	Invoice #
7/31/2015	1600

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	7/2/2015	Review Email from Attorney Nicholson	0.1	250.00	25.00
KRS #3	7/6/2015	Send email to Attorney Ballard	0.1	250.00	25.00
KRS #3	7/15/2015	Send email to Attorney Nicholson	0.1	250.00	25.00
KRS #3	7/17/2015	Send follow-up email to Attorney Nicholson; Email to/from Attorney Nicholson with document production	0.2	250.00	50.00
KRS #3	7/24/2015	Review docket; email to/from Attorney Ballard and Attorney Nicholson	0.2	250.00	50.00
KRS #3	7/27/2015	Draft, revise, and finalize letter to Judge Hocker requesting status conference	0.1	250.00	25.00
postage	7/27/2015	postage	2	0.49	0.98
KRS #3	7/30/2015	Revise and send numerous emails regarding scheduling; review emails with Attorney Ballard	0.2	250.00	50.00
				Total	\$250.98

ROA 00305

Law Offices of Joseph M. McCulloch, Jr. d/b/a

Invoice

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

ROA 00306 Invoice #	
9/1/2015	1616

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	8/3/2015	Numerous emails to/from Judge Hocker's office and Attorney Nicholson; email to Desa Ballard	0.3	250.00	75.00
KRS #3	8/6/2015	Teleconference with Desa Ballard in preparation for status conference	0.2	250.00	50.00
KRS #3	8/10/2015	Teleconference with Nick Nicholson	0.2	250.00	50.00
KRS #3	8/11/2015	Email to/from Attorney Ballard; review answer to interrogatories from Attorney Nicholson	0.1	250.00	25.00
KRS #3	8/12/2015	Teleconference with Attorney Ballard; review documents and materials from Attorney Ballard; review file in preparation for teleconference with Judge Hocker	0.7	250.00	175.00
KRS #3	8/13/2015	Teleconference with Attorney Nicholson; teleconference with Judge Hocker and Attorney Nicholson; send email to Attorney Ballard	0.3	250.00	75.00
KRS #3	8/17/2015	Draft proposed scheduling order; forward to Attorney Ballard; email to Attorney Nicholson	0.3	250.00	75.00
KRS #3	8/18/2015	Email to/from Attorney Ballard	0.1	250.00	25.00
KRS #3	8/19/2015	Email to/from Attorney Nicholson	0.1	250.00	25.00
KRS #3	8/20/2015	Send email to Judge Hocker and Attorney Nicholson with proposed order; review response from same	0.3	250.00	75.00
KRS #3	8/21/2015	Email to/from Judge Hocker; email to/from Attorney Ballard	0.1	250.00	25.00
KRS #3	8/24/2015	Revise letter to Attorney Nicholson; send email to Attorney Ballard	0.2	250.00	50.00
KRS #3	8/25/2015	Email to/from Attorney Ballard	0.1	250.00	25.00
				Total	\$750.00

ROA 00306

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00307 Invoice #	
9/30/2015	1634

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	9/25/2015	Send email to Attorney Ballard regarding expert status	0.1	250.00	25.00
KRS #3	9/28/2015	Review email for Attorney Ballard regarding expert status	0.1	250.00	25.00
KRS #3	9/29/2015	Review and respond to email to Attorney Ballard; review file in response to same	0.2	250.00	50.00
				Total	\$100.00

ROA 00307

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00308 Invoice #	
10/30/2015	1643

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	10/7/2015	Emails to/from Attorney Ballard	0.1	250.00	25.00
KRS #3	10/8/2015	Meeting on FOIA with Attorneys Ballard and McCulloch	0.5	250.00	125.00
KRS #3	10/8/2015	Email Attorney Nicholson regarding deposition	0.1	250.00	25.00
KRS #3	10/12/2015	Emails to Attorney Ballard and Attorney Nicholson	0.1	250.00	25.00
postage	10/12/2015	postage	1	0.49	0.49
KRS #3	10/15/2015	Emails to/from Attorney Ballard regarding deposition	0.1	250.00	25.00
KRS #3	10/16/2015	Revise and finalize Notice of Deposition to Attorney Nicholson	0.1	250.00	25.00
KRS #3	10/21/2015	Revise and finalize Requests to Admit; email to/from Attorney Ballard	0.5	250.00	125.00
postage	10/21/2015	postage	1	0.49	0.49
KRS #3	10/21/2015	Teleconference with Attorney Nicholson; email with Attorney Ballard	0.2	250.00	50.00
KRS #3	10/22/2015	Review revised interrogatory responses from Attorney Nicholson; forward to Attorney Ballard	0.2	250.00	50.00
			Total		
			\$475.98		

ROA 00308

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00309		Invoice #
11/30/2015		1655

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	11/4/2015	Tothace Deposition in Newberry; travel to and from	3.8	250.00	950.00
				Total	\$950.00

ROA 00309

Law Offices of Joseph M. McCulloch, Jr. d/b/a

Invoice

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

ROA 00310	Invoice #
2/29/2016	1673

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	1/27/2016	Review discovery; draft, revise and finalize email to Attorney Ballard; draft, revise and finalize Requests to Produce to defendant	1	250.00	250.00
postage	1/28/2016	Postage	1	0.49	0.49
KRS #3	2/15/2016	Email to Attorney Ballard, review response to same	0.1	250.00	25.00
Total					\$275.49

ROA 00310

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00311	Invoice #
4/6/2016	1688

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	3/4/2016	Emails to/from Attorney Nicholson	0.1	250.00	25.00
KRS #3	3/25/2016	Forward response to request to produce to Attorney Ballard	0.1	250.00	25.00
KRS #3	3/31/2016	Revise and finalize notes for summary judgment; request documents received by county	3.6	250.00	900.00
				Total	\$950.00

ROA 00311

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00312 Invoice #	
5/6/2016	1697

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

PAID

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	4/1/2016	Finalize motion documents for service; search exhibits	0.8	250.00	200.00
				Total	\$200.00

ROA 00312

Law Offices of Joseph M. McCulloch, Jr. d/b/a

Invoice

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

ROA 00313	Invoice #
6/6/2016	1708

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	6/14/2016	Prepare for Motion hearing	3.1	250.00	775.00
KRS #3	6/15/2016	Attend motions hearing in Newberry; travel to and from	3.5	250.00	875.00
				Total	\$1,650.00

ROA 00313

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00314 Invoice #	
6/29/2016	1717

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

Terms

Item	Serviced	Description	Quantity	Rate	Amount
copies KRS #3	6/15/2016	Copies for hearing	132	0.10	13.20
	6/28/2016	Review email from Judge Sprouse's office; forward same to Attorney Ballard	0.1	250.00	25.00
				Total	\$38.20

ROA 00314

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00315 Invoice #	
7/31/2016	1727

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	7/5/2016	Assign task to T. Dalton, specifically research on cost of saving text messages and options, in preparation for trial	0.1	250.00	25.00
KRS #3	7/14/2016	Teleconference with Attorney Nicholson regarding trial; draft, revise, and finalize Status Report for Judge Addy; draft brief memorandum for Attorney Ballard regarding pros and cons of trial (no charge)	0.3	0.00	0.00
KRS #3	7/18/2016	Teleconference with Mr. Jayroe regarding case; e-mails to/from Attorney Ballard	0.2	250.00	50.00
KRS #3	7/19/2016	Research terms of court/available judges; emails to/from Attorney Ballards regarding trian schedule	0.2	250.00	50.00
JMM #4	7/19/2016	Teleconference with Judge Addy's office regarding scheduling	0.2	300.00	60.00
				Total	\$185.00

ROA 00315

Law Offices of Joseph M. McCulloch, Jr. d/b/a

Invoice

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

ROA 00316	Date	Invoice #
8/31/2016		1731

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	8/9/2016	Review email and submission from Attorney Nicholson; forward to Attorney Ballard	0.2	250.00	50.00
KRS #3	8/10/2016	Revise and finalize pre-trial brief for submission to Judge Lee	1	250.00	250.00
KRS #3	8/17/2016	Review e-mail from Attorney Nicholson; send email to Beth Cogan regarding trial subpoenas	0.1	250.00	25.00
KRS #3	8/22/2016	Prepare trial subpoenas for Wayne Adams, A.J. Tothacer, and Dylan Snyder; prepare cover letter to Attorney Nicholson and Mr. Snyder; email to/from Attorney Nicholson	0.3	250.00	75.00
postage	8/22/2016	Postage for subpoenas	4	0.49	1.96
KRS #3	8/23/2016	Attorneys Schillaci and McCulloch meeting with Art and Jana Jayroe, Attorney Ballard; travel to and from; teleconference with Attorney Ballard (no charge - during return travel)	1.3	250.00	325.00
Misc. Expense	8/24/2016	Fee for Process Server (invoice attached)	1	75.00	75.00
KRS #3	8/30/2016	Emails to/from Attorney Ballard in preparation for trial	0.2	250.00	50.00
				Total	\$851.96

ROA 00316



ROA 00317

1111 Greene St
Columbia, SC 29201-3951
Tel: (803) 799-3807

Order Date: 09/02/2016 Branch: 1502
Order Time: 14:56:00 Register: 8
Pickup Date: 09/05/2016
Pickup Time: 12:00
Team Member: Danica S.



Customer: desa ballard

Project Name:
Copy & Print 1591.65
3 @ 530.55
Litigation Serv D 5895 @ 0.27
Deposit 0.00
Sub-Total 1591.65
Discount 0.00
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ROA 00317

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law

1513 Hampton Street

P.O. Box 11623 (29211)

Columbia, SC 29201

Invoice

ROA 00318

Date	Invoice #
9/27/2016	1741

Bill To

Desa Ballard
226 State Street
West Columbia, SC 29169
RE: FOIA Newberry County Action (Jayroe)

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	9/1/2016	Prepare for trial including compilation of necessary law and facts and update of same, and analyze and summarize key points in Tothacer deposition; teleconference with Newberry Clerk of Court concerning schedule and inform client of same; emails to and from client in preparation for trial	2.7	250.00	675.00
copies	9/1/2016	Copies	221	0.10	22.10
KRS #3	9/2/2016	Teleconferences with client in preparation for trial; prepare cross examination points for Mr. Snyder; select deposition extracts for Mr. Tothacer and forward to Judge Russo and Attorney Nicholson; review counter selections from Attorney Nicholson; revise proposed stipulated facts; review emails to and from client.	5.1	250.00	1,275.00
JMM #4	9/2/2016	Review file	2	300.00	600.00
JMM #4	9/4/2016	Trial preparation	2	300.00	600.00
KRS #3	9/4/2016	Review materials from client	0.2	250.00	50.00
JMM #4	9/5/2016	Trial preparation	2	300.00	600.00
KRS #3	9/5/2016	Trial preparation including meeting with client for preparation of direct testimony, selection of exhibits, an discussion of trial strategy	7.6	250.00	1,900.00
JMM #4	9/6/2016	Attend trial and travel to/from; trial prep	10.5	300.00	3,150.00
KRS #3	9/6/2016	Meeting with client; attend trial; travel to and from; revise and finalize stipulations and forward to Attorney Nicholson	9.7	250.00	2,425.00
JMM #4	9/7/2016	Attend trial and travel to/from; trial prcp	6	300.00	1,800.00
KRS #3	9/7/2016	Review introduced exhibits in assisting Attorney McCulloch with cross; compare proposed stipulations for discussion with client; discuss same with client; trial attendance; travel to and from	5.3	250.00	1,325.00
KRS #3	9/9/2016	Review emails from Attorney Nicholson and Ms. Cogan	0.2	250.00	50.00
				Total	

Law Offices of Joseph M. McCulloch, Jr. d/b/a

McCulloch & Schillaci, Attorneys at Law
1513 Hampton Street
P.O. Box 11623 (29211)
Columbia, SC 29201

Invoice

ROA 00319

Date	Invoice #
9/27/2016	1741

Bill To
Desa Ballard 226 State Street West Columbia, SC 29169 RE: FOIA Newberry County Action (Jayroe)

Terms

Item	Serviced	Description	Quantity	Rate	Amount
KRS #3	9/26/2016	Email to/from Attorney Nicholson; draft, revise, and finalize email to Judge Russo regarding proposed order time parameters.	0.2	250.00	50.00
copies	9/26/2016	Copies (transcript)	93	0.10	9.30
KRS #3	10/4/2016	Emails to/from Attorney Nicholson	0.1	250.00	25.00
KRS #3	10/6/2016	Review transcript, prepare draft Order	4.2	250.00	1,050.00
copies	10/6/2016	Copies	93	0.10	9.30
postage	10/6/2016	postage	1	9.85	9.85
KRS #3	10/8/2016	Revise and finalize proposed order; research	2.3	250.00	575.00
KRS #3	10/9/2016	Revise and finalize proposed order	2.6	250.00	650.00
KRS #3	10/10/2016	Review email from client; finalize prepared order based on comments from client and Attorney McCulloch	1.5	250.00	375.00
				Total	\$17,225.55

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11/04/2015

FRANCES C. MOYD

2015-CP-34-00141

DESA BALLARD vs. NEWBERRY COUNTY

DEPOSITION OF A.J. TOTHACER, JR., ESQ.
ORIGINAL AND ONE COPY OF TRANSCRIPT

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COMPRESSED TRANSCRIPT

39.20

EXHIBIT COPIES

38.00

READ & SIGN

12.51

Total Due: 581.71

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ROA 00320

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ROA 00321

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PO Box 11623
Columbia, SC 29211
Paying for: Ballard, Desa

Date: 3/20/2015
Receipt #: 665131
Clerk: c36jtoby

Transaction Type: Payment
Payment Type: Check
Total Paid: \$150.00
Reference #: 3257
Comment: Non-Refundable

Total Received: \$150.00
Change Due: \$0.00

2015CP3600141	Desa Ballard VS Newberry County	\$150.00	\$150.00	\$0.00 899

Total Cases: 1	\$150.00	\$150.00	\$0.00

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3355

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BALLARD & WATSON, ATTORNEYS AT LAW
OPERATING ACCOUNT

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WEST COLUMBIA, SC 29171
803-796-9298

Newberry County

Jun 05/15

\$1,000.00

PAY TO THE
ORDER OF

*** One Thousand

00/100

DOLLARS

Newberry County

TWO SIGNATURES REQUIRED OVER \$1000.00
VOID AFTER 90 DAYS

[Signature]
[Signature]
AUTHORIZED SIGNATURE

MEMO

Partial FOIA response-paid under protest (Jayroe)

⑈003355⑈

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3355

DATE : June 05, 2015
CHE # : 3355
AMOUNT : \$1,000.00
ACCOUNT : 10
PAID TO : Newberry County

EXPLANATION : Partial FOIA response-paid under protest (Jayroe)

CLIENT : Jayroe, Art
MATTER : 141014-001

McCULLOCH & SCHILLACI
ATTORNEYS AT LAW

1513 HAMPTON STREET
P.O. Box 11623 (29211)
COLUMBIA, SC 29201
(803) 779-0005 • FAX (803) 779-0666

ROA 00323

JOSEPH M. McCULLOCH, JR.
joe@mccullochlaw.com

KATHY SCHILLACI
kathy@mccullochlaw.com

October 17, 2016

Newberry County Courthouse
Attn: Jackie S. Bowers, Clerk of Court
P.O. Drawer 10
Newberry, South Carolina 29108

RE: **Desa Ballard v. Newberry County**
Case Number: **2015-CP-36-00141**

Dear Ms. Bowers:

Please find enclosed the original Affidavit of Attorney Fees and Costs for filing. I have also enclosed a copy and a self-addressed, pre-stamped envelope. If you would please clock and return the copy I would most appreciate it. Thank you for your attention to this matter and please do not hesitate to call the office should you have any questions.

Sincerely,



Joseph M. McCulloch

JMM/erg
Enclosure(s)

Copy returned 10/21/16

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ROA 00323

ROA 00324

From: Nicholson, Nick [<mailto:nnicholson@hsblawfirm.com>]
Sent: Wednesday, October 12, 2016 12:37 PM
To: 'Russo, Thomas A.'
Cc: Kathy Schillaci; Russo, Thomas A. Law Clerk (Emily Nellerhoe)
Subject: Ballard v. Newberry County; 2015-CP-36-00141

Judge Russo,

On behalf of Newberry County I have attached a proposed order. I have also attached for your convenience Defendant's Exhibit 1. Thank you for your consideration of these matters. Please let me know if you need anything else.

Best regards.

Nick

**Haynsworth
Sinkler Boyd, P.A.**
ATTORNEYS AND COUNSELORS AT LAW

Boyd B. (Nick) Nicholson, Jr. | Attorney | Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor (29601) | Post Office Box 2048 (29602) | Greenville, South Carolina
Phone: 864.240.3200 | Fax: 864.240.3336 | Direct: 864.240.3247 | Mobile: 864.430.0693
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ROA 00324

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF NEWBERRY	)	C.A. No. 2015-CP-36-00141
	)	
Desa Ballard,	)	
	)	
Plaintiff,	)	
	)	
	)	
	)	ORDER
vs.	)	
	)	
Newberry County,	)	
	)	
Defendant.	)	

INTRODUCTION

This is an action alleging violations of the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10, *et. seq.*, and the South Carolina Public Records, Reports and Official Documents Act ("Records Act"), S.C. Code Ann. § 30-1-10, *et. seq.* The parties tried this case before the Court, sitting without a jury, on September 6 and 7, 2016. Joseph M. McCulloch, Jr. and Kathy R. Schillaci represented the Plaintiff, Desa Ballard, and Boyd B. Nicholson, Jr. represented the Defendant, Newberry County. Ms. Ballard and Dylan Snyder testified in the Plaintiff's case-in-chief, and Wayne Adams and Jay Tothacer testified in the Defendant's case-in-chief. Both Ms. Ballard and the County designated portions of Jay Tothacer's deposition, all without objection. Both parties also submitted multiple exhibits, all of which came into evidence without objection.

Ms. Ballard claims that the County violated FOIA and the Records Act with respect to the production and maintenance of certain County documents (namely, e-mails and text messages of Mr. Adams, the County Administrator), and she also contends that the County violated FOIA with respect to its announcement of executive sessions during certain meetings of

County Council. The County contends that it has complied with FOIA and the Records Act. For the reasons discussed below, the Court finds that Ms. Ballard has not met her burden of proof, and the County is entitled to judgment.

FINDINGS OF FACT¹

Ms. Ballard's FOIA Request and the County's Response.

On December 2, 2014 Ms. Ballard sent a FOIA request in the form of a letter to Mr. Adams, the County Administrator, seeking documents in sixteen different categories that dated, in some cases, back to 1995. See tab 1 of Defendant's Exhibit 1. Ms. Ballard made this request in connection with a number of claims that she was pursuing on behalf of Magistrate Judge Arthur Jayroe against the County.² Category seven in Ms. Ballard's FOIA request requested all electronic messages, in any format and including private devices, between Mr. Adams and County Council members dating back to 2010. Id.

Mr. Adams received the FOIA request on December 3 and turned it over to Jay Tothacer, the County Attorney. On December 4 Mr. Tothacer sent communications to various employees of the County and Judge Jayroe that included the FOIA request and seeking assistance in

¹ To the extent that any finding of fact in this Order would be more properly identified as a conclusion of law, it should be considered as such. To the extent that any conclusion of law in this Order would be more properly identified as a finding of fact, it should be considered as such.

² Judge Jayroe is no longer on the bench. The cases involving him and the County are:

Jayroe v. Newberry Cnty., 413 S.C. 176, 775 S.E.2d 382 (2015). Civil action in the original jurisdiction of the Supreme Court filed February 25, 2015 and disposed of pursuant to the cited opinion.

Jayroe v. Newberry Cnty., Appellate Case No. 2016-000305 (2016). Administrative action filed March 11, 2015 and tried before County Council. Judge Jayroe has appealed.

Jayroe v. Newberry Cnty., et. al., C.A. No. 2015-CP-36-636. Civil action filed in Court of Common Pleas on July 2, 2015 and pending.

gathering responsive documents. See 12-4-14 e-mail from Jay Tothacer attached as tab 2 to Defendant's Exhibit 1. See also Tothacer Deposition at p. 21, l. 17 – p. 22, l. 2. (Mr. Tothacer sent a copy of the FOIA request letter "to everybody that I thought would have information that would be responsive to it. I even suggested to them, as I saw it, this would be the area that you would have the information for. ... As an example, she asked a lot of questions about magistrates, and so I sent it to the Chief Magistrate [Judge Jayroe] and asked him to respond to it."). Mr. Tothacer also followed up verbally with the individuals to whom he had sent the FOIA request:

I would check with them and ask them where they were in the process because Ms. Ballard was hoping it would be responded to as quickly as possible, so I was trying to gauge where they were in the request. For instance, some of the information that the finance director provided was not readily available. She had to go to our archive area. And so I was trying to get an idea of when responses would be back.

Tothacer Deposition (Exhibit 2) at p. 23, line 15-22. He also consulted with Dylan Snyder, the County's Information Technology ("IT") Director at the time, "because several of the requests were related to computers." Id. at p. 24, lines 5-10.

On December 22, thirteen business days after Mr. Adams received Ms. Ballard's request, Mr. Tothacer sent her a three-page letter detailing the status of his search thus far, including documents located, and the estimated costs for searching and copying documents. See 12.22.14 letter from Jay Tothacer, tab 3 to Defendant's Exhibit 1. Through phone calls and correspondence with Mr. Tothacer, Ms. Ballard agreed to reduce the scope of her FOIA request. See, e.g., 12-30-14, 1-5-15 and 1-27-15 e-mails from Ms. Ballard to Mr. Tothacer, included as tabs 4, 6 and 12 of Defendant's Exhibit 1. Ms. Ballard and Mr. Tothacer corresponded on numerous other occasions about the FOIA response, up until the filing of this lawsuit. See, generally, Defendant's Exhibit 1. Mr. Tothacer sent Ms. Ballard responsive e-mails either from

or to Wayne Adams. This production totaled 139 e-mails that contained 376 pages of material (e-mails and attachments). See Defendant's Exhibit 4. In all, the County produced over 2,000 pages of documents to Ms. Ballard. See Defendant's Exhibits 2-4.

Jay Tothacer testified that the County responded to the FOIA request in full. Ms. Ballard agreed that the County's response to her FOIA request had been timely, but she complained about the County's not producing e-mails and texts from Mr. Adams.

Mr. Adams' E-mails.

Mr. Tothacer informed Ms. Ballard that Mr. Adams' computer had crashed in March 2014 and "he is limited to whatever is on his system since then. As we discussed, we do not have archiving capabilities of email on any documents stored on personal computers beyond what is still available on that personal computer." See 12.22.14 letter from Jay Tothacer, tab 3 of Defendant's Exhibit 1. Ms. Ballard argued that the County should have retrieved data from the crashed computer, and she argued further that the County did not properly back up or store its e-mails.

The Crash of Mr. Adams' Computer

After Mr. Adams' computer crashed, the County's IT Director examined it. He ran diagnostic tests on the computer and found that it was "completely toasted." Tr. P. 83, ll. 11-17. Mr. Snyder concluded that the hard drive was useless and that no data could be recovered from it. Affidavit of Dylan Snyder (attached hereto as Exhibit 3) at ¶ 5. Thus, he disposed of it promptly. Id. These events occurred in March 2014, and Ms. Ballard's FOIA request was made in December 2014.

The County's E-mail Storage System

The County preserves e-mails by storing them on end-user's individual computers. The only IT professional who testified in this case, former County IT Director Dylan Snyder, testified that storing e-mails on end-user computers is industry standard. He testified that his current employer, a large South Carolina trucking company, does not back up end user computers and does not have a separate server for e-mails. The County also backs up certain end-user computers with external hard drives. Jay Tothacer testified that he has backed up his computer with an external hard drive for the past six years. Wayne Adams testified that he did not use an external hard drive prior to the time his computer crashed. He testified that until his computer crashed, he had never had any problems with losing computer data. After his computer crashed, Mr. Adams stated that he began using an external hard drive.

Mr. Adams' Text Messages

As noted above Ms. Ballard and Mr. Tothacer corresponded several times about the FOIA request. Some of that correspondence concerned Ms. Ballard's request for text messages from Mr. Adams. See e-mails from 1-26-15 -- 1-28-15 between Mr. Tothacer and Ms. Ballard, included as tabs 12, 15, 16 and 17 of Defendant's Exhibit 1. As Mr. Tothacer explained to Ms. Ballard, the County's cellphone carrier, Verizon, does not maintain text messages over an extended period. See id. See also Tothacer Deposition at p. 45, ll. 11-15 and p. 49, l. 17 – p. 52, l. 8 (testimony concerning same). Mr. Tothacer provided to Ms. Ballard an e-mail message from Verizon about the unavailability of texts, which stated:

VZW requires a valid state or federal search warrant. 18 U.S.C. 2703(a) requires that disclosure of the content of communications can be made only pursuant to a validly issued state or federal search warrant.

- VZW is only able to capture the last 3-5 days worth of content (never more than 10).

- Due to system limitations, terminating content is the only available option. Additionally, system outages and upgrades may result in VZW not capturing content.

VZW has a charge for the preservation of text message content. It is billed per number at \$50 per 5-day increments at a minimum of \$50 for each request.

See 1-28-15 e-mail from Ciarra Jones to Jay Tothacer, included as tab 16 to Defendant's Exhibit

1.

After receiving the FOIA request Mr. Tothacer reviewed Mr. Adams' cell phone, and he saw no text messages that were responsive to the request. Tothacer Deposition at p. 56, ll. 11-21. The testimony demonstrated that the County seldom, if ever, uses text messaging for County business. Mr. Tothacer testified that he did not use text messaging for County business. When asked if he had conducted County business via text messages, Mr. Adams stated that if he had, "it's been very seldom." Transcript P. 120, ll. 19-22. He also stated that he was not "aware of an example" where he had sent a text message for County business. Id. Mr. Snyder testified that he "wasn't completely aware of" County employees using texts for County business, though he did state that "it would not surprise him" if it had occurred. Transcript P. 70, l. 23 – P. 71, l. 6. Ms. Ballard testified that she had a text from Mr. Adams to the Mayor of Little Mountain (Judge Jayroe's wife), which illustrated that Mr. Adams did conduct County business via text messaging. However, she did not divulge what this text said, and she did not enter the text as an exhibit.

CONCLUSIONS OF LAW**I. CLAIMS INVOLVING THE PRODUCTION OF RECORDS.****A. Claims under FOIA.**

As noted above the County produced over 2,000 pages of documents to Ms. Ballard, including 376 pages of e-mails from or to Mr. Adams. Ms. Ballard testified that the County's response to her FOIA request had been timely. Mr. Tothacer testified he believed the County had fully complied with this FOIA request. Tothacer Deposition at p. 93, l. 24 – p. 94, l. 4. (“Q. Now, today, do you believe that Newberry County has fully complied with its obligations under Exhibit 1, which was Ms. Ballard's FOIA? A. To the best of our ability to provide the information that we have or have access to, I believe that is the case. That, yes, we have fully responded.”). See also id. at p. 94, ll. 5-7 (“Q. You believe you fully complied with your obligations? A. I believe we've fully responded. I don't know how else to couch that.”).

Ms. Ballard argued that the County violated FOIA by not producing e-mails from Mr. Adams' crashed computer. As noted above, the County has produced 139 e-mails of Mr. Adams' e-mail, totaling 376 pages and ranging in dates from May 2010 to December 2014. The County produced e-mails from Mr. Adams' post-crash computer, and with regard to e-mails created before the crash, the County produced them from the computers of other County employees and hard copy files. Even if there were e-mails that were lost because of the computer crash and not produced, these facts would not constitute a violation of FOIA, which requires the production of non-exempt documents in the possession of a governmental body. See Op. S.C. Att'y Gen., July 9, 2010 (stating that information regarding insurance rates, “if held in the City's possession,” would constitute a public record) (emphasis supplied); Op. S.C. Att'y Gen., October 7, 1998 (implying that possession is a prerequisite to classifying a record as a public record—“in regard

to the disclosure of documents in possession of the Legislative Delegation, it must first be determined whether such documents meet the definition of 'public record.'"); see also Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150-51 (1980) (finding that (1) it is impossible for an agency to withhold information without "custody or control necessary to enable it to withhold"; and (2) "An agency's failure to sue a third party to obtain possession is not a withholding under the Act"). Regarding the text messages, the only testimony on this point comes from Mr. Tothacer, who reviewed Mr. Adams' phone and found no responsive texts.

In summary, FOIA requires the production of non-exempt documents in the possession of a governmental body. The testimony and exhibits demonstrate that the County has done just that, producing over 2,000 documents, pursuant to an extensive FOIA request, in a timely fashion. Therefore, to the extent that Ms. Ballard claims that the County has violated FOIA with respect to the production of documents, she has not met her burden of proof. Judgment for the County is granted on this claim.

B. Records Act.

Ms. Ballard also argues that the County has violated the Records Act with respect to the e-mails and texts of Mr. Adams. The County first contends that there is no private right of action under the Records Act, and alternatively that it has complied with the Records Act.

1. Private Right of Action.

"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 the statute.... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." Adkins v. South Carolina

Dept. of Corrections, 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004) (quoting Whitworth v. Fast Fare Markets of South Carolina, Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)). “Where a statute does not specifically create a private cause of action, one can be implied **only if the legislation was enacted for the special benefit of a private party.** Adkins, 360 S.C. at 418, 602 S.E.2d at 54 (quoting Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992) (emphasis supplied in Adkins opinion). The overall purpose of the Records Act is to preserve government documents for the benefit of South Carolinians generally. And unlike FOIA, the Records Act does not contain an explicit right of action for violations of the Records Act., FOIA. See S.C. Code Ann. § 30-4-100. It is indeed illustrative that the FOIA, which is merely one chapter removed from the Records Act in Title 30, contains an express right of action, whereas the Records Act does not. The Legislature certainly could have included a similar provision in the Records Act but chose not to do so. Given the Court’s ruling as described below, however, that Ms. Ballard has not proven a violation of the Records Act, the Court need not decide here whether the Records Act creates a private cause of action. Indeed, even if the Court were to rule definitively that no private right of action exists, judicial economy would counsel that the Court should nevertheless make findings on the substance of Ms. Ballard’s Records Act Claims in advance of a possible appeal.

2. **The Merits of the Records Act Claims.**

The Records Act does not dictate how a local government should preserve records. Instead, the Records Act states:

A records management program directed to the application of **efficient and economical management** methods and relating to the creation, utilization, maintenance, retention, preservation, and disposal of public records must be established and administered by the Archives...The head of each agency, the governing body of each subdivision, and every public records custodian shall

cooperate with the Archives in complying with the provisions of this chapter and to establish and maintain an active, continuing program for the **economical and efficient management** of the records of the agency or subdivision.”

S.C. Code Ann. § 30-1-80 (emphasis added). Thus, the Records Act recognizes that local governments like the County may consider economy and efficiency in determining how best to protect and preserve their records. As a county government, the County has great discretion in determining what it feels is efficient and economical for Newberry County as decreed by Home Rule. See S.C. Constitution, Art. VIII, § 17.³ See also S.C. Code Ann. § 4-9-25 (codifying Home Rule for counties).⁴

The reason for this deference to local government is the legislature's “realization that different local governments have different problems that require different solutions. . . . By enacting statutes like § 4-9-25 . . . the General Assembly gave local governments the power to

³ The full text of Article 17 reads as follows:

The provisions of this Constitution and all laws concerning local government **shall be liberally construed in their favor**. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution. (Emphasis added)

⁴ The full text of Section 4-9-25 reads as follows:

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. **The powers of a county must be liberally construed in favor of the county** and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties. (Emphasis added)

deal with these problems at the local level rather than at the State Capitol.” Hospitality Ass’n. of South Carolina v. Cnty. of Charleston, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995). Our appellate courts recognize that “legislators and administrators are properly concerned with balancing numerous competing considerations and thus, we will normally refrain from reviewing the merits of their decisions, absent evidence of arbitrariness or irrationality.” County of Charleston v. Sleepy Hollow Youth, Inc., 340 S.C. 174, 181, 530 S.E.2d 636, 640 (Ct. App. 2000). See also Smith v. Georgetown County Council, 292 S.C. 235, 239, 355 S.E.2d 864, 866 (Ct. App. 1987) (“it is not the role of the courts to substitute their judgment for that of local legislative bodies, which are better qualified to act upon local ... matters.”). In light of Home Rule, therefore, Ms. Ballard must show that the County has acted arbitrarily or irrationally. County of Charleston v. Sleepy Hollow Youth, Inc., 340 S.C. at 181, 530 S.E.2d at 640. Ms. Ballard did not make this showing.

Ms. Ballard argues that the County violated the Records Act in three particulars: (1) not adopting its own document retention policy; (2) not properly backing up or archiving e-mail; and (3) not archiving text messages. Ms. Ballard cannot prove a violation of the Records Act under any of these theories.

a. Retention Schedule.

Ms. Ballard argues that the County failed to enact its own document retention policy. The Records Act, however, does not require that the County promulgate such a policy. Instead, the Records Act allows a county to either follow the State Archive’s document retention policy or adopt its own policy. See S.C. Code Ann. § 30-1-90(B) (“[G]eneral schedules for records series common to agencies and subdivisions may be issued by the Archives. Agencies and subdivisions must be allowed to opt out of these general schedules and proceed pursuant to the provisions of

subsection (A) in the establishment of specific records schedules.”). See also S.C. Code of Regulations R. 12-500 (“These general schedules supersede all schedules approved previously for the same records series. However, county governments may opt out of these general schedules and request the continuing use of existing schedules or the establishment of specific retention schedules for their records when appropriate, necessary, or in order to avoid conflict with other laws or regulations.”). The testimony demonstrates that the County has chosen to follow the State Archive’s Document Retention Policy rather than adopt its own. The law allows this course of action, and thus, the County’s decision to follow the State’s policy rather than adopting its own policy does not entitle Ms. Ballard to any relief.

b. Archiving E-mails.

Ms. Ballard argues that the County did not properly back up or archive its e-mail. First, nowhere does the Records Act mandate that local governments like the County store e-mail in any particular manner, or even that they maintain copies of e-mails. Indeed, the Records Act does not address storage of e-mails at all. Instead, the Records Act requires that local government adhere to minimum requirements relating to the construction of the facilities in which they are kept, the environment surrounding these records, and the security and protection that local government is to provide. See S.C. Reg. 12-1002 (“Any facility or area thereof in which the records of a South Carolina public body are maintained shall meet the following minimum standards” with respect to (A) Construction, (B) Environment and (C) Security/Protection.). Specifically, this regulation requires:

A. Construction:

- (1) The building shall be of sound construction and shall be well-maintained, with a roof which is free of leaks.
- (2) If the facility is located off-site (away from the building where the records are ordinarily maintained and used), and if part of the

structure is used for other purposes, a fire wall shall separate the records area from any area which might present a hazard to the records.

B. Environment:

- (1) It shall be kept clean to avoid accumulations of dust and dirt.
- (2) If the facility is not climate-controlled, the records storage area shall be well-ventilated and shall not be subject to rapid and extreme fluctuations of temperature and humidity (more than plus or minus forty degrees or forty percent within twenty-four hours).
- (3) It shall be free of vermin and shall have a pest control program to guard against insects and rodents.
- (4) It shall be well-lighted, but records shall not be exposed to direct sunlight.
- (5) Records shall be protected from the threat of damage caused by smoking, eating and drinking.
- (6) Records shall be placed a minimum of three inches from the floor on sturdy, well-supported shelving units, file cabinets, or wooden pallets. Unbound inactive records shall be stored in file cabinets or in closed containers placed on shelves or pallets.
- (7) Records shall not be placed in areas subject to flooding or excessive moisture, in areas with exposed water or steam pipes subject to leaking, or in areas that are adjacent to furnaces or boilers unless separated by a four-hour fire wall.

C. Security/Protection:

- (1) It shall not be located in any area where the risk of natural and man-made disasters poses a significant threat to the facility and its contents. It shall be located sufficiently separate from external hazards to ensure a high degree of safety from such occurrences as fire and flood.
- (2) It shall be located within the coverage area of a fire station and near a regularly patrolled police route.
- (3) It shall be secured at all times, and, in the case of an off-site storage facility, if it is not normally open to the public, access shall be restricted to authorized persons.

(4) It shall have an operational fire detection mechanism. In an off-site, unstaffed facility, the fire detection mechanism shall have an external audible alarm.

(5) It shall contain an adequate supply (one or more) of well-distributed portable fire extinguishers with a minimum classification of IIA:10B:C suitable for extinguishing fires in all record materials stored.

Id. Mr. Adams testified that the County met these standards, and Ms. Ballard offered no evidence to the contrary. The County complied and continues to comply with the State's minimum standards for records preservation, and for this reason alone Ms. Ballard's Record Act claims fail.

Second, the County did archive its e-mail, using end-user computers. Mr. Snyder testified this was industry standard. He testified that his current employer, a large South Carolina trucking company, does not back up end user computers and does not have a separate server to retain e-mails. Like the County, his new employer stores e-mails on end-user computers also. Ms. Ballard offered no evidence to rebut Mr. Snyder's testimony about this industry standard, and in fact she provided no evidence of how other entities back up e-mails.

Ms. Ballard did argue that the County could have cheaply and easily backed-up its e-mails using "the Cloud." Mr. Snyder testified, however, that the Cloud was not fully developed in 2014, and thus he was dubious of whether or not it was even an option for the County during the time period in question. More important, Mr. Snyder testified that the Cloud was not secure, and thus was not a viable option for storing the County's records.

The County also backs up end-user computers with external hard drives. Jay Tothacer testified that he has backed up his computer with an external hard drive for the past six years. Wayne Adams testified that he did not use an external hard drive prior to the time his computer crashed. He testified that until his computer crashed, he had never had any problems with losing

computer data. After his computer crashed, Mr. Adams stated that he began using an external hard drive.

Nothing in the State's minimum standards, and nothing that Ms. Ballard pointed to, directs how the County should maintain e-mails. Ms. Ballard argues that the State Archives document retention schedule required the County to back up e-mails. The document retention schedule, however, only dictates how long the County must retain certain documents; it does not direct how the County must store them. As noted above, the Records Act directs only that the County utilize "efficient and economical" methods to preserve its documents. S.C. Code Ann. § 30-1-80.

To the extent that Ms. Ballard claims that the County's losing of documents through a computer crash is a *per se* violation of the Records Act, the Court finds that this simply is not the law. Under Ms. Ballard's theory, local governments would violate the law if documents were lost due to catastrophic fires, computer or other calamities. The Records Act, however, does not subject local government to this type of strict liability. The testimony shows that Mr. Adams never had a problem losing data until his computer crashed, and thus his storing of e-mails on his computer was "efficient and economical." After his computer crashed Mr. Adams began to back up his computer with an external hard drive.

In summary, the Court finds that the County complied with the Records Act with regard to Mr. Adams' e-mails. The County complies with the State's Minimum Standards for document storage facilities, stores e-mails consistently with industry standards, and has even taken the added step of using external hard drives as an added measure of archiving e-mails.

c. Archiving Text Messages.

Ms. Ballard argues that the County failed to archive text messages. The Court disagrees. With respect to correspondence, the Document Retention Schedule for Counties under the Records Act describes three categories of documents – (1) Policy and Program Records⁵ that must be stored permanently, (2) General Administrative Records⁶ that must be stored for five years, and (3) General Housekeeping Files⁷ that must be stored until no longer needed for reference. S.C. Regs. 12-503.15. As noted in the Findings of Fact the County seldom, if ever, conducts business via text. Even if the County on occasion does conduct business via text, there

⁵ Policy and Program Records are defined as records which “document the formulation and adoption of policies and procedures and the implementation or management of the programs or functions of the office or department. Included are such records as correspondence with citizens and government officials regarding policy and procedures development or program administration; annual or ad hoc narrative or statistical reports on program activities, achievements or plans; organizational charts and mission statements; studies regarding department or office operations; circular letters, directives or similar papers addressed to subordinate units or staff concerning policies, procedures, or programs; and records related to significant events in which the department or office participated. Records may include photographs, published material, audio tape, or other record forms. S.C. Regs. 12-503.15(1).

⁶ General Administrative Records are defined as “records ... of a general facilitative nature created or received in the course of administering programs. Included are such records as correspondence of a routine or repetitive type, such as request for information; reference materials, sometimes of a technical nature, used, but not created by, the office; daily, weekly, or monthly office activity reports which are summarized in annual reports or which relate to routine activities; personnel data on office staff which are duplicated in personnel office files; purchase orders, travel expense statements or similar financial papers which are duplicated in fiscal office files; daily or weekly work assignments for office staff; suspense or follow up files which duplicate copies of papers filed elsewhere; circular letters, directives or similar papers received from other offices; and rough drafts or notes created in compiling reports or studies. S.C. Regs. 12-503.15(1).

⁷ General Housekeeping Files are defined as “records ... of a general ‘housekeeping’ nature created or maintained by an office which do not relate directly to the primary program responsibility of the office. Included are such records as charitable fund raising drive materials; custodial services request; emergency evacuation procedures; notices of holidays; parking space assignment lists; telephone installation requests; and lists showing the distribution of keys.” S.C. Regs. 12-503.15(3).

is no evidence that these texts rise to the level of material that must be archived for any extended period of time. Thus, Ms. Ballard has not shown a violation of the Records Act related to text messages.

Based on the foregoing, Ms. Ballard has not met her burden of proof with regard to her claims under the Records Act. Judgment for the County is granted on these claims.

II. CLAIMS INVOLVING EXECUTIVE SESSION.

Under FOIA “[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. § 30-4-70(b). FOIA explains further that “specific purpose” means “a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section.” *Id.* These sub-sections are as follows:

- (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; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.
- (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.

S.C. Code Ann. § 30-4-70(a).

Ms. Ballard claims that the County did not properly state the purpose of executive session in several different instances. Mr. Tothacer testified that the County announces the specific purpose of each executive session “[w]ithin the requirements of the law,” Tothacer Deposition (Exhibit 2) at p. 71, ll. 16-18, explaining:

[Y]ou give one of the reasons for the section and if you can give any additional information, you may include that. But if you give the reason that's stated, like, here's a simple one: Investigative proceedings regarding the allegations of criminal misconduct. That's a specific purpose. You don't say, for example: Personnel matters, because there's not an exemption for personnel matters.

Id. at p. 71, l. 25 – p.72, l. 8. Mr. Tothacer's testimony echoes FOIA, which defines “specific purpose” as “a description of the matter to be discussed as identified in items (1) through (5) of subsection (a).” The County did this in announcements of executive sessions at issue.

The case of Quality Towing v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001) illustrates the point. There, the announcement of an executive session was simply “Towing — Contractual Recommendation.” 345 S.C. at 164, 547 S.E.2d at 866. The court held the meeting minutes reflected the city council failed to announce the specific purpose of the executive session. Id. This announcement did not comply with FOIA because a “contractual recommendation” is not set forth in any of the sub-sections of 30-4-70(a), which define the term “specific purpose.” The County went well beyond what was announced in Quality Towing. In each challenged instance the County noted the specific exemption and announced it. It is also significant that the County did not simply list every exemption. Instead, as Mr. Tothacer testified, the County selected the exemption applicable to that particular executive session.

Therefore, the County properly announced the specific purposes of the executive sessions at issue. Thus, judgment should be awarded to the County on this issue.

CONCLUSION

For the foregoing reasons the Court grants judgment to the County.

IT IS SO ORDERED.

The Honorable Thomas A. Russo,
Circuit Court Judge

ROA 00344

From: Kathy Schillaci
Sent: Wednesday, October 12, 2016 2:59 PM
To: trussoj@sccourts.org; 'trussolc@sccourts.org'
Cc: nnicholson@hsblawfirm.com; Joe McCulloch
Subject: 2015-CP-36-00141

Judge Russo, I hope you are doing well. I have attached our proposed order and affidavit of attorney fees in the above-captioned case. I mailed to you last week a copy of the trial transcript and a copy of our exhibits. Should you need any additional information, please do not hesitate to contact me. We greatly appreciate your time and consideration. Thanks, Kathy

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ROA 00344

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

THIS MATTER CAME BEFORE ME for non-jury trial beginning on September 6, 2016. Plaintiff was represented by Joseph M. McCulloch, Jr. and Kathy R. Schillaci. Defendant was represented by Boyd B. Nicholson, Jr. This matter involved an action for equitable relief against the Defendant, Newberry County, pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. Section 30-4-10 *et seq.* (hereafter "FOIA") and the South Carolina Public Records Act (hereafter "Public Records Act"). Specifically, the Plaintiff seeks a declaratory judgment that the 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;
- (2) failing to properly announce the "specific purpose" of executive meetings as required by law.

Additionally, the Plaintiff seeks an award of attorney fees pursuant to S.C. Code Ann. §30-4-100(b).

As set forth below, I find the Plaintiff has met her burden of proof as to both causes of action and find declaratory relief appropriate.

PART I. DOCUMENT REQUESTS UNDER FOIA

Based on the testimony and all evidence presented at trial, this court makes the following findings of fact and law.

FINDINGS OF FACT AND LAW

1. The South Carolina Freedom of Information Act ("the Act") governs the public disclosure of the activities of public bodies. Lambries v. Saluda County 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 County, 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. The 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).
3. 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.¹ S.C. Code Ann. §30-4-20(c).
4. The record is void of any special exemptions or exceptions claimed by the Defendant as to the specific documents sought. *See* S.C. Code Ann. §30-4-40.
5. This court finds the Plaintiff has a right to inspect public documents. S.C. Code Ann. §30-4-30(a). The Plaintiff, Desa Ballard, is an attorney licensed in the State of South Carolina. On December 2, 2014, as part of her representation of a client, she properly served a FOIA request upon the Defendant, Newberry County, seeking a number of documents. She ultimately narrowed her request with the focus on documents involving the county magistrate's

¹ See T. p. 169, line 2 - p. 170, line 3; Plaintiff's Exhibit 29 (Answers to Req. to Admit).

court.² The FOIA request included - and Plaintiff was particularly interested in - email and text messages to and from the Defendant's county administrator, Wayne Adams, related to the magistrate's court.³

6. The Defendant's county administrator selected Jay Tothacer, the Defendant's county attorney, as the "point person" in responding to the Plaintiff's FOIA request.⁴ In this role, Mr. Tothacer served as the Defendant's authorized representative. Mr. Tothacer testified he did not know and made no effort to determine whether the Defendant is subject to the archives requirements promulgated by the South Carolina Department of Archives and History.⁵ Further, Mr. Tothacer did not review the State Archives guidelines in connection with the response to the FOIA request.⁶

7. The 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.⁷

8. As to the FOIA request for Mr. Adams' emails, Mr. Tothacer informed Ms. Ballard that the county administrator's computer had crashed in March 2014 so as to emails on Mr. Adams' computers⁸, the Defendant could only provide those emails from March 2014 forward.⁹ He further informed Ms. Ballard the emails from the "crashed computer" had not been archived.¹⁰ Importantly, Ms. Ballard testified the pre-March 2014 period of time was the most

² Plaintiff's Exhibit 1 (FOIA request).

³ T. p. 18, lines 11-16.

⁴ Plaintiff's Exhibit 27, p. 18, line 17 - p. 19, line 10; Plaintiff's Exhibit 24, p. 7.

⁵ T. p. 149, lines 2-19; Plaintiff's Exhibit 27, p. 58, lines 17 - 25.

⁶ *Id.* p. 59, lines 1-5.

⁷ Plaintiff's Exhibits 24 and 25; T. p. 148, line 24 - p. 149, line 1, p. 161, lines 8-16, p. 163, lines 10-21.

⁸ While most county computers are PC, the county administrator's computer, specifically the one that crashed, was an Apple. He also had an Ipad and an Iphone.

⁹ T. p. 19, lines 15-19; Plaintiff's Exhibit 1A number 7.

¹⁰ T. p. 20, lines 1-6; Plaintiff's Exhibit 1A number 7.

relevant in terms of her FOIA request, and it appears from the various exhibits and her testimony that she made this fact known to the Defendant.¹¹

9. 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 as "I trust Mr. Adams to do the search."¹² This is relevant given Mr. Adams testimony that he was "not that familiar" with Ms. Ballard's FOIA request.¹³

10. As to the FOIA request for Mr. Adams' text messages, none were provided.¹⁴ Although Mr. Adams testified he may have conducted county business by text messages and Mr. Tothacer confirmed this fact, the Defendant does not archive or save text messages in any way.¹⁵ Moreover, although Mr. Tothacer testified he checked Mr. Adams' *current* cell phone for relevant text messages, Mr. Adams has had several county cell phones and those cell phones were not checked.¹⁶

11. When asked in discovery to provide "all FOIA policies, rules or guidelines in use or relied upon by Newberry County from 2013 to present," the Defendant answered, "none."¹⁷ Interestingly, the Defendant also has no documentation evidencing the computer crash.¹⁸

12. While the Defendant did provide approximately 1800 documents by its count and the Plaintiff paid for the cost of that production, the only e-mails produced directly from the county administrator were half an inch thick and were those from March 2014 forward found on

¹¹ T. p. 19, line 20 - p. 21, line 11; Plaintiff's Exhibits 2,8

¹² Plaintiff's Exhibit 27, p. 34, line 16 - 21, p. 35, line 8, p. 61, line 21 - p. 62, line 3.

¹³ T. p. 119, line 20 - p. 120, line 2.

¹⁴ T. p. 122, lines 10-12.

¹⁵ Exhibit 27, p. 47, lines 11 - p. 48, line 12 (Mr. Adams and Mr. Tothacer have exchanged text messages related to county business), p. 45, lines 8-15 (county does not archive or save text messages); T. p. 19, lines 3-7, p. 120, lines 19-25, p. 168, lines 11-17.

¹⁶ T. p. 126, lines 11-14; Plaintiff's Exhibit 27, p. 56, line 15 - p. 57, line 4.

¹⁷ Plaintiff's Exhibit 25, Response to Request to Produce No. 2.

¹⁸ *Id.*, Response to Request to Produce No. 6.

his new computer.¹⁹ When the Plaintiff again specifically requested the e-mails from the old computer, she was told by the Defendant's attorney, "[w]e do not have archiving capabilities of email of any documents stored on personal computers beyond what is still available on that individual personal computer."²⁰ When asked, "paragraph eleven reassures us that nobody is archiving or backing up in Newberry County," Dylan Snyder²¹ answered, "Yes. From an e-mail system standpoint, that would be correct."²²

13. It appears to this Court from the exhibits and testimony that the Defendant has no system in place for backing up or archiving county emails, no connected email servers, no cloud storage, and no end user back-ups.²³ As Mr. Tothacer testified, the only e-mail archiving done by the Defendant "is what individual users do on their computers, as far as I know."²⁴ However, the Defendant provided no information or policy to the individual user to even suggest that archiving be done, and no directive exists to provide the end user with information as to what he or she is required to retain. Indeed, the Defendant could cite to no policies concerning the preservation of emails, no policies concerning the archiving of emails, and no policies regarding when a user can purge electronic data from his or her computer.²⁵

14. Mr. Snyder testified that had he been made aware of the law requiring preservation and retention of official public documents, he would have taken steps and made recommendations for achieving computer back-up in the county.²⁶

15. I find it significant that Mr. Snyder testified he asked county council three years

¹⁹ T. p. 40, lines 3-19.

²⁰ Plaintiff's Exhibit 1A.

²¹ Dylan Snyder was the Defendant's IT director for all relevant time periods. See Paragraph 12.

²² T. p. 97, lines 1-4.

²³ Plaintiff's Exhibit 25; T. p. 97, lines 1-4, p. 20, lines 9-16.

²⁴ Plaintiff's Exhibit 27, p. 60, lines 12-16; see also Plaintiff's Exhibit 24, Answer to Interrogatories No. 9 and 14.

²⁵ T. p. 163, lines 10-21; T. p. 164, line 24 - p. 165, line 4.

²⁶ T. p. 81, lines 11-21.

in a row during the budget process to upgrade the Defendant's email system to an exchange server which is industry standard and would have allowed for e-mail archiving.²⁷ He also wanted to have a seven year archiving policy. Specifically the 2013-2014 budget request was for a Microsoft active directory exchange server.²⁸ The Defendant then approved \$68,420 for two servers – one server to be used as a backup redundant link in case of the failure of the first server – and \$35,000 for equipment replacement.²⁹

16. Mr. Snyder's first request to Newberry County Council for this server to achieve email archiving was in 2014 *prior to the crash of Mr. Adam's computer*. Importantly, it appears this budget item was approved by Newberry County Council for the 2013-2014 budget year. The Defendant at trial offered no explanation in testimony for its failure to implement the budget request. Mr. Tothacer could not explain why the server was never purchased.³⁰ Notably, it appears the Defendant never told Mr. Snyder his request for hardware for archiving had been approved. At the time of trial, Mr. Snyder was still not aware that his request for purchase of an exchange server had been approved.³¹

17. As Mr. Adams agrees, the chief administrative officer in charge of public records is the legal custodian and is responsible to carry out the provisions of the Public Records Act.³² Newberry County is governed under the Home Rule Act as a Council--Administrator form of government, pursuant to S.C. Code Ann. §4-9-10(b) and 4-9-610 *et seq.* and the county administrator is the "administrative head" of the county. S.C. Code Ann. §4-9-620 & 630. Therefore, the county administrator has the duty to implement the document retention policies

²⁷ T. p. 98, line 21 – p. 99, lines 5; T. p. 100, line 2 – p. 101, line 3.

²⁸ Defendant's Exhibit 9; T. p. 175, lines 16-19.

²⁹ T. p. 116, line 18 – p. 117, line 12.

³⁰ *Id.*, T. p. 178, lines 2-9.

³¹ T. p. 98, line 25 – p. 101, line 24

³² T. p. 123, lines 7-15; S.C. Code Ann. §30-1-20.

mandated by state law. S.C. Code Ann. §4-9-630. The legal custodian of public records “shall protect them against deterioration, mutilation, theft, loss or destruction. . .” S.C. Code Ann. §30-1-70. The maintenance of those documents is subject to document retention schedules promulgated by the State Archives. S.C. Code Ann. §30-1-80.

18. Pursuant to S.C. Code Ann. §30-1-90(B), the State Archives promulgated document retention policies applicable to county governments. These regulations were approved on June 26, 1992 as Reg. 12-500 through 12-512.2; additional regulations were approved in 2002. Reg. 12-500 through 12-518.3.³³ Reg. 12-503.15 requires that “incoming and outgoing correspondence to and from the office” be maintained for a minimum of five (5) years, or permanently, depending on the nature of the correspondence. Reg. 12-503.15(A) and (B). An exception is made for “general housekeeping files” but the court finds the FOIA documents requested here were not “general housekeeping files.”³⁴

19. It appears to this court as it relates to county e-mails and texts that the Defendant is required to follow the State Archives Retention Schedule or have its own retention schedules. Mr. Adams testified the Defendant “defaults” to the state Public Records Act because the County does not have its own policy.³⁵ However, the Defendant at trial offered no explanation for its failure to implement the state archiving requirements.

20. Although the Defendant argues that there is no private right of action under the Public Records Act, I find this argument unpersuasive for several reasons. First, Brock v. Town of Mt. Pleasant, 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2015), involved a private cause of action under both FOIA and the Public Records Act. Secondly, our case law holds that “statutes dealing with the same subject matter are *in pari materia* and must be construed together, if

³³ See Plaintiff's Exhibit 13.

³⁴ See T. p. 124, lines 12-19.

³⁵ T. p. 123, line 25 - p. 124, line 3.

possible, to produce a single, harmonious result. Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject must be reconciled, if possible, so as to render both operative.” Amisub of S.C., Inc. v. S.C. Dept. of Health & Envtl. Control, 407 S.C. 583, 757 S.E.2d 408 (2014)(internal citations omitted); *see* Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015); *see also* Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012)(conferring standing based on the “public importance” exception). As such and set forth below, I find there is a private right of action under the Public Records Act as it comports with FOIA compliance.

21. This court finds the Defendant was required to preserve its administrator’s county related e-mails and text messages, required to produce those pursuant to FOIA, and the Defendant has not set forth a valid reason for its failure to preserve and thereafter produce said documents. When asked, “Wouldn’t you agree that you can’t provide documents pursuant to FOIA if you’re not retaining and preserving the documents,” Mr. Tothacer admitted, I suppose you have to have the record to provide it.”³⁶ As the purpose of FOIA is to protect the public from secret governmental activity, it would be illogical for governmental entities to simply not retain documents as a way to avoid its FOIA obligations. The Defendant attempted to deflect this responsibility, asserting the FOIA and the Public Records Act have no relation to each other.

22. Cost does not appear to be an adequate or valid excuse for not complying with the statutes, and has never been recognized by our appellate courts as an excuse or justification for non-compliance. According to the record, there are inexpensive methods for preserving both emails and text messages.³⁷ Significantly, had the Defendant implemented its own approved

³⁶ T. p. 150, lines 15-21.

³⁷ Mr. Synder testified there are inexpensive methods for saving text messages and email back-up including downloading to a server, thumb drives, external hard drives, CDRs, the Cloud, and printing. T. p. 74, lines 8-13, p.

budget item for e-mail backup, the loss of e-mails from Mr. Adams' county computer would have been prevented. This is especially important as Mr. Synder acknowledged³⁸ and this court can take judicial notice that computer crashes are not unusual.

23. In her original FOIA request in December 2014, the Plaintiff sought the non-privileged litigation documents in the *Newberry County versus Abraham* case.³⁹ Although those documents were requested as part of the original FOIA, they were not produced until *after* the lawsuit was filed.⁴⁰ While the Defendant may argue these documents were in the possession of outside counsel, these were documents the Defendant should have had and timely produced. The Plaintiff specifically requested these documents before the lawsuit was filed. As such, I find these documents were not provided timely.

24. Based on the above findings, it appears to this court that the Defendant violated its duties under the Public Records Act and FOIA and as such, declaratory relief is appropriate.

DECLARATORY RELIEF AS TO FOIA

The relief available to the Plaintiff includes declaratory relief and injunctive relief. S.C. Code Ann. §30-4-100(a). The Plaintiff is entitled to a declaratory judgment that the Defendant has violated the act and is entitled to relief. While the Plaintiff in her Complaint requested the Defendant employ, at its expense, any necessary technology consultants to retrieve the records that it has negligently destroyed (or failed to maintain), it appears from the testimony of Mr. Snyder that the hard drive at issue has been destroyed.⁴¹ As such, this relief does not appear to be available.

75, lines 1-5, p. 90, lines 10-21. It appears Mr. Adams never inquired into the cost of obtaining these items for backing-up e-mail. T. p. 121, lines 1-14.

³⁸ T. p. 75, line 21 - p. 76, line 4.

³⁹ Plaintiff's Exhibit 1.

⁴⁰ T. p. 27, lines 14-17; Plaintiff's Exhibits 1, 8-9.

⁴¹ T. p. 85, lines 9-14.

Although declaratory relief may not have been necessary had the Defendant adopted an applicable retention policy since the filing of this lawsuit, here the Defendant has not done so. Mr. Tothacer testified that the Defendant has not changed its procedure regarding email and text archiving. "We haven't changed what was in effect before the FOI request was filed, so nothing."⁴² This was also evident from the testimony of Mr. Synder.⁴³ As such, this Court finds it appropriate to Order the Defendant to implement the e-mail archiving system, or similar such system, that it approved in the 2013-2014 budget cycle in order to comply with its duties under South Carolina law. I order this be done within sixty (60) days. Specifically as to email and text messages, I also order that the Defendant's county administrator or individual selected by him consult with a representative from State Archives within ninety (90) days to ensure the Defendant is in compliance with state law and to follow recommendations from State Archives as to retention of electronic records.⁴⁴

PART II. EXECUTIVE SESSIONS OF COUNTY COUNCIL

Based on the testimony and all evidence presented at trial, this court makes the following findings of fact and law.

FINDINGS OF FACT AND LAW

1. The Plaintiff also seeks a declaration that the Defendant violated FOIA, specifically, S.C. Code §30-4-70, with respect to numerous occasions in which the Newberry County Council went into executive session but did not properly announce the "specific purpose of the executive 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.

⁴² Plaintiff's Exhibit 27, p. 91, lines 19 - p. 92, line 1.

⁴³ T. p. 97, lines 1-4; *see also* T. p. 163, lines 10-17; Plaintiff's Exhibit 25.

⁴⁴ See generally T. p. 147, line 12 through p. 148, line 5; T. p. 149, lines 7-19.

3. FOIA creates an affirmative duty on the part of public bodies to disclose information. Burton v. York County Sheriff's Department, 358 S.C. 339, 594 S.E.2d 888, Ct. App. 2004). The Act should be "liberally construed to carry out the purpose mandated by the legislature." Brock v. Town of Mount Pleasant, 411 S.C. at 117, 767 S.E.2d at 203. The announcement of an executive session in the minutes must specify the "specific purpose" of the executive session. Id., 411 S.C. at 121, citing §30-4-70(b).

4. 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 Publishing Company Inc. v. Barnwell, 291 S.C. 4, 11, 351 S.E.2d 878 (Ct. App. 1986). The act "must be construed so as to make it possible for citizens. . . to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings." Lambries v. Saluda County Council, 409 S.C. at 1, 760 S.E.2d at 785 (citing Section 30-5-15).

5. The Defendant concedes its county council meetings are governed by FOIA.⁴⁵

6. The Plaintiff alleges, and this court agrees, that the public would have no idea what is discussed in executive session as the Defendant merely recites the statute verbatim, in whole or in part, and in such a general way that the specific topic of the actual executive session is hidden. As Mr. Tothacer testified, "We will name or list a specific one of five reasons that you can go into executive session. We quote the statute in its entirety, that section of the statute."⁴⁶

7. With respect to the minutes of Defendant's County Council meetings placed in

⁴⁵ Plaintiff's Exhibit 27, p. 71, lines 10-12.

⁴⁶ T. p. 140, lines 5-8.

evidence, Mr. Tothacer testified that the specific nature of the discussion during executive session could not be determined from the minutes unless there was a vote directly after Council returned to public session.⁴⁷

8. For example, as testified by the Plaintiff in reference to an August 20, 2014 County Council meeting, “[T]hey obviously knew what they were going to be talking about because the materials were there.”⁴⁸ The Agenda (Plaintiff’s Exhibit 16) contains on page 4 redacted matters relating to executive session.⁴⁹ The minutes then announce the executive session (Plaintiff’s Exhibit 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.” When Mr. Tothacer was asked to set forth the “specific purpose,” he testified, “There appears to have been an executive session . . . [for] receipt of legal advice about a pending, threatened, or potential claim.”

Question: Do you know what kind of claim?

Answer: Do not, not based on that [minutes].

Question: Do you know how the public would know?

Answer: No.⁵⁰

9. Another example involves the July 16, 2014 executive session. When asked the specific purpose from a review of the minutes, Mr. Tothacer testified (reading from exhibit): “Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase 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

⁴⁷ Plaintiff’s Exhibit 27, p. 74, line 6 - p. 75, line 8, p. 78, line 2 - p. 80, line 7, p. 82, line 1 - p. 87, line 21.

⁴⁸ T. p. 26, lines 22-23.

⁴⁹ Plaintiff’s Exhibit 16; T. p. 33, line 9 - p. 34, line 12.

⁵⁰ Plaintiff’s Exhibit 27, p. 79, line 22 - p. 80, line 8.

of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.”

Question: So general public would not know kind of the general nature of that legal advice correct?

Answer: That’s correct.⁵¹

10. Based on a review of the minutes provided (Plaintiff’s Exhibit 12) and liberally construing FOIA to carry out the purpose mandated by the legislature, this court finds the Defendant violated both the letter and spirit of the FOIA by not setting forth the “specific purpose” of executive session in its minutes. “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)(“Towing – Contractual Recommendation” not sufficient); Brock v. Town of Mt. Pleasant, 767 S.E.2d 203, 411 S.C. 106 (S.C. App. 2015)(“Legal Advice pertaining to an EEOC Complaint relative to a firefighter applicant (Personnel matter)” and “Legal Advice pertaining to Mathis Ferry Road Project (DEPAUL) relative to PBS & J” did state the specific purpose).

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

DECLARATORY RELIEF

As this court finds the Defendant violated FOIA by not properly announcing the “specific purpose” of executive session as evidenced in the minutes, declaratory relief is appropriate. Specifically, per the Defendant’s County Council minutes, the executive sessions held on these occasions were not properly identified, and therefore the subject matter of these sessions must be disclosed to the public. As such, the Defendant is ordered within fifteen (15) days to submit to the Plaintiff the redacted information contained in Plaintiff’s Exhibit 16 and

⁵¹ Id., p. 82, line 10 – p. 83, line 12.

any other documentation which reflects the discussions during that executive session.⁵²

Additionally, the Defendant is required in the future to properly announce the “specific purpose” of the executive and not merely recite the statutory language, subject to court monitoring if necessary.

ATTORNEY FEES AND COSTS

“The FOIA provides for attorney’s fees to a prevailing party seeking relief under the act. 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.” Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835, 841 (Ct. App. 2015). I find an award of attorney fees and litigation costs are appropriate. Plaintiff’s counsel has submitted Affidavits as to fees and costs to this court. Based on my review of the attorney fee Affidavits, I find the fees and costs reasonable and award attorney fees of \$ 24,667.50 and costs of \$ 2,604.88 and require the Defendant to pay such award within thirty (30) days of this Order. I further find the Plaintiff is entitled to the return of the \$1,000 fee for the production of Abraham litigation documents as the documents were not timely provided and were only produced once the lawsuit was filed.⁵³

IT IS SO ORDERED.

The Honorable Thomas A. Russo,
Presiding Judge

This ____ day of _____, 2016

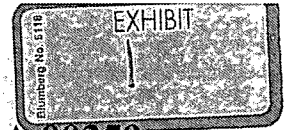
Florence, South Carolina

⁵² This is the relief sought by the Plaintiff. See T. p. 42, line 15 - p. 43, line 6, p. 63, line 10 - p. 64, line 6, p. 137, lines 1-18.

⁵³ T. p. 27, line 6 – p. 28, line 9; S.C. Code Ann. §30-4-30(b).



Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.



ROA 00359 Debra Ballard
Harvey M. Watson III

December 2, 2014

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

Via U.S. Mail
Wayne Adams
County Administrator
County of Newberry
Post Office Box 156
Newberry, South Carolina 29108

Re: Freedom of Information Act Request

Dear Mr. Adams:

This correspondence is addressed to you based upon your position as custodian of records for Newberry County pursuant to S.C. Code Ann. § 30-1-20 or the records officer thereof, for purposes of receiving and responding to the request herein. If you are not the proper individual for receipt of this request, please advise by return mail. Otherwise, the requesting party will consider the request properly received by you in accordance with the Act.

Pursuant to S.C. Code Ann. §§30-4-10 *et seq.*, the Freedom of Information Act (herein "the act"), you are requested to produce to the undersigned copies of the following public records. The term "public records" is defined in Section 30-4-20(c), as amended. This request does not include a request for any materials that are protected by the attorney-client relationship or are otherwise privileged or materials that exempt from disclosure by statutory law. Provided, however, any documents which are responsive to this request that are withheld on the basis of privilege or exemption should be identified, along with the basis upon which such document(s) is withheld from disclosure. Such identification shall include the author and date of the document, a general description thereof, as well as the names of all recipient(s) of such document, in order to allow the requesting party to determine whether there is need for further inquiry to determine the validity of the response.

Within five (5) days of the receipt of this letter, please provide an estimate of the fees you anticipate will be required in order to produce the materials requested. Pursuant to Section 30-4-30(b), fees may not be charged for examination and review to determine if the documents requested are subject to disclosure. Such five (5) day period shall not reduce or extend the response time period provided by Section 30-4-30(c).

1. The records management program for Newberry County Magistrate's Court as required by Section 30-1-80.

ROA 00359

2. Any and all approvals received by Newberry County or any of its agents from the Director of the State Archives authorizing the destruction of any public record regarding the Magistrate's Court of Newberry County at any time since 1995, as required by S.C. Code Ann. § 30-1-110.
3. Documents related to the appointment of magistrates for Newberry County at all times from 2010 to the present, including communication in any form with any member of the South Carolina Senate, including but not limited to Senator Ronnie Cromer.
4. Documents related to the number of full-time or part-time magistrates for Newberry County at all times from 2007 to the present, including communication in any form with any member of the South Carolina Senate, including but not limited to Senator Ronnie Cromer.
5. Any memoranda or document from 2010 to the present in which the operations and/or staffing of the Newberry County Magistrate Court, including its judges and/or employees, is discussed or referenced in any manner, directly or indirectly.
6. Any and all documents related to the case of Thomas Abraham v. Newberry County, Case No. 8:11-cv-03016-TMC (United States District Court for the District of South Carolina) and Case No. 2011-CP-36-464 (Newberry County Court of Common Pleas). Your response should not include any documents that available of record through the Newberry County Clerk of Court public files or the public files of the United States District Court for the District of South Carolina nor should it include any materials exempt from disclosure pursuant to the attorney-client relationship. It should include any and all correspondence generated or received during the litigation of the case or afterwards, if related.
7. Any and all electronic messages (to or from wadams@newberrycounty.net or any private email address), including texts on private cell phones, sent to or received by you with the members of county council or any of their agents for the period 2010 to the present.
8. Any and all communications of any kind between any officer or agent of Newberry County with Robert L. McCurdy of South Carolina Court Administration regarding the Magistrate's Court for Newberry County.
9. Any and all opinions requested or received from any officer or agent of Newberry County from the South Carolina Attorney General regarding compensation of magistrates.
10. Any and all documents relating to the implementation of the \$4,500.00 payment authorized by county council at its meeting in September, 1995, other than confidential compensation reports, including but not limited to memoranda, documents, emails, notes, or other form of communication or recordation, at any time from September 1995 to the present.

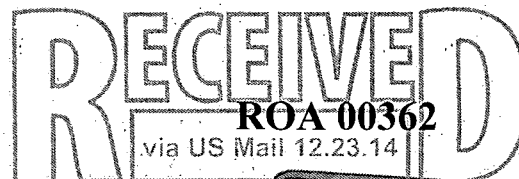
11. Any and all electronic messages sent to or received by tabraham@newberrycounty.net from 2005 to the present.
12. Agenda or minutes reflecting agenda or items discussed (or to be discussed) for all meetings of executive session of county council from 2004 to the present.
13. All agenda for Newberry County Public Safety and Courts committee from 2004 to the present.
14. All minutes for Newberry County Public Safety and Courts committee from 2004 to the present.
15. Voting records for any action taken in executive session whether during county council meetings or otherwise for any time since 2004 to the present.
16. Any and all documents evidencing or reflecting directives from Chief Magistrate Jayroe regarding the allocation of use of the supplemental full-time magistrate's pay approved by resolution or other action of Newberry County Council in or about September, 2005.

To the extent the requested materials are stored or held by the custodian by electronic means, we will provide at your request electronic media storage device(s) to assist with reproduction for purposes of responding to this request. Any materials stored electronically are requested to be produced in electronic format that is capable of being read by generally-available and identifiable software which we may use to access the produced materials.

We look forward to hearing from you.

Sincerely yours,

Desa Ballard by H.W. Watson
Desa Ballard
desab@desaballard.com



COUNTY OF NEWBERRY

OFFICE OF THE COUNTY COUNCIL
POST OFFICE BOX 156
NEWBERRY, SOUTH CAROLINA 29108

(803)321-2100
FAX: (803)321-2102

COUNCILMEN:

HENRY H. LIVINGSTON, III, CHAIRMAN
KIRKSEY KOON, VICE-CHAIRMAN
JOHN E. CALDWELL
WILLIAM D. WALDROP
LESLIE HIPP
STEVE STOCKMAN
SCOTT CAIN

WAYNE ADAMS
COUNTY ADMINISTRATOR
A. J. TOTHACER, JR.
COUNTY ATTORNEY
LAURIE N. RENWICK
CLERK TO COUNCIL

December 22, 2014

Desa Ballard, Esquire
P.O. Box 6338
West Columbia, SC 29171

Dear Ms. Ballard:

Your FOI request dated December 2, 2014 to Wayne Adams has been referred to me for this response. Thanks you for your time last week allowing me to address certain concerns with the breadth of the request and our ability to respond. We are more than happy to provide you with the information requested (if we have it). I would like to follow up with our earlier conversation by referring to each item requested and commenting on the items.

1. The records management program for the Newberry County Magistrate's Court would be within the purview of Chief Magistrate Art Jayroe. As of the date of this letter I have not received a response from him to my request to assist with your request.
2. Information from State Archives with regards to the Magistrate's Court would also be within the purview of Chief Magistrate Art Jayroe – again with no response thus far.
3. I have received copies responsive to this request from the Finance Director and Human Resources Director and there are a total of 263 items with a total time of one hour spent. These items do not include information that may be in other files that have not yet been reviewed and I would expect there will be more items (from the Administrator, Clerk to Council and my files).
4. I have received copies responsive to this request from the Finance Director and Human Resources Director and there are a total of 263 items with a total time of one hour spent. These items do not include information that may be in other files that have not yet been

ROA 00362

ROA 00363
reviewed and I would expect there will be more items (from the Administrator, Clerk to Council and my files).

5. Some of this information may be contained in the responses to numbers 3 and 4 but will also require additional efforts from the Clerk to Council. No response received from Chief Magistrate Art Jayroe.
6. I doubt that there is much that was not a part of the file but any response will require a review of our files along with the information in the public Court files.
7. Mr. Adams' computer suffered a crash in March of 2014 and he is limited to whatever is on his system since then. As we discussed, we do not have archiving capabilities of email of any documents stored on personal computers beyond what is still available on that personal computer. We believe that it may take Mr. Adams almost a day to review his computer for this response. We do not anticipate that it will result in more than 100-200 copies. The Clerk to Council may also have some materials covered by this response in the narrow reading of Administrator and Clerk to Council as 'agent' of County Council as we discussed.
8. Mainly this item would be in the files of the Magistrates and thus far we've had no response from Chief Magistrate Art Jayroe. The Clerk to Council and I may also have some files but it would be helpful if some date limitations could be provided.
9. No assistance from the Chief Magistrate on any files that may be in the Magistrate's offices. Perhaps the Clerk to Council and I may have some information in our files. Again, it would be beneficial if some date limitations could be provided.
10. Most of these documents were included in the Abraham case unless the Chief Magistrate has some that we are not aware of. We will search and provide copies even if already in the Abraham file as it is more efficient to do so.
11. When Judge Abraham left the employ of Newberry County in February of 2012 the email account was deleted and our system does not have archiving or backup ability.
12. This will require a review of each agenda since 2004 and will require several hours of research and review – likely by the Clerk to Council.
13. The Public Safety and Courts committee was only established in January 2008. This will require a review of each agenda since 2004 and will require several hours of research and review – likely by the Clerk to Council.
14. Same response as in number 13 above.
15. This will require a review of each agenda since 2004 and will require several hours of research and review – likely by the Clerk to Council. There are no votes taken in Executive Session and only votes afterward if Council chooses to act based on matters discussed in Executive Session.
16. No response from Chief Magistrate Art Jayroe although there may be copies contained in those copies from the Finance and Human Resources Directors as well as from the Clerk to Council.

You may wish to review the Newberry County website at www.newberrycounty.net and the 'County Council' tab which will provide links to agendas and minutes from County Council

ROA 00363

meetings as far back as February 2002 and as far back as March 2011 for agendas and minutes for the Public Safety and Courts Committee. This would be the same resource we will use to search for many of the requested items. For years prior to those listed and available on the website it will require the Clerk to Council to locate and review the hard copies located in binders from the respective years. **ROA 00364**

Based on the request as presented, we anticipate that the bulk of time will be spent by the Clerk to Council and may approach 15 hours (her hourly rate is \$26/hour. The HR director has expended an hour (likely more) in the copies she has provided and her hourly rate is \$29/hour. Due to the sensitive nature of Mr. Adam's materials he is the only one who can review his files and his hourly rate is \$60/hour. The copy charge of 30¢/page has been approved by County Council and is in effect for each copy provided. It is anticipated that the Clerk to Council copies may number around 500 and Mr. Adams around 100-200.

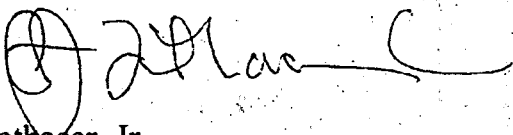
As you are aware, I do not charge for my review of the files but will need to do so since the copies already provided to me contain some personal items such as Social Security Numbers which must be redacted before release. Based on our current staffing it is doubtful that we will provide any copies before the New Year. Beyond the initial copies provided by the Finance and HR directors any further research and copying will occur on a basis as time permits. At this point, I cannot offer a good estimate of when your request will be completely filled. As we discussed, any limiting by subject matter or time will assist in the completion of the request.

In order to begin the work associated with the request we estimate that costs may be in the \$1,000 range and would like a deposit of 25% of those anticipated costs or \$250. We do not have the easy capability of providing these items in an electronic form and will be providing you with hard copies of each item.

I will be providing a copy of this response to Chief Magistrate Art Jayroe with hopes that he will provide his estimate of time, copies and costs. It may be that you will have to forward a request directly to him since we cannot force him to respond.

If you desire further information please do not hesitate to contact me.

Sincerely,

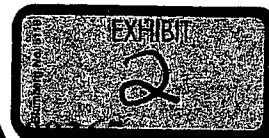


A. J. Tothacer, Jr.
County Attorney

ROA 00364



Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.



ROA 00365
Desa Ballard
Harvey M. Watson III

December 30, 2014

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

Via U.S. Mail
A.J. Tothacer, County Attorney
County of Newberry
Post Office Box 156
Newberry, South Carolina 29108

Re: Outstanding FOIA request to Wayne Adams

Dear Jay:

In accordance with our telephone conversation, your letter of December 22, 2014, and my email of December 30, 2014, I am enclosing my check in the amount of \$500 payable to Newberry County as an advance for the costs of producing the materials requested in the outstanding FOIA request. I will require an accounting of these funds, identifying whose time is being paid for and what service.

I would also ask you to reconsider your position that the only way the County can response to this request is by paper production. It might be wise to have your IT person both assist you with the search for the requested information and reproduce in an electronic format. I believe it would involve significantly less staff time and would produce a product that is more cohesive for me and for you.

Lastly, I am not convinced that the "crash" of Mr. Adams' computer prevents production of his emails. I believe there is an obligation to retrieve documents that involve county business and that simply saying a "crash" occurred is not sufficient. I believe the County's IT person needs to get involved, not just for purposes of my FOIA request (and therefore not at my expense) but also for the County's own records.

I will look forward to receiving the first documents per our email of December 30, 2014 at your earliest opportunity, but before January 9, 2015.

With warm regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

ROA 00365



COUNTY OF NEWBERRY

OFFICE OF THE COUNTY COUNCIL
POST OFFICE BOX 156
NEWBERRY, SOUTH CAROLINA 29108

(803)321-2100
FAX: (803)321-2102

COUNCILMEN:
HENRY H. LIVINGSTON, III, CHAIRMAN
KIRKSEY KOON, VICE-CHAIRMAN
WILLIAM D. WALDROP
LESLIE HIPPI
STEVE STOCKMAN
SCOTT CAIN
TRAVIS REEDER

WAYNE ADAMS
COUNTY ADMINISTRATOR
A. J. TOTHACER, JR.
COUNTY ATTORNEY
LAURIE N. RENWICK
CLERK TO COUNCIL

February 9, 2015

Desa Ballard, Esquire
P.O. Box 6338
West Columbia, SC 29171

Dear Ms. Ballard:

Enclosed is the final group of documents provided in response to your December 2, 2014 FOIA request. These represent emails from two (2) councilmembers (Cain and Koon), a fiscal accounting specialist (Brehmer), the HR Director (Hill) and my copies of emails and a few items in follow up to the Clerk to Council's prior response.

I have also included a recap sheet of costs thus far and recognition of your initial \$500 deposit and additional deposits of \$100 and \$400. Including the 178 copies in the responses provided today there is a balance of \$55.35 remaining and we have enclosed a check made payable to you in that amount.

With this final instalment of materials I now consider that we have responded completely to your FOI request dated December 2, 2014.

Sincerely,

A. J. Tothacer, Jr.
County Attorney

ROA 00366



ROA 00367

Desa Ballard

From: Jay Tothacer <jtothacer@newberrycounty.net>
Sent: Thursday, February 26, 2015 2:03 PM
To: Desa Ballard
Subject: RE: Incomplete FOIA response

I will review my files and speak with Mr. Aydlette as to #6.

We have provided all of Mr. Adam's emails that we have and of the few texts available – there are none germane to your request – so that is my final response.

Jay

From: Desa Ballard [mailto:desab@desaballard.com]
Sent: Thursday, February 26, 2015 1:49 PM
To: Jay Tothacer
Cc: Laurie Renwick; Beth Cogan; Beth Cogan; Mara Ballard
Subject: RE: Incomplete FOIA response

I will compare this with the information I have.

The county or its attorneys (Aydlette – and therefore within the control of the county) will have a great deal of information on Item 6 that is not privileged, such as correspondence, roster notices, emails with the court and clerk for scheduling, you know what's privileged and what's not. As to anything that you are claiming privilege on, I will need a privilege log. In the interim, please send me all non-privileged documents and begin a privilege log.

Is this your final word on Mr. Adams' personal emails and texts?

db

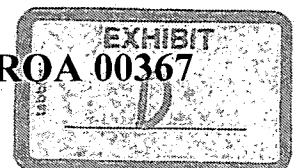
From: Jay Tothacer [mailto:jtothacer@newberrycounty.net]
Sent: Thursday, February 19, 2015 3:18 PM
To: Desa Ballard
Cc: Laurie Renwick
Subject: RE: Incomplete FOIA response

Attached to this email is a recap of the items we have sent to you along with reference to the letters (by date) that they were mailed.

In the last mailing (dated February 9th) there were a few items from the Clerk to Council – the bulk of her copies had been sent earlier.

I have asked her about the missing Public Safety and Courts committee meetings (August 11, 2014 and October 20, 2014). Once those have been posted on the website we will contact you via email.

After you have reviewed the attached recap please feel free to contact me if you have additional questions or concerns.



ROA 00367

I do not believe we have any additional information to provide beyond the minutes from the
Public Safety and Courts Committee meetings. ROA 00368

Jay

From: Desa Ballard [<mailto:desab@desaballard.com>]
Sent: Saturday, February 14, 2015 3:17 PM
To: Austin Tothacer, Jr. (jtothacer@newberrycounty.net)
Cc: Beth Cogan; Beth Cogan; Mara Ballard
Subject: Incomplete FOIA response

I have received your letter of February 9, 2015 in which you suggest that you have completed the required FOIA production. I do not think the production is complete.

While I have not had the opportunity to review what you have produced in detail, and because of the inadequate labeling of the items you have produced, identifying missing items is difficult.

I would appreciate you itemizing to me what production of materials (I received letters from you dated January 8, 13, 26, 29, 2015 and February 9, 2015 with enclosures) are responsive to what item number of the original request, as amended by our subsequent communication.

As to the Public Safety and courts Committee, I am missing both minutes and agenda of items not on the website. Specifically, *inter alia*, I have no minutes for the Public Safety and Courts Committee for the meetings on August 11, 2014 or October 20, 2014 (which are not yet posted to the website). The last response I have from you regarding agenda and minutes that are not on the website was contained in your letter dated January 29, 2015, in which you indicated that Ms. Renwick was unable to complete her review and you expected to send me what was missing from her responses "early next week" as it related to Item Nos. 12, 13, and 14. The following letter dated February 9, 2015 does not include any additional materials from Ms. Renwick addressing items 12, 13 and 14.

I still have no texts from Mr. Adams to council members or their agents. I will attempt shortly to give you a comprehensive list of everything I believe to be missing, but would appreciate you sending the above items at your earliest convenience.

db

Desa Ballard
Ballard & Watson
Attorneys at Law
Telephone 803.796.9299
Facsimile 803.796.1066
E-mail: desab@desaballard.com, copy to mara@desaballard.com



ROA 00369

From: Nicholson, Nick [<mailto:nnicholson@hsblawfirm.com>]
Sent: Friday, June 05, 2015 4:24 PM
To: Kathy Schillaci
Subject: RE: Ballard v. Newberry County

Kathy,

Please see attached.

Best regards.

Nick

 Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

Boyd B. (Nick) Nicholson, Jr. | Attorney | Haynsworth Sinkler Boyd, P.A.

ONE North Main, 2nd Floor (29601) | Post Office Box 2048 (29602) | Greenville,
South Carolina
Phone: 864.240.3200 | Fax: 864.240.3336 | Direct: 864.240.3247 | Mobile:
864.430.0693

[website](#) | [bio](#) | [vCard](#) | [map](#) | [email](#) | [blog](#)

From: Nicholson, Nick
Sent: Friday, June 05, 2015 2:10 PM
To: 'Kathy Schillaci'
Subject: RE: Ballard v. Newberry County

Kathy,

Why don't you deliver the check to our office in Columbia. The address is:

1201 Main Street, 22nd Floor
Columbia, SC 29201-3226

Best regards.

Nick

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

Boyd B. (Nick) Nicholson, Jr. | Attorney | Haynsworth Sinkler Boyd, P.A.

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ROA 00369

**NEWBERRY COUNTY COUNCIL
MINUTES
APRIL 16, 2014
7:00 P.M.**

Newberry County Council met on Wednesday, April 16, 2014, at 7:00 p.m. in Council Chambers at the Courthouse Annex, 1309 College Street, Newberry, SC, for a regular scheduled meeting.

PRESENT: Henry H. Livingston, III, Chairman
Kirksey Koon, Vice Chairman
John E. Caldwell, Councilman
Bill Waldrop, Councilman
Leslie (Les) Hipp, Councilman
Steven C. Stockman, Councilman
Scott Cain, Councilman
Wayne Adams, County Administrator
A.J. Tothacer, County Attorney
Laurie Renwick, Clerk to Council
Debbie Cromer, Finance Director

PRESS: Natalie Netzel, Newberry Observer
Tammy Kitchen, WKDK

The meeting was duly advertised as required by law.

Chairman Livingston called the meeting to order and determined a quorum present.

Mr. Cain led the invocation followed by the Pledge of Allegiance.

1. Adoption of Consent Agenda

Mr. Cain motioned to adopt the consent agenda; seconded by Mr. Hipp. The vote was unanimous.

2. Ordinance #03-04-14: An Ordinance to Amend Chapter 96 of the Newberry County Code of Ordinances relating to Animal Control matters.

Mr. Cain motioned to approve third reading of Ordinance #03-04-14; seconded by Mr. Waldrop. The vote was unanimous.

3. **Ordinance #04-05-14: : An Ordinance acting on a request to amend the Official Zoning Map established pursuant to Zoning Ordinance No. 12-24-01, codified in Chapter 153 of the Newberry County Code of Ordinances, so as to rezone a two and fifty-nine hundredth (2.59) acres real estate parcel designated as TMS Parcel No. 651-60 from Rural (R2) to General Commercial (GC).**

Mr. Hipp motioned to approve second reading of Ordinance #04-05-14; seconded by Mr. Stockman. The vote was unanimous.

4. **Ordinance #04-06-14: An Ordinance acting on a request to amend the Official Zoning Map established pursuant to Zoning Ordinance No. 12-24-01, codified in Chapter 153 of the Newberry County Code of Ordinances, so as to rezone a two (2.0) acres real estate parcel designated as TMS Parcel No. 5-3-101 from Single Family Residential (RS1) to Single Family Residential (RS1A).**

Mr. Hipp motioned to approve second reading of Ordinance #04-06-14; seconded by Mr. Cain. The vote was unanimous.

5. **Ordinance #04-07-14: An Ordinance to provide appropriations for the Fiscal Year beginning July 1, 2014, and ending June 30, 2015, for the Newberry County Budget for county ordinary purposes and for other county purposes for which the county may levy a tax and receive revenues; to provide for the levy of taxes on all taxable personal and real property in Newberry County for all county purposes, including sufficient tax to pay the principal and interest on outstanding indebtedness of Newberry County payable during said fiscal year; to provide for matters relating to Newberry County; and to provide for the expenditure of said taxes and other revenues received by the county during said fiscal year, and to provide for borrowing in anticipation of tax collections by the issuance of one or more tax anticipation notes, if necessary.**

Mr. Adams reported that the operating portion of the budget is balanced at \$21,700,781.00 and the capital budgets are balanced at \$2,355,000.00 all of which were included in transmittal documents presented to the Finance Committee on Monday, April 7, 2014. He said there will be a Budget Work Session on Monday, April 21, 2014, at 6:00 p.m. to discuss all aspects of the proposed budgets.

Mr. Waldrop motioned to approve first reading of Ordinance #04-07-14; second by Mr. Cain. The vote was unanimous.

6. **Ordinance #04-08-14: An Ordinance to provide appropriations for the Fiscal Year beginning July 1, 2014 and ending June 30, 2015, for the Newberry County Library, Piedmont Technical College and the Newberry Agency for**

the Disabilities and Special Needs; to provide for the levy of taxes on all taxable personal and real estate properties in Newberry County for said purposes; to provide for the expenditure of said taxes and other revenues received by the county during said fiscal year for said purposes.

Mr. Adams reported that this Ordinance will provide \$403,881.00 for the Newberry County Library System, \$397,132.00 for Piedmont Technical College, and \$22,606.00 for the Newberry County Disabilities and Special Needs.

Mr. Caldwell motioned to approve first reading of Ordinance #04-08-14; seconded by Mr. Cain. The vote was unanimous.

7. Consideration of Request for Proposal for Cleaning of Record Books for Clerk of Court's Office

Mrs. Waldrop reported that they received one proposal from ECS Conservation for the cleaning of approximately 765 volumes of court related documents. The Clerk of Court has checked references and she is comfortable with ECS doing the work and has suggested that the balance of IV-D funds remaining at the end of the year be used for the book cleaning.

Mr. Hipp motioned to approve the proposal from ECS; seconded by Mr. Cain.

Chairman Livingston asked if there was any discussion.

Mr. Koon asked Mrs. Bowers which records were included in this proposal.

Mr. Bowers responded that these were deed and mortgage records, financial statements, and indexes.

Mr. Koon commented that some of our records are at the SC Department of Archives and History but they do not like to accept records postdating 1950. He asked Mrs. Bowers if these records could be put on microfilm.

Mrs. Bowers said it would be more expensive to have them microfilmed.

Having no further discussion, the vote was unanimous to approve the proposal from ECS for cleaning record books in the Clerk of Court's Office.

Mrs. Bowers requested that the IV-D funding (\$80,000-\$100,000) be turned over to the county at the end of the year to be used for the book cleaning and the restoration of the Courthouse.

8. Consideration of Bids for Whitmire Fire Department Improvements

Mrs. Waldrop reported that they received three (3) bids and W.E. Baker & Sons was the apparent low bidder in the amount of \$94,219.00.00. Mr. West asked members of the fire department to remove some items as the bid was over budget. After some value engineering, the bid amount was reduced to \$86,400.00 which still leaves a shortfall of \$7,580.00.

Mr. Michael Thomas, Whitmire Fire Department Chief, thanked Council for considering and budgeting for the renovations to the fire department. He said they are just trying to get the building up to code because it is also used as a voting precinct. The members of the fire department are going to do some of the work to offset the cost and save the county money.

Mr. Cain motioned to approve the bid of \$86,400.00 with the \$7,580.00 shortfall coming from contingency; seconded by Mr. Waldrop. The vote was unanimous.

9. Consideration of 3rd Quarter Appropriation (FY14/14 Proviso) for Library in the amount of \$5,625.00

Mr. Sam Ziady, Library Director, reported on the Summer Reading Program and the Little Learner Program at the Newberry County Library. He stated that they were very pleased with the new computer lab addition at the Whitmire Library. He said Adult Ed is currently offering GED classes to 16 students at the Whitmire Library. He said they appreciated Council's support.

10. Appointments

No appointments.

11. Committee Reports

No committee reports.

12. Public Comments (by those who signed up at meeting)

Mr. Charles Allen, Silverstreet resident, introduced himself and shared his concerns about Jacksonville Lane and the need for it to be serviced. He said four (4) families live on the road and the last time it was serviced was in September of 2010. He was told that the road was taken out of the county road system.

Chairman Livingston asked Mr. Allen to meet with the County Administrator the next day to discuss the options available.

13. Executive Session

Chairman Livingston reported that Council would like an Executive Session pursuant to the following:

- a. §30-4-70(a)(5) SC Code of Laws: 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.
- b. §30-4-70(a)(1) SC Code of Laws: 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; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

Mr. Cain motioned to go into Executive Session; seconded by Mr. Waldrop. The vote was unanimous.

EXECUTIVE SESSION [7:22 p.m. – 8:42 p.m.]

Mr. Adams reported that Council met in Executive Session to discuss two matters. The first was an Economic Development matter and no action was taken by Council in that session. The second was a personnel matter to evaluate the job performance of the County Administrator and the Clerk to Council.

Chairman Livingston reported that the county is well served by the Administrator and the Clerk to Council. He said Council appreciates all that they do for the county.

14. Comments/Request from County Administrator

No comments.

15. Comments/Request from Council Members

All of members of Council wished everyone a Happy Easter.

16. Future Meetings

- a. Budget Work Session 4/21/14 @ 6:00 p.m.
- b. Public Safety and Courts Committee 5/05/14 @ 6:00 p.m.
- c. County Council 5/07/14 @ 7:00 p.m.
- d. Public Works and Planning Committee 5/12/14 @ 6:00 p.m.
- e. County Council 5/21/14 @ 7:00 p.m.

17. Adjournment

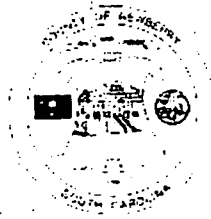
Chairman Livingston declared the meeting adjourned at 8:45 p.m.

NEWBERRY COUNTY COUNCIL

Henry H. Livingston, III, Chairman

APPROVED:

Laurie N. Renwick, Clerk to Council



**NEWBERRY COUNTY COUNCIL
MINUTES
May 7, 2014, 2014
7:00 P.M.**

Newberry County Council met on Wednesday, May 7, 2014, at 7:00 p.m. in Council Chambers at the Courthouse Annex, 1309 College Street, Newberry, SC, for a regular scheduled meeting.

PRESENT: Henry H. Livingston, III, Chairman
Kirksey Koon, Vice Chairman
John E. Caldwell, Councilman
Bill Waldrop, Councilman
Leslie (Les) Hipp, Councilman
Steven C. Stockman, Councilman
Scott Cain, Councilman
Wayne Adams, County Administrator
A.J. Tothacer, County Attorney
Laurie Renwick, Clerk to Council
Debbie Cromer, Finance Director

PRESS: Natalie Netzel, Newberry Observer
Tammy Kitchen, WKDK

The meeting was duly advertised as required by law.

Chairman Livingston called the meeting to order and determined a quorum present.

Mr. Caldwell led the invocation followed by the Pledge of Allegiance.

Chairman Livingston recognized Mrs. Beth Jaeger as the new Director of Piedmont Technical College.

1. Adoption of Consent Agenda

Mr. Koon motioned to adopt the consent agenda; seconded by Mr. Caldwell. The vote was unanimous.

2. **Ordinance #04-05-14: An Ordinance acting on a request to amend the Official Zoning Map established pursuant to Zoning Ordinance No. 12-24-01, codified in Chapter 153 of the Newberry County Code of Ordinances, so as to rezone a two and fifty-nine hundredth (2.59) acres real estate parcel designated as TMS Parcel No. 651-60 from Rural (R2) to General Commercial (GC).**

Chairman Livingston declared this the Public Hearing.

Having received no comments from the public, Chairman Livingston declared the Public Hearing closed.

Mr. Koon motioned to approve third reading of Ordinance #04-05-14; seconded by Mr. Cain. The vote was unanimous.

3. **Ordinance #04-06-14: An Ordinance acting on a request to amend the Official Zoning Map established pursuant to Zoning Ordinance No. 12-24-01, codified in Chapter 153 of the Newberry County Code of Ordinances, so as to rezone a two (2.0) acres real estate parcel designated as TMS Parcel No. 5-3-101 from Single Family Residential (RS1) to Single Family Residential (RS1A).**

Chairman Livingston declared this the Public Hearing.

Mr. Gene Tynes introduced himself and said he was a representative of the Homeowners Association of the Waters Edge Subdivision where this lot is located. This lot is really a boat storage lot that was established when the subdivision was developed 10-12 years ago and unbeknownst to anyone it was not properly zoned. He said he was in support of the rezoning.

Having received no other comments from the public, Chairman Livingston declared the Public Hearing closed.

Mr. Waldrop motioned to approve third reading of Ordinance #04-06-14; seconded by Mr. Hipp. The vote was unanimous.

4. **Ordinance #04-07-14: An Ordinance to provide appropriations for the Fiscal Year beginning July 1, 2014, and ending June 30, 2015, for the Newberry County Budget for county ordinary purposes and for other county purposes for which the county may levy a tax and receive revenues; to provide for the levy of taxes on all taxable personal and real property in Newberry County for all county purposes, including sufficient tax to pay the principal and**

interest on outstanding indebtedness of Newberry County payable during said fiscal year; to provide for matters relating to Newberry County; and to provide for the expenditure of said taxes and other revenues received by the county during said fiscal year, and to provide for borrowing in anticipation of tax collections by the issuance of one or more tax anticipation notes, if necessary.

Mr. Waldrop motioned to approve second reading of Ordinance #04-07-14; second by Mr. Cain.

Mr. Adams reported that the operating expenses are balanced with revenues at \$21,700,781.00 and capital budgets are balanced at \$2,355,000.00. He said the main issue in flux right now is the difference in the appropriation for the Local Government Fund by the two houses of the General Assembly. The Senate currently has an appropriation of \$100,000.00 less than is funded in our budget and the House version matches what we have in our budget.

Chairman Livingston asked if there was any discussion.

Mr. Hipp commented that we had a number of people come before our last work session making some requests. At this time, he is not going to propose an amendment but if we do receive the LGF funds from the legislature to replace the \$100,000.00, he will propose a couple of minor changes to our budget.

Having received no further discussion, the vote was unanimous to approve second reading of Ordinance #04-07-14.

5. **Ordinance #04-08-14: An Ordinance to provide appropriations for the Fiscal Year beginning July 1, 2014 and ending June 30, 2015, for the Newberry County Library, Piedmont Technical College and the Newberry Agency for the Disabilities and Special Needs; to provide for the levy of taxes on all taxable personal and real estate properties in Newberry County for said purposes; to provide for the expenditure of said taxes and other revenues received by the county during said fiscal year for said purposes.**

Mr. Koon motioned to approve second reading of Ordinance #04-08-14; seconded by Mr. Hipp.

Mr. Adams reported that this ordinance will provide \$403,881.00 for the Newberry County Library System, \$397,132.00 for Piedmont Technical College, and \$22,606.00 for the Newberry County Disabilities and Special Needs and is unchanged from first reading.

Having received no discussion, the vote was unanimous to approve second reading of Ordinance #04-08-14.

6. **Ordinance #05-09-14: To amend the Code of Ordinances of the County of Newberry to include the offense, exceptions, definitions, and penalties of distracted driving.**

Mr. Cain motioned to approve first reading of Ordinance #04-09-14; seconded by Mr. Hipp.

Mr. Adams reported that this ordinance pertains to banning the use of hand held electronic devices for texting and talking while driving. The General Assembly is in the process of addressing the same issue and whatever they do will take precedence over the legislative actions of the local governments. The final General Assembly action could leave open some areas of local regulation depending on which bill is ultimately approved. The Public Safety and Courts Committee recommended advancing the reading process of the Newberry County ordinance in case the General Assembly ends up doing nothing or fails to address some area that the county wants to regulate. The proposed ordinance can be amended during the reading process to achieve whatever purposes remain.

Having received no discussion, the vote was unanimous to approve first reading of Ordinance #05-09-14

7. **Resolution #04-14: A Resolution in support of fully funding the Statutorily Prescribed Formula of the Local Government Fund**

Mr. Hipp motioned to approve Resolution #04-14; seconded by Mr. Cain.

Mr. Adams reported that under the current funding scenario in the House, the county would receive about ½ million dollars less than we would otherwise receive under the Local Government Fund formula. This formula has been under suspension since 2008 when revenues for the state shrank significantly. Revenues are up this year and the LGF funding is still down and may go \$100,000.00 or so less than the previous year. We have been experiencing this shortfall for some time and may be aggravated in the coming year if the Senate version persists.

Mr. Adams read Resolution #04-14 into the record.

WHEREAS, Newberry County Council has learned that the Local Government Fund (LGF) allocated by the South Carolina General Assembly for FY 14-15 provides Newberry County with more than \$500,000 *less than* the statutorily prescribed formula amount, as set forth in §6-27-30 of the Code of Laws of South Carolina, 1976, as amended, pursuant to the State Aid to Subdivisions Act; and

WHEREAS, the South Carolina General Assembly has not fully funded the LGF allocation since 1984, and continues in the coming year to severely underfund it, despite a significant increase in revenues of the State; and

WHEREAS, mandated State obligations, including those pertaining to providing offices for and otherwise funding numerous State functions, have not correspondingly declined with this loss of revenue; and

WHEREAS, the failure of the LGF to offset State-related costs incurred at the local level necessarily increases the property tax liability of Newberry County citizens, and also for property owning citizens in every county of our State;

NOW, THEREFORE, BE IT RESOLVED by Newberry County Council to impress upon the General Assembly that its diminution of the statutorily required LGF has become a recurring property tax *by the South General Assembly* on South Carolinians; and

BE IT FURTHER RESOLVED that the County Council urges the Newberry County Legislative Delegation to stand up for Newberry County, and all other counties, by seeking full funding of the statutory funding formula; and

BE IT FURTHER RESOLVED that Newberry County Council directs its Clerk to Council to forward a copy of this Resolution to both members of the Newberry County Legislative Delegation, requesting that they further circulate it among their colleagues in the General Assembly.

AND IT IS SO RESOLVED THIS DAY OF MAY 7, 2014 AT NEWBERRY, S.C.

Having received no discussion, the vote was unanimous to approve Resolution #04-14.

8. Proclamation declaring May 15, 2014 as Peace Officers' Memorial Day

Mr. Adams read the Peace Officers' Memorial Day Proclamation into the record.

WHEREAS, The Congress and President of the United States have designated May 15, 2014, as Peace Officers' Memorial Day; and

WHEREAS, the members of the law enforcement agencies of Newberry County play an essential role in safe guarding the rights and freedoms of the citizens of our community; and

WHEREAS, it is important that all citizens know and understand the duties, responsibilities, hazards and sacrifices of their law enforcement officers, and that law enforcement officers recognize their duty to serve the people of this community, by protecting them against violence and disorder; and

WHEREAS, the law enforcement officers of Newberry County unceasingly provide a vital public service;

NOW, THEREFORE, IT IS HEREBY PROCLAIMED that the County Council of Newberry County directs that all flags on County buildings be flown at half-staff on May 15, 2014, in recognition of Peace Officers' Memorial Day and in memory of those law enforcement officers, who through their courageous deeds, have made the ultimate sacrifice in service to their community or have become disabled in the performance of duty, and to honor those law enforcement officers presently serving the community.

Mr. Koon motioned to approve Proclamation declaring May 15, 2014 as Peace Officers' Memorial Day; seconded by Hipp. The vote was unanimous.

9. Appointments

No appointments.

10. Committee Reports**a. Public Safety and Courts Committee - 05/05/14**

Mr. Tommy Long reported that the committee met on Monday, May 5, 2014 and there were four (4) items on the agenda.

- Discussion of the texting ordinance
- Discussion of paid firefighters for daytime coverage
- Mr. West gave an update on the Courthouse renovation and the new Sheriff's Office building

Mr. Hipp asked Mr. Long when the benchmark was for talking with the other counties and having the meetings for the paid firefighters. He said we are in the budget process and having paid firefighters will affect our budget.

Mr. Long responded that he has a meeting set up Tuesday with the fire chiefs and board members. He said he has already been to Sumter to discuss what they are doing and he would like for Dorchester to come up and talk to us as well.

Mr. Hipp commented that it would be nice to have all this information available for our next budget work session on June 9th.

11. Public Comments (by those who signed up at meeting)

No comments.

12. Executive Session

Chairman Livingston stated that Council will meet in Executive Session pursuant to §30-4-70(a)(1) of the SC Code of Laws for 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; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

Mr. Koon motioned to go into Executive Session; seconded by Mr. Cain. The vote was unanimous.

EXECUTIVE SESSION [7:20 p.m. – 7:50 p.m.]

Chairman Livingston reported that Council met in Executive Session and no action was taken in that session. He asked if Council had any comments from the session.

Mr. Hipp motioned to extend the Memorandum of Understanding and employment agreement with the County Administrator through the year 2016; seconded by Mr. Waldrop. The vote was unanimous.

13. Comments/Request from County Administrator

Mr. Adams thanked County Council for their confidence and said he enjoys the working environment that they provide. He said in his 19 years of being a County Administrator, this was the best group he has ever worked with.

Mr. Adams also said that on Monday afternoon our state lost one of its great leaders over the past half century. Mr. Butler Derrick was a 10 term Congressman representing South Carolina's third district which for a short time included Newberry County. He said more important for him, Mr. Derrick was a mentor, a friend, and his boss. He asked that his family be remembered during their period of bereavement.

14. Comments/Request from Council Members

In conjunction with Peace Officers' Memorial Day, Mr. Cain commended all of Newberry County's public safety and law enforcement personnel for their efforts in doing their day to day jobs.

Mr. Hipp applauded the United States Supreme Court for supporting prayer before local government meetings and also stated that Mr. Adams was by far the best administrator that he has had a chance to work with.

Mr. Waldrop said that he has worked with many administrators and Mr. Adams is the best one we have ever had and he is proud of him.

Mr. Koon seconded Mr. Cain and Mr. Hipp's comments.

Chairman Livingston commented that he appreciates all that Mr. Adams does. He gave a recap of all of Mr. Adams accomplishments during his tenure as Newberry County's Administrator and noted that he has been a stabilizing force for the county. He said a new contract with a salary increase is extremely justified.

15. Future Meetings

- a. Public Works and Planning Committee 5/12/14 @ 6:00 p.m.
- b. County Council 5/21/14 @ 7:00 p.m.

16. Adjournment

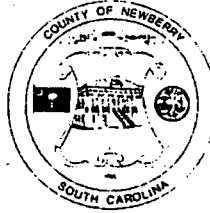
Chairman Livingston declared the meeting adjourned at 7:55 p.m.

NEWBERRY COUNTY COUNCIL

Henry H. Livingston, III, Chairman

APPROVED:

Laurie N. Renwick, Clerk to Council



**NEWBERRY COUNTY COUNCIL
MINUTES
MAY 21, 2014
7:00 P.M.**

Newberry County Council met on Wednesday, May 21, 2014, at 7:00 p.m. in Council Chambers at the Courthouse Annex, 1309 College Street, Newberry, SC, for a regular scheduled meeting.

PRESENT: Henry H. Livingston, III, Chairman
Kirksey Koon, Vice Chairman
John E. Caldwell, Councilman
Bill Waldrop, Councilman
Leslie (Les) Hipp, Councilman
Steven C. Stockman, Councilman
Scott Cain, Councilman
Wayne Adams, County Administrator
Laurie Renwick, Clerk to Council
Debbie Cromer, Finance Director

ABSENT: A.J. Tothacer, County Attorney

PRESS: Kevin Boozer, Newberry Observer
Tammy Kitchen, WKDK

The meeting was duly advertised as required by law.

Chairman Livingston called the meeting to order and determined a quorum present.

Mr. Hipp led the invocation followed by the Pledge of Allegiance.

Chairman Livingston noted that Council would like to include a Proclamation (agenda item 4a) for Foster Care Awareness Month.

1. Adoption of Consent Agenda

Mr. Caldwell motioned to adopt the consent agenda; seconded by Mr. Hipp. The vote was unanimous.

2. Newberry County Service Awards.

Chairman Livingston recognized the following employees for their years of service. Virginia Atkins, Building and Zoning – 5 years; Donald Leitzsey, Public Works – 10 years; Roy Long, Public Works – 10 years; Andrew Stout, Sheriff's Office – 10 years; Robert Dennis, Sheriff's Office – 15 years; and Todd Johnson, Sheriff's Office – 20 years.

3. Ordinance #05-09-14: To amend the Code of Ordinances of the County of Newberry to include the offense, exceptions, definitions, and penalties of distracted driving.

Mr. Adams reported that this ordinance pertains to banning the use of hand held electronic devices for texting and talking while driving. The General Assembly is in the process of dealing with this in some fashion and the county will pick up some other piece of it once a decision has been made at the state level. The Public Safety and Courts Committee has recommended that Council go ahead with the reading process so that we will be poised to act on whatever is left to be done when the General Assembly adjourns.

Mr. Koon motioned to approve second reading of Ordinance #05-09-14; seconded by Mr. Hipp. The vote was unanimous.

4. Consideration of Request for Proposals for Website Development and Implementation

Mr. Dylan Snyder, IT Director, reported that we had 15 vendors respond to this Request for Proposal which was advertised in SCIBO, the Newberry County website, and the Newberry Observer. The proposals ranged from \$14,000.00 - \$55,000.00 to redesign the county's website. The main reasons for the redesign are for security purposes, age of the current website, to increase mobile presence and browser compatibility, make ADA compliant, increase calendar offerings, and to improve content and placement. The ultimate benefits for the redesign are for ease of use, ease of navigation, and ease of information finding.

Mr. Hipp asked if this was within our budget.

Mr. Adams responded that the county has \$44,000.00 budgeted for this redesign.

Mr. Hipp commented that our website is not the easiest to navigate and needs updating. There is a lot of effort involved in changing things within our system.

Mr. Snyder reported that after evaluating the vendors, staff would like to recommend Vision Internet in the amount of \$23,975.00. This company has designed over 1,000 county and local government websites to include Rock Hill, Dorchester, and Kershaw Counties in South Carolina. He said this is what they do and they do it very well.

Mr. Koon motioned to approve the RFP from Vision Internet for website development and implementation; seconded by Mr. Hipp. The vote was unanimous.

4a. Proclamation declaring May 2014 Foster Care Awareness Month.

Mr. Adams read the Proclamation into the record.

WHEREAS, the family, serving as the primary source of love, identity, self-esteem and support, is the very foundation of our communities and our State, and

WHEREAS, in Newberry County, South Carolina there are 44 children and youth in foster care being provided with a safe, secure and stable home along with the compassion and nurture of a foster family, and

WHEREAS, all young people in foster care need a meaningful connection to a caring adult who becomes a supportive and lasting presence in their lives, and

WHEREAS, foster, kinship and adoptive families, who open their homes and hearts and support children whose families are in crisis, play a vital role in helping children and families heal and reconnect thereby launching young people into successful adulthood, and

WHEREAS, dedicated resource foster families frequently adopt foster children, resulting in a greater need for more resource foster families, and

WHEREAS, there are numerous individuals, public and private organizations who work to increase public awareness of the needs of children in and leaving foster care as well as the enduring and valuable contribution of resource foster parents, and the foster care "system" is only as good as those who choose to be part of it,

NOW, THEREFORE, Newberry County Council hereby proclaims May as **FOSTER CARE AWARENESS MONTH** in Newberry County and urges all citizens to come forward and do something positive that will help *change a lifetime* for children and youth in foster care.

Mr. Hipp motioned to approve the Proclamation declaring May 2014 as Foster Care Awareness Month; seconded by Mr. Waldrop. The vote was unanimous.

Chairman Livingston thanked all those who work with foster care and those who serve as foster care parents because they are a valuable source and greatly needed in our community.

5. Appointments

No appointments.

6. Committee Reports

a. Public Works and Planning on 5/12/14

Mr. Mike Pisano reported that the committee met on 5/12/14 and the following items were discussed.

- Berley Road Bridge has been completed with a couple punch list items remaining.
- The Maybinton ball field has been completed and in use. The county purchased a drag for the infield and a chalk line machine and has installed several port-a-johns.
- The airport apron project will be going out for bid later this month.
- There are several petitions for road paving (Crescent Street and Hawkins Street). Staff is in the process of gathering all the information from the land owners.
- Discussion of Single Stream Recycling.
- Mr. Gernie Stuck, citizen, came before the committee to discuss maintenance on a portion of Buzhardt Road. Mr. Pisano said the county is responsible for 1854 ft. of maintenance on Buzhardt Road; however, this maintenance ends at the private property of Mr. Tom Abraham to which Mr. Stuck has an easement in order to access his property. The county does not have any record that it ever maintained this portion of Buzhardt Road; it is still on private property.

Mr. Cain commented that the committee heard all of the discussions and our hands are tied because it is private property.

Mr. Koon stated that Mr. Abraham contacted staff by email and reiterated what the county had found about the easement and that it was indeed private property owned by Mr. Abraham. He said if Mr. Stuck wished to have it maintained, he was free to do whatever maintenance he needed to access his property.

7. Public Comments (by those who signed up at meeting)

No comments.

8. Executive Session

Chairman Livingston stated that staff requests an Executive Session pursuant to SC Code §30-4-70(a)(2) for 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.

Mr. Hipp motioned to go into Executive Session; seconded by Mr. Cain. The vote was unanimous.

EXECUTIVE SESSION [7:25 p.m. – 8:22 p.m.]

Mr. Hipp motioned to return to Open Session; seconded by Mr. Waldrop. The vote was unanimous.

Mr. Adams reported that Council met in Executive Session for the stated purpose and no action was taken in that session.

9. Comments/Request from County Administrator

No comments.

10. Comments/Request from Council Members

Mr. Hipp wished everyone an enjoyable Memorial Day weekend.

Mr. Koon added "God Bless America".

11. Future Meetings

- a. Personnel and Intergovernmental Relations Committee 6/2/14 @ 6:00 p.m.
- b. County Council 6/4/14 @ 7:00 p.m.
- c. "On the Move with Margaret" 6/09/14 @ 9:30 a.m.
- d. County Council 6/18/14 @ 7:00 p.m.
- e. Economic Development Committee 6/23/14 @ 6:00 p.m.

412. Adjournment

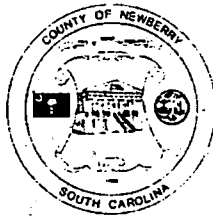
Chairman Livingston declared the meeting adjourned at 8:24 p.m.

NEWBERRY COUNTY COUNCIL

Henry H. Livingston, III, Chairman

APPROVED:

Laurie N. Renwick, Clerk to Council



**NEWBERRY COUNTY COUNCIL
MINUTES
JULY 16, 2014**

Newberry County Council met on Wednesday, July 16, 2014, at 7:00 p.m. in Council Chambers at the Courthouse Annex, 1309 College Street, Newberry, SC, for a regular scheduled meeting.

PRESENT: Henry H. Livingston, III, Chairman
Kirksey Koon, Vice Chairman
Bill Waldrop, Councilman
Leslie (Les) Hipp, Councilman
Steven C. Stockman, Councilman
Scott Cain, Councilman
Wayne Adams, County Administrator
A.J. Tothacer, County Attorney
Laurie Renwick, Clerk to Council
Debbie Cromer, Finance Director

ABSENT: John E. Caldwell, Councilman

MEDIA: Kevin Boozer, Newberry Observer
Tammy Kitchen, WKDK

The meeting was duly advertised as required by law.

Chairman Livingston called the meeting to order and determined a quorum present. He noted that Mr. Caldwell was out of town and would not be present for the meeting.

Mr. Waldrop led the invocation followed by the Pledge of Allegiance.

1. Additions, Deletions and Adoption of Agenda

Mr. Hipp motioned to adopt the Agenda; seconded by Mr. Cain. The vote was unanimous.

2. Newberry County Service Awards

Chairman Livingston presented the following service awards: Gary Ball, custodial Services (absent) – 5 years; Autrice Griffin, Sheriff's Office (absent) – 10 years; Sharon McClanahan, Sheriff's Office (absent) – 10 years; Teresa Powers, Economic Development Director – 10 years; and Judy Sanders, Magistrate's Office – 20 years.

3. Ordinance #07-11-14: An Ordinance authorizing the execution of an Equipment Lease-Purchase Agreement in the amount not exceeding \$1,265,000 relating to the purchase of certain equipment by Newberry County, authorizing the execution of other necessary documents and papers, and other matters relating thereto.

Mr. Adams reported that annually Council utilizes lease purchase to acquire durable goods and rolling stock of significant financial commitment. Over the past four years, this has been used for fire trucks, ambulances, and rescue vehicles. This year, the lease purchase includes upgrades to: fire service radio system (specifically moving to a simulcast repeater system on the fire channel), twenty-four self-contained breathing apparatuses for fire fighters, fifteen solid waste compactors for single stream recycling and two modular ambulances. He said all of these items were contained in the annual budget.

Mr. Cain motioned to approve first reading of Ordinance #07-11-14; seconded by Mr. Waldrop. The vote was unanimous.

4. Resolution #05-14: A Resolution accepting Federal Aviation Authority (FAA) and South Carolina Aeronautics Commission (SCAC) Grant for rehabilitation and expansion of the Airport Terminal Apron.

Mr. Adams reported that approval of this Resolution is a requirement of the grant which is coming from both the State and the Federal Aviation Authority. The items pertaining to this will be discussed more as Agenda Item #6.

Mr. Cain motioned to approve Resolution #05-14; seconded by Mr. Hipp. The vote was unanimous.

5. Resolution #06-14: A Resolution honoring Mrs. Cleo Epting Wise on her 105th Birthday

Mr. Adams read Resolution #06-14 into the record:

WHEREAS, Newberry County Council is honored to recognize Mrs. Cleo Epting Wise who has reached an important milestone in life; and,

WHEREAS, Mrs. Wise was born in Chapin, South Carolina on July 16, 1909, and is the second of seven children born to the late Herbert Lake and Mattie Wiggers Epting; and,

WHEREAS, Mrs. Wise has lived her entire adult life in Newberry County and is a member of Saint James Lutheran Church; and,

WHEREAS, Mrs. Wise has led an exemplary life before her five children, eighteen grandchildren, thirty-one great-grandchildren, eleven great great-grandchildren and other family members and friends; and,

WHEREAS, Mrs. Wise has been a faithful and devout servant of the Lord and continues to be an inspiration to all who know her.

NOW THEREFORE BE IT RESOLVED THAT Newberry County Council hereby honors and congratulates Mrs. Cleo Wise on her 105th birthday and presents her with a framed copy of this resolution.

ADOPTED this 16th day of July, 2014 by Newberry County Council.

Resolution #06-14 was unanimously approve by Council.

Family members present accepted the framed Resolution on behalf of Mrs. Wise.

6. Consideration of Bids for Airport Apron Expansion and Rehabilitation

Mrs. Waldrop reported that staff received two bids on June 11, 2014, for the airport apron. One from Satterfield Construction Co., Inc. in the amount of \$969,851.20 and the other from McClam and Associates, Inc. in the amount of \$1,032,405.60. The majority of this project will be funded by grants for the FAA and the State. She said Judy Elder with Talbert & Bright was available to answer any questions.

Mr. Adams said this is all total a \$1.1 million dollar project. The County's obligation is only \$56,242.00 with the State matching this amount (\$56,242.00) and the remaining \$1,012,345.00 comes from the Federal Aviation Administration.

Mr. Hipp asked Ms. Elder if she had any questions if the two bidders are totally committed to the specifications.

Ms. Elder said both are committed and certified and she did not have any questions regarding the qualifications of the low bidder.

Chairman Livingston invited Mr. W.F. (Troup) Partridge III to the podium to speak as he had signed up for comments regarding the airport.

Mr. Partridge thanked Council for the opportunity to address them tonight and said he does with great pride as the Legislative Delegation's appointee on the Airport Commission. He wanted to praise Council and say thank you for standing by and committing to the airport. There is no other investment in which you can contribute \$56,000.00 and get over 1 million dollars back in instant return. There is no better way to

showcase Newberry for growth in the future or to support enterprise as a magnet attraction. The terminal building needs some improvements but we have a great facility and continuing to keep it up and improve it is a very smart investment for Newberry County. He commended Council for recognizing this and for doing so.

Mr. Cain commented that the airport makes the continuous loop for all of our infrastructure logistical issues along with the interstate and railroad to be able to showcase the Mega-Site. Upgrading the airport will entice corporate jets to come in and service economic development in this region and this is hugely important for our county and the entire region.

Mr. Cain motioned to approve the low bid from Satterfield Construction Co., in the amount of \$969,851.20; seconded by Mr. Hipp. The vote was unanimous.

7. Appointments

Mr. Hipp (with Mr. Koon's concurrence) nominated Mr. Bob Burch for an appointment to the Newberry Co. Hospital Board representing District 5; seconded by Mr. Koon. The vote was unanimous.

Mr. Koon nominated Mr. Dwight McDuffie for reappointment to the Joint Planning Commission representing District 4; seconded by Mr. Hipp. The vote was unanimous.

Mr. Koon nominated Mrs. Tammy Kitchen for an appointment to the Accommodations Tax Commission representing the cultural arena; seconded by Mr. Waldrop. The vote was unanimous.

8. Committee Meetings

a. Finance Committee 7/14/14

Mrs. Cromer reported that the Finance Committee met on Monday and the following was presented:

- Mr. West, Facilities Manager, gave an update on Capital Projects
- Discussion of Hwy. 219 property
- Mr. Adams and Mr. DuBose presented options for funding of paid fire services.

9. Public Comments

No comments.

10. Executive Session

Minutes
July 16, 2014

a. Mr. Adams reported that staff would like an Executive Session under §30-4-70(a)(2) of the SC Code of Laws for 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.
for the receipt of legal advice where the legal advice relates to pending

Mr. Hipp motioned to go into Executive Session; seconded by Mr. Waldrop. The vote was unanimous.

Executive Session [7:16 p.m. - 7:48 p.m.]

Mr. Hipp motioned to return to Open Session; seconded by Mr. Waldrop. The vote was unanimous.

Mr. Adams reported that Council met in Executive Session for the stated purpose and no action was taken in that session.

11. Comments/Request from Administrator

No comments.

12. Comments/Request from Council Members

No comments.

13. Future Meetings

- a. No County Council Meeting on 8/6/14
- b. Public Safety and Courts Committee 8/11/14 @ 6:00 p.m.
- c. County Council 8/20/14 @ 7:00 p.m.
- d. Public Works and Planning Committee 8/25/14 @ 6:00 p.m.

14. Adjournment

Chairman Livingston declared the meeting adjourned at 7:50 p.m.

ROA 00395

NEWBERRY COUNTY COUNCIL

Henry H. Livingston, Chairman

APPROVED:

Laurie N. Renwick, Clerk to Council

**Newberry County Council
Public Safety and Courts Committee**

August 11, 2014

The regular quarterly meeting for the Newberry County Council Public Safety and Courts Committee was held on August 11, 2014 6:00 p.m. in the Courthouse Annex Conference Room.

PRESENT:

Bill Waldrop, Chairman
Kirksey Koon, Councilmen
John Caldwell, Councilmen
Scott Cain, Councilmen

OTHERS PRESENT:

Wayne Adams, Laurie Renwick, Debbie Cromer, Karen Brehmer, Ervin West, Theo DuBose, Tommy Long, Jay Tothacer, Wesley Boland, Patrick Meetze, Larry Dehart, Chris Johnson

MEDIA:

Andrew Wigger, Newberry Observer

1. Call to Order and Invocation

Chairman Waldrop called the meeting to order followed by invocation.

2. Approval of May 5, 2014 Minutes

May 5, 2014 minutes passed with all in favor.

3. Update on Paid Firefighter Service- Tommy Long, Emergency Services Coordinator and Theo Dubose, Haynsworth Sinkler Boyd

Tommy Long reported that a ten (10) member committee has been set up with three members from the Board of Rural Fire Control and Board of Rescue Squads. This committee also includes Tommy Long, Emergency Services Coordinator, Chief Keith Minick, and Gene Shealy (non-voting member). The committee will be meeting the 2nd or the 4th Tuesday of this month. The objective of the committee is to research and make a recommendation of how many people to hire; define their duties; recommend improvements and consolidate where possible. The committee will report to the Fire Board for approval. This was taken as information only by the committee.

4. Funding Options for Paid Firefighter Service- Theo Dubose, Haynsworth Sinkler Boyd

Mr. Dubose reported that he and Mr. Adams have discussed the funding for this project. He advised they are still in the information gathering process and will meet with City Manager, Al Harvey next week to do discuss the city's involvement.

5.

6. Update on Radio System- Major Wesley Boland, Sheriff's Office

Major Boland reported that the narrow banding project is completed. He said the best options for the fire side are voter transmission and simulcast transmission and advised that there is no 100 percent fix to the county's radio problems; some areas will still have dead zones.

7. Public Safety Updates-Tommy Long, Emergency Services Coordinator-

- **Mutual Aid Agreements-** Tommy Long reported he is in the process of updating agreements on all surrounding counties.
- **Portable Morgue-** Tommy Long reported the morgue has arrived and is being stored at the Sheriff's Office fenced-in area to keep it secure. He is still waiting on the company to give a training class on how to operate it.

8. Facilities Updates-Ervin West, Director of Facilities Management

- **Courthouse-** Mr. West reported the painting has started in the courtroom, sanding the hardwood floors have also begun. The solicitor's suite has been finished. The ceiling work has started in the stairwell. The soil report has been completed for the basement areaway. The report has been sent to three different structural engineer companies for evaluations. The presentation meeting will be August 27th at 6:00p.m.
- **Whitmire Fire Department-** Mr. West reported it is near completed. Have minor issues with the plumbing and electrical work. The office is also near completion.
- **Whitmire Rescue\EMS-** Mr. West reported the building is in use. The phone lines have finally been hooked up, and they are working on a security key pad for EMS. Also the bay doors needed to switch to automatic instead on manual.
- **Sheriff's Office-** Mr. West reported the irrigations have started; but the contractor had to stop and do another project. He will be back at the sheriff's office later this week. The trailers have been moved away and clean-up is underway. The front generator has been fenced in and the flag pole has been put up.

9. Public Comments**10. Executive Session**

§30-4-70(a)(2) SC Code of Laws: 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.

11. Adjournment

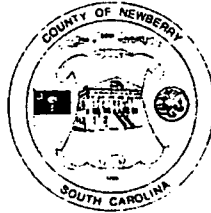
The meeting was declared adjourned by Chairman Waldrop.

Public Safety and Courts Committee

APPROVED:

Bill Waldrop, Chairman

Zenda McClurkin, Recorder



**NEWBERRY COUNTY COUNCIL
MINUTES
AUGUST 20, 2014**

Newberry County Council met on Wednesday, August 20, 2014, at 7:00 p.m. in Council Chambers at the Courthouse Annex, 1309 College Street, Newberry, SC, for a regular scheduled meeting.

PRESENT: Henry H. Livingston, III, Chairman
Kirksey Koon, Vice Chairman
John E. Caldwell, Councilman
Bill Waldrop, Councilman
Leslie (Les) Hipp, Councilman
Steven C. Stockman, Councilman
Scott Cain, Councilman
Wayne Adams, County Administrator
A.J. Tothacer, County Attorney
Laurie Renwick, Clerk to Council
Debbie Cromer, Finance Director

MEDIA: Andrew Wigger, Newberry Observer
Tammy Kitchen, WKDK

The meeting was duly advertised as required by law.

Chairman Livingston called the meeting to order and determined a quorum present.

Mr. Adams led the invocation followed by the Pledge of Allegiance.

1. Adoption of Consent Agenda

Mr. Cain motioned to adopt the consent agenda; seconded by Mr. Stockman. The vote was unanimous.

2. Additions, Deletions and Adoption of Agenda

Mr. Hipp motioned to adopt the agenda; seconded by Mr. Cain. The vote was unanimous.

3. Newberry County Service Awards

Chairman Livingston presented the following service awards: David Parnell, Director of Veteran Affairs – 5 years; Charles Verner, Public Defender (absent) – 10 years; and Janice Allen, Clerk of Court's Office (absent) – 20 years.

4. Ordinance #07-11-14: An Ordinance authorizing the execution of an Equipment Lease-Purchase Agreement in the amount not exceeding \$1,265,000 relating to the purchase of certain equipment by Newberry County, authorizing the execution of other necessary documents and papers, and other matters relating thereto.

Chairman Livingston declared this the Public Hearing.

Having received no comments from the public, Chairman Livingston declared the Public Hearing closed.

Mr. Adams reported that the county has utilized lease purchase funding for a number of items over the past four years; rolling stock relating to public safety to include fire trucks, ambulances, and rescue trucks. This particular lease purchase will involve upgrades to the fire radio system, purchase of twenty-four (24) self-contained breathing apparatuses for fire fighters, fifteen (15) solid waste compactors for use in single stream recycling, and two (2) modular ambulances. He said all of these items were approved as part of the annual budget.

Mr. Koon motioned to approve second reading of Ordinance #07-11-14; seconded by Mr. Hipp. The vote was unanimous.

5. Consideration of Bids for Creek Crossings at Lynches Woods Park

	<u>Base Bid</u>	<u>Alt #1</u>	<u>Alt #2</u>	<u>Total</u>
Capital Construction, LLC	\$76,300.00	\$42,000.00	\$42,000.00	\$160,300.00
Martin & Son Construction	\$94,400.00	\$47,040.00	\$47,040.00	\$188,480.00

Mrs. Waldrop reported that bids were received on June 12, 2014, and were brought before County Council on June 18, 2014. It was decided at that meeting that more information was needed. Staff met with the Lynches Woods Committee on August 7, 2014, and it was determined that actual stones will be used for the facades rather than synthetic material. She said staff recommends the low bid from Capital Construction,

LLC in the amount of \$160,300.00 which includes the base bid of \$76,300.00 and two alternates at \$42,000.00 each.

Mr. Adams noted that the base bid was for two crossings and each alternate was for an additional crossing; a total of four crossings.

Mr. Hipp motioned to approve the low bid from Capital Construction in the amount of \$160,300.00; seconded by Mr. Koon. The vote was unanimous.

6. Consideration of Disbursement of FY13/14 Funding by recommendation of Accommodations Tax Committee

Mr. Ernie Shealy, Accommodations Tax Committee Chairman, reported that the amount of tourism related funding to be distributed for FY13/14 is \$31,549.17; however, requests for these funds came in at an all-time high of \$63,890.00. The committee was faced with reviewing requests from existing projects along with newer projects with no history; however, wanting to encourage these new projects especially in the Town of Whitmire which has not had a lot of activity in years past. After careful consideration, the committee came up with the following recommendation:

Tourism Related:

Newberry Opera House	\$9,250.00
Newberry Co. Law Enforcement	3,000.00
Prosperity's Hoppin'	900.00
Newberry Co. Historical	
Museum Society	1,899.17
Little Mountain Reunion	3,000.00
Newberry Visitors Center	6,000.00
Party in the Pines	2,000.00
Newberry Community Players	500.00
Ag-Treasure Tour – Whitmire	2,000.00
Palmetto Trail Hike – Whitmire	1,000.00
Antique Car Show and Veterans	
Salute – Whitmire	2,000.00
TOTAL	\$31,549.17

Mr. Shealy said that the committee would like to also recommend that the funding for promotional related funds be disbursed as in prior years as followings:

Promotional Related

Newberry County Chamber – Lead Agency	40%
Prosperity Business Association	15%
Capital City Lake Murray	45%

Mr. Cain thanked the Accommodation Tax Committee for considering the Town of Whitmire.

Mr. Hipp commented that the amount of funding received this year has dropped and asked if the committee had an idea of why.

Mr. Shealy stated that they have seen a steady decline in tourism funding over the past several years due to the economy.

Mr. Koon motioned to accept the Accommodations Tax Committee's recommendation; seconded by Mr. Waldrop. The vote was unanimous.

Chairman Livingston thanked Mr. Shealy and members of the Accommodation Tax Committee for the great job they do in disbursing of these monies and trying to be fair.

7. Appointments

Mr. Waldrop nominated Mrs. Doriece McMorris for an appointment to the Newberry County Memorial Board to replace Mrs. Jessie Reeder; seconded by Mr. Cain. The vote was unanimous.

Mr. Waldrop thanked Mrs. Reeder for her service on the NCMH Board and stated that she is now a member of the Newberry County School Board and unable to serve on both.

8. Committee Meetings

a. Public Safety and Courts Committee 8/11/14

Mr. Tommy Long, Emergency Services Coordinator, reported that the Public Safety and Courts Committee met on August 11th and presented the following five (5) items on the agenda.

- A committee has been formed to research the paid fire fighter service and to set up goals and objectives. The committee consists of three (3) members on the fire side, three (3) members on the rescue side, the City Fire Chief, Councilman Scott Cain, James Shealy from the City Fire Department, and himself. The committee will have their first meeting on September 4th.
- Mr. DuBose presented funding options available for paid fire fighter positions.
- Mr. Wesley Boland gave an update on the radio system.
- Mr. Long reported that the new mobile morgue has arrived and he is updating the Mutual Aid Agreements with surrounding counties
- Mr. West gave an update on the renovations at the Courthouse, Whitmire Fire Department, Whitmire Rescue, and the Sheriff's Office.

Mr. Cain commented that the committee formed to research the paid fire fighter service is a progressive group made up of fire and rescue board members who are looking at where we are, where we are going, and for ways to better provide services for the citizens of Newberry County.

9. Public Comments

No comments.

10. Executive Session

Mr. Adams reported that staff would like an Executive Session for 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.

Mr. Koon motioned to go into Executive Session; seconded by Mr. Cain. The vote was unanimous.

Executive Session [7:20 p.m. – 7:45p.m.]

Chairman Livingston returned the meeting on Open Session and asked the County Attorney to report out.

Mr. Tothacer reported that Newberry County Council went into Executive Session to receive legal advice and no action was taken in that session.

Mr. Koon commented that after receiving the information and discussion in Executive Session, he motioned that Mr. Adams be given permission to send a letter to Senator Cromer requesting that he go to three (3) full time magistrates and no part-time magistrates; seconded by Mr. Hipp. The vote was unanimous.

11. Comments/Request from Administrator

No comments.

12. Comments/Request from Council Members

No comments.

13. Future Meetings

- a. Public Works and Planning Committee 8/25/14 @ 6:00 p.m.
- b. Council Work Session 8/27/14 @ 6:00 p.m.
- c. County Council 9/3/14 @ 7:00 p.m.

14. Adjournment

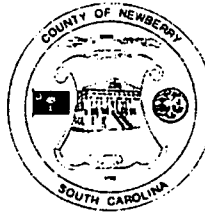
Chairman Livingston adjourned the meeting at 8:48 p.m.

NEWBERRY COUNTY COUNCIL

Henry H. Livingston, Chairman

APPROVED:

Laurie N. Renwick, Clerk to Council



**NEWBERRY COUNTY COUNCIL
MINUTES
JANUARY 21, 2015**

Newberry County Council met on Wednesday, January 21, 2015, at 7:00 p.m. in Council Chambers at the Courthouse Annex, 1309 College Street, Newberry, SC, for a regular scheduled meeting.

PRESENT: Henry H. Livingston, III, Chairman
Kirksey Koon, Vice Chairman
Bill Waldrop, Councilman
Leslie (Les) Hipp, Councilman
Steve Stockman, Councilman
Scott Cain, Councilman
Travis Reeder, Councilman
Wayne Adams, County Administrator
A.J. Tothacer, County Attorney
Laurie Renwick, Clerk to Council
Debbie Cromer, Finance Director

MEDIA: Andrew Wigger, Newberry Observer
Samie Truong, WKDK

The meeting was duly advertised as required by law.

Chairman Livingston called the meeting to order.

Mr. Adams led the invocation followed by the Pledge of Allegiance.

1. Adoption of Consent Agenda

Mr. Hipp motioned to adopt the consent agenda; seconded by Mr. Cain. The vote was unanimous.

2. Additions, Deletions and Adoption of Agenda

Mr. Adams reported that staff would like to add an Executive Session under Section 30-4-70(a)(2) for discussion concerning the settlement of legal claims and under Section 30-4-70(a)(5) for discussion of matters relating to the proposed location of industry.

Mr. Cain motioned to adopt the agenda as amended; seconded by Mr. Hipp. The vote was unanimous.

3. *Personal Appearances*

a. David Enzastiga, Rich and Enzastiga – Financial Audit FY13/14

Mr. Enzastiga reported that Newberry County was issued an unqualified opinion; the best opinion they can give. He distributed each Council member a copy of the audit report and briefly highlighted the major points contained therein. A copy of the FY13/14 Financial Audit will be made available for viewing on the county's website.

Chairman Livingston thanked the Finance Department, Auditor, County Administrator and others for working diligently on this and stated he was proud of the quality of people we have on our administrative team.

4. *Consideration of Proposed Change Orders to Lynches Woods Bridges Repair Project*

Mr. West reported that staff has a request for two change orders from the Lynches Woods Committee pertaining to the construction of the new bridges. The first proposed change order is to install cedar post and railing above the block wall to increase the overall height to about 4'2". He said the cost for this change order is \$7,605.00 for the four bridges under construction now. Change order #2 would revise the type of stone that will be applied to the structural part of the retaining wall. The contract drawings call for a veneer type stone and the Lynches Woods Committee has requested a dry-stacked Tennessee field stone. He said the additional cost on this change order is \$45,162.00 for four bridges. The Tennessee field stone cost more than the veneer stone and labor cost for the dry stack method is about double.

Chairman Livingston stated that he would give those citizens who had signed up to speak on this matter the opportunity before any voting by Council and invited Mrs. Laura Dukes to the podium.

Mrs. Dukes introduced herself as a Landscape Architect in the county. She said she was the guilty party who brought the rock to the county's attention. She commended Council for considering changing the rock style and method of laying it and noted that to accept the two change orders would definitely be a step in the right direction. Should Council decide not to accept the rock change order, she would recommend leaving the concrete masonry block exposed until the county can afford to do the right thing.

Chairman Livingston invited Dr. Charles Horne to the podium.

Dr. Horne introduced himself as a Biology Professor at Newberry College and said he has been on the Lynches Woods Advisory Board for several years. He said the advisory board has been

working the past several years on safety and trying to keep the historic component at Lynch's Woods. He felt the veneer stone would be more susceptible to weathering and Ms. Dukes has more experience with rocks that will be more resistant to break down over time. He said the base work on the bridges are of good quality and looks as if it will last a long time and we would like the stones to do the same thing.

Chairman Livingston invited Mr. John Sukovich to the podium.

Mr. Sukovich introduced himself as a retired college professor and said he has lived in Newberry County since 1976 and resides at 606 Morningside Drive.

He said he and his wife have ridden horses in Lynch's Woods several times a week for all these years year round. He said they love the place and it is special.

He would like to see that it continues to be appreciated and remain a jewel in Newberry County. He felt the railings and newly constructed bridges will keep people safe and said it is not going to be cheap to make these renovations and repairs. He questioned whether it would be cheaper to spend the money now or face a multi-million dollar lawsuit due to negligence if these safety issues are not corrected. He would like to see the rock facing to last as long as the previous construction that had been there since the 1930's.

Mr. Gordon Johnson stood and stated that he was 100% in favor of the railing for safety but asked if the change order for the stone was for reinforcement of the structure or for aesthetics purposes.

Mr. West responded that in his opinion the stone does not have anything to do with the structural integrity. The old bridges were torn out and the new bridges constructed with reinforced concrete footings, state of the art aluminum culverts which were backfilled with granular material. The headwalls are solid filled concrete blocks that are reinforced and tied into the footings. What we are talking about is the stone that will be applied to the structural part. He said in his opinion, neither the veneer stone nor the Tennessee field stone will add any structural strength to the headwalls.

Mr. Cain shared his concerns about the addition of \$53,000 to this project halfway through the process. He commented that the bridges are structurally sound and all we are talking about now is the façade and railing for additional height.

There was discussion about re-bidding the stone work and Mr. Cain asked how much this would decrease the contractor's contract.

Mr. West responded that it would be reduced \$15,678.00.

Mr. Cain inquired if the 15,678 was added in to the \$45,000.00

Mr. West said that the stacked stone was originally \$60,000.00 and the original veneer was \$15,000.00. He said whatever the new bid would be we could bank the \$15,000.00 and put towards it.

Mr. Hipp asked Mr. West if the contract was written to allow us the option to remove items without reducing the costs and if so the contractor is not obligated to give us \$15,000.00.

Mr. West commented that he would have to defer that to Mr. Tothacer to read the fine print.

Mr. Hipp indicated that Council wanted the bridge walls to have a good appearance and the stone veneer in the specs would be historically correct and noted that the existing bridges do not have all dry-stacked construction. He said his concern is that we have nine (9) bridges and we are just now working on four (4) of them. That would be \$90,000.00 for the dry stacked process. Mr. Hipp said he appreciated the work of the Lynches Woods Committee; they have done an excellent job and we could not have done it without them. He felt the railing could be brought up to a 4 feet height for safety purpose for \$7,000.00; however, he felt the veneer stone in the original contract for \$15,000.00 is close enough to what was originally there and that we ought to proceed with that.

Mrs. Dukes stood at her seat and made additional comments which were inaudible on the recorder.

Mr. Hipp commented that the committee's input was appreciated because they raised the curb height to the attention. Bringing it up three feet and adding the additional height with the railings only further enhances the safety for walkers or horseback riders.

Mrs. Dukes made further comments that were inaudible on the recorder.

Chairman Livingston asked where the \$140,000.00 in the Lynches Woods account came from that is being used on this project.

Mr. Gordon Johnson spoke in reference to this question but his comments were inaudible on the recorder.

Chairman Livingston responded that he recalled where the money came from and there has been opposition to going in and disturbing anything or harvesting timber. He said that Mrs. Dukes' point is valid about not doing anything until it can be done right; however, there should be some sustainability of the property. If you look at good forestry management, we are not doing a good job with this piece of property and he felt we could selectively market some timber and protect the pristine value and plant species within.

Chairman Livingston commented that as a steward of taxpayer dollars, there are projects that weigh heavier than the aesthetics of the headwalls such as safety issues in the park.

Mr. Sukovich stood and commented from the floor; however, they were inaudible on the recorder.

Mr. Koon inquired about the looks of the stone that was removed versus the Tennessee field stone and if it looked the same.

Mr. West stated that there is no conformity with the current stone; each wall is made of a little different stone. It was just mortared in placed one stone on top of the other. He said a lot of the walls have fallen over and needs to be addressed. In several cases, those fallen walls are blocking the natural flow of water getting into the existing culvert causing low cuts and undercutting the road. There are other maintenance that needs to be done to the existing headwalls that we have now that do not need to be neglected.

Mr. Koon asked if the addition of railing was a safety issue or just for looks.

Mr. West responded that to get it higher is always a good thing. We are at 32 inches now and another foot will be good.

Mr. Waldrop shared his concerns about the railing rotting and should be careful about using cedar.

Mr. West said he has spoken with a local vendor and he supply us with up to a 24 feet one length piece.

Chairman Livingston wanted people to understand that we are not just discussing four bridges but there are five more to do which will total up to \$117,000.00 in additional costs. The cedar railing itself will be \$17,111.00 for all nine bridges.

There was discussion among Council and the public about safety guidelines for the height of the headwalls and adherence to OSHA, ADA, and DOT standards.

Some of these standard do not come into play with this project but Mrs. Dukes said the SCDOT guidelines are the closest that we should follow.

Mr. West said this is a unique situation in deciding which code governs it; he would recommend going with DOT standards as Mrs. Dukes suggested.

Mr. Hipp referred back to the two change orders and commented that 42 inches is a reasonable for safety and \$7,000.00 for the total cost of this project is not a significant increase for what could be gained in safety. The maintenance of this railing could be done by our Public Works personnel. He said the second change order is of some concern to him. We would be looking at \$90,000.00 for all the bridges and whatever we do we need to do throughout the park. It will be hard to do something less on the remaining bridges than we do on the first four. We need to do the same throughout the park so there is some consistency in how it looks. He further stated that he was not in favor of leaving exposed cement block. He felt it would be difficult to revisit project and allocate funding for finishing the stone work later. He said his recommendation would be to go with the original rock veneer.

Mr. Hipp motioned to approve change order #1 to install cedar railing to the four bridges in the amount of \$7,605.00; seconded by Mr. Cain.

Chairman Livingston wanted to elaborate on the issue of safety. He said the last time he rode through Lynches Woods there were a lot of fallen trees. It happened in Irmo where a limb fell on

a child. With all the activity in the park from horse back riders, hikers, bikers, the potential for a tree falling is greater when we do not manage the forest any better than we are doing. Would the committee like to study the possibility of thinning or finding a way for the trees to be managed better for safety purposes and use that money to bring this project to standard to which they want as another option?

Mr. Hipp respectively addressed the Chairman and noted that there is a motion and a second on the floor to approve the railings and what he is proposing is outside of anything here. Having the committee look into this is a good thing in the long term but we have a park that we need to get back open.

Without further discussion, the vote to approve \$7,605 for cedar railings for four bridges in Lynches Woods was unanimous.

Chairman Livingston thanked all those who came and spoke on behalf of Lynches Woods and stated that the park is an extremely valuable asset to this county.

Mr. Koon recommended tabling change order #2 until we could have Mr. West do a little more study of the difference between the Tennessee field stone and the veneer finish.

Mr. West said there were several things to look at. One being to look at the contract to see if we would get the full deduct back and we can research the veneer and the Tennessee stone. He said another option would be to re-bid the stacked stone out to see how it comes out. The price right now to do the Tennessee stone is \$60,000.00 not \$45,000.00; the \$45,000.00 is with the deduct from the contract.

Mr. Hipp commented that even if we selected today to go with Tennessee field stone we are looking at 10 weeks and there are a lot of people anxious for Lynches Woods to reopen. Whatever we do, we need to do on an expedited basis. He felt going out for bids is not going to be in our best time interest.

Mr. Cain stated that technically both of these are veneers; one is a dry stack and one is a mortar stack; our structural wall is already there.

There was discussion among Council about the look of the proposed veneer. Mr. Adams reported that the veneer will be flat; however, the contractor said there are several dozen varieties of stone that can be used within the original spec price. He said he felt the committee's issue was with the coloring of the stone.

Dr. Horne responded that it was the chemical composition of the stone that was the committee's concern. The veneer is subject to weathering and the original stone out there now is either granite or quartz which is very resilient.

Mr. Adams and Mr. West concurred that at first the committee did not like the color and they did not like the width of the mortar joints.

Mr. Sukovich and Mrs. Dukes commented that the mock up was constructed with shoddy workmanship and insufficient.

Mr. Hipp stated that following the mock up, Council had discussed reducing the mortar joints in the specs to reduce the freeze/thaw cycle that has been mentioned. He said the difficult decision for Council is do we pay this much in addition to what we have that is beyond the budget for the project.

Mr. Hipp shared his concerns that he did not want the committee to think that their effort has not been appreciated if Council does not accept everything that the committee has proposed.

Mr. Waldrop commented that he wanted to make sure the structural block was sufficiently reinforced with rebar to prevent washing in the future.

Mr. Stockman commented that he felt a lot of this is about aesthetics and he was not sure about how much safety will be provided by raising the wall. He said there is a lot of other work to be done in the park and he did see spending this much money at this time.

Mr. Stockman motioned that we proceed with the rest of the project as originally presented; seconded by Mr. Waldrop. The vote passed by vote of 4-2-1; with Mr. Koon and Mr. Cain opposed and Mr. Hipp abstaining from the vote.

5. *Consideration of Central SC Alliance 3rd Quarter Invoice in the amount of \$18,000.00.*

Mr. Hipp motioned to approve 3rd Quarter Invoice; seconded by Mr. Waldrop.

Chairman Livingston asked if there was any discussion.

Mr. Koon stated that he has voted against this the last two times and will vote against it this time because he feels we have not received a fair return on our investment.

Having received no further discussion, the vote to approve Central SC Alliance 3rd Quarter Invoice in the amount of \$18,000.00 was approved by vote of 5-2; with Mr. Koon and Mr. Reeder opposed.

6. *Consideration of Fire and Rescue Automatic Aid Agreement between Newberry County and Greenwood County.*

Mr. Adams reported that this is a standard Mutual Aid Agreement and Greenwood County Council has asked that Newberry County Council express its opinion before they take it up.

Mr. Koon motioned to approve the agreement; seconded by Mr. Waldrop. The vote was unanimous.

7. *Committee Reports*

a. Public Safety and Courts Committee - 1/12/15

Mr. Tommy Long, Emergency Services Coordinator, reported that the Public Safety and Courts Committee met on January 12, 2015 and there were five (5) items on the agenda. The first two were discussions from the Sheriff's Office regarding additional security requirements that may cause some additional funding and health services at the jail. The committee was updated on some grants; one from DHEC in the amount of \$46,114.00 to update radios for EMS service and three (3) forestry grants (50/50 match) for fire departments in the amount of \$6,146.00. Mr. Long gave the committee and ISO rating update and reported that Friendly Fire Department just received its ISO rating which went from 1 7-10 rating to a 5-10 rating. He said they are in the process of evaluating four (4) other stations now. The final item was a presentation and briefing from the newly establish fire/rescue committee establish to research the possibility of having paid fire members.

b. Finance Committee - 1/15/15

Chairman Livingston reported that the committee heard from Mr. David Enzastiga on the audit which he presented tonight.

8. *Appointments*

No appointments

9. *Public Comments (by those who signed up at meeting)*

Chairman Livingston granted those who signed up the opportunity to comment along with the discussion of agenda item #4.

10. *Executive Session*

Mr. Adams reported that staff would like an Executive Session under Section 30-4-70(a)(2) for discussion concerning the settlement of legal claims and under Section 30-4-70(a)(5) for discussion of matters relating to the proposed location of industry.

Mr. Koon motioned to go into Executive Session; seconded by Mr. Cain. The vote was unanimous

Executive Session [8:25 p.m. – 9:25 p.m.]

Mr. Tothacer reported that Council went into Executive Session to discuss a legal matter and the proposed location of industry and no action was taken in that session.

11. *Comments/Request from County Administrator*

Minutes
January 21, 2015

No comments.

12. *Comments/Requests from Council Members*

No comments.

13. *Future Meetings*

- a. County Council 2/4/15 @ 7:00 p.m.
- b. Economic Development Committee 2/9/15 @ 6:00 p.m.
- c. County Council 2/18/15 @ 7:00 p.m.
- d. Personnel and Intergovernmental Relations 2/23/15 @ 6:00 p.m.

14. *Adjournment*

Chairman Livingston declared the meeting adjourned at 9:27 p.m.

NEWBERRY COUNTY COUNCIL

Henry H. Livingston, Chairman

APPROVED:

Laurie N. Renwick, Clerk to Council



ROA 00414

General Records Retention Schedules for County Records



South Carolina Department of Archives and History
Archives and Records Management Division
8301 Parklane Road
Columbia, South Carolina 29223-4905

ROA 00414

**General records retention schedules
for county records _____ 2002**

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Introduction

The Archives and Records Management Division of the State Archives has prepared these general retention and disposition schedules to give South Carolina's counties the legal authorization to retain and dispose of records common to eighteen offices and functions. The schedules list permanently valuable records, which should be properly protected for future use, and they also supply a timetable that will allow records custodians to regularly and legally dispose of records of non-permanent value. In preparing the schedules, the Division consulted with various local and state government officials.

Purpose

The schedules are designed to:

- give county governments uniform guidelines for the retention and disposition of common records;
- make sure counties retain for as long as necessary the records they will need for administrative, legal, fiscal, and other uses;
- make sure counties retain records for as long as state and federal laws, regulations, policies, and procedures require;
- promote the cost-effective management of records;
- give counties the legal authorization they need to dispose regularly of their obsolete records.

Statutory authority

Section 30-1-90(B) of the *Code of Laws of South Carolina, 1976*, as amended, authorizes the State Archives to promulgate as state regulations, general schedules for records common to local governments. On 26 June 1992, the General Assembly approved the county general schedules as Regulation 12-500 through 12-512.2. On 26 April 2002, the General Assembly approved additions/revisions to the county general schedules as Regulation 12-500 through 12-518.3

Definitions of schedules

A records retention schedule describes one or several records series, shows the length of time the records should be retained, and indicates their final disposition. Schedules are of two types – specific and general.

Specific Records Retention Schedules – these schedules are prepared and approved specifically for your county; your county's name will appear on these.

General Records Retention Schedules – these schedules are state regulations issued by the State Archives and are published in the *Code of Laws of South Carolina 1976*, as amended. When a general schedule applies to records already covered under a specific schedule, the general schedule will supersede the specific schedule unless you wish to opt out of using the general schedule.

Special provisions

Opting out – You may already have approved specific schedules that cover some of the same records as the general schedules. If you prefer to continue using these specific schedules, the regulations allow you to opt out of using the general schedules. The regulations will also let you opt out of using general schedules if you wish to establish new specific schedules instead.

Unique records – These general schedules do not list records that are unique to your county. To control the retention and disposition of these, you should refer to your specific schedules. If you have no specific schedules, contact your records officer. If you do not know who your records officer is, contact our Local Records Services Unit at 803-896-6122.

Confidential and restricted records – County records officers and records custodians should ensure that confidential records are filed, accessed, and disposed of according to federal, state, and local legal requirements.

Exceptions to minimum retention periods – These general schedules establish minimum retention periods for the official copy of your county's records. Although most records can be destroyed when their minimum retentions have been met, you may need to keep some records longer to satisfy specific requirements. Be sure those requirements have been met before you dispose of those records.

Copies – These general schedules do not cover copies of records, which you may have made for convenience, information, or duplication. You may destroy copies when you no longer need them.

To whom do these schedules apply?

The following county government offices and functions: register of deeds, sheriff/detention, county council/administration, finance, purchasing, personnel, auditor, treasurer, tax collector, tax assessor, building/planning and development, veterans affairs, maintenance garage/fleet maintenance, library, emergency services, animal control, voter registration and elections, and coroner.

To whom do these schedules not apply?

- Municipalities, townships, school districts, special purpose districts, and any quasi-governmental subdivisions. The State Archives has developed separate general schedules for municipalities and school districts.
- Circuit courts of common pleas and general sessions, family courts, magistrate courts and probate courts. Separate general schedules for court records have been issued through South Carolina Court Administration.

General schedule format

Format for County Council Minutes

Subarticle 3. County Council/Administration

12-503.2 County Council Minutes

A. Description: Record of the proceedings at meetings of the county council, which includes written descriptions of the financial and administrative business conducted. Information includes date of meeting, names of councilmen present, claim approvals, petitions, bids, proposals, and other matters discussed by or brought to the attention of the council.

B. Retention: Permanent. Microfilm for security.

Each record series listed in the general schedule is presented in the following format:

Subarticle number – This publication contains schedules for eighteen offices/functions, each with a separate subarticle number.

Regulation number and series title – The first line includes the regulation number, which is used for control, and the title most commonly used by counties.

Part A – Description: A short statement describing the use and informational content of the record series. It helps to identify the record.

Part B – Retention: The time period indicating the minimum length of time that records should be retained by the office before their disposition can take place. Some records are scheduled for permanent retention because of their value; others have retention periods that vary from "until no longer needed for reference" to seventy-five years.

Explanation of micrographics terms used in retention schedules

"Microfilm Optional" – Microfilm may be substituted for the original records IF the microfilm meets state standards (see R-12-200 of the *Code of Laws of South Carolina, 1976*, as amended). Before you destroy the originals, you must submit to the State Archives and have approved a Microfilm Quality Certification for Records Disposition form.

"Permanent. Microfilm for security" – You cannot destroy the original records after microfilming.

"Permanent. Microfilm" – You must microfilm records of permanent value that are on non-permanent media like computer tape and computer printouts to preserve the information they hold. And you must submit a Microfilm Quality Certification for Records Disposition form to the State Archives for approval before you destroy the non-permanent media those records are on.

Using this schedule effectively

- Your county records officer should coordinate all activities relating to the retention and disposition of your records and function as a liaison with the State Archives in administering the county's records management program. If you have no county records officer, each records custodian has these responsibilities.
- County records officers should work with other county staff to coordinate the regular disposition of obsolete records. Disposition should be carried out periodically—at least once a year. To streamline disposition, your staff should review filing arrangements, cut off files periodically, and develop procedures to segregate inactive and obsolete files.
- Generally, non-archival records should be destroyed when the minimum retention periods have been met, unless they are needed to meet specific requirements (see Section 12-500). Although you are not required to destroy records at the end of their minimum retention periods, obsolete records should not occupy expensive office and storage space.
- The titles and descriptions of record series listed in the general schedule may not reflect exactly the titles and descriptions you use. If you are not certain whether the schedule applies to a specific record in your office, please contact the Local Records Services Unit at 803-896-6122.

How to use the general schedules

1. Study the general schedules and compare them with your specific schedules, if you have any, to determine which schedules you will use.
2. Locate and examine all your records.
3. Match each records series with the title and description on the general schedule.
4. Follow the records disposition process outlined below. The process is illustrated by the flow chart on page 8.

Records disposition process**Permanent (archival) records:**

Paper Records – After your permanently-valuable paper records become inactive, you should transfer them to an archival repository. Contact the Local Records Services Unit for advice on caring for and protecting your archival records.

Micrographics – If you microfilm permanent records, contact the Micrographics Services Branch at 803-896-6208 for help and information about microfilm standards.

Digital Images – If you are maintaining permanent records as digital images, special requirements apply. Contact the Local Records Services Unit at 803-896-6122 for more information.

Non-permanent records:

To destroy records according to general schedules, you must complete and forward to the Local Records Services Unit a "Report on Records Destroyed" form. A sample form is included on page 5 and blank forms are available from the Local Records Services Unit. Follow the step-by-step instructions on the back of the form. Please note that both the form and the process are the same as those you use to document records disposal under your specific schedules. To help you estimate cubic footage for column 9 on the form, we have included a table of volumes on page 7.

Contacting the State Archives — When and whom?**When?**

1. You submit a "Report on Records Destroyed" form when destroying records covered by general and/or specific schedules.
2. You need to prepare or revise specific schedules.
3. You need help with your records management duties.

Whom?

Local Records Services Unit
8301 Parklane Road
Columbia, SC 29223-4905
Phone 803-896-6122 Fax 803-896-6138

When?

1. You want to substitute microfilm (Form ARM-12 Microfilm Quality Certification For Records Disposition) for the original records. (Note: You must have a records schedule to do this.)
2. You need to store security microfilm of permanently valuable records.
3. You want information about the filming, processing, quality control, and duplicating services the State Archives provides.

Whom?

Micrographics Services Branch
8301 Parklane Road
Columbia, SC 29223-4905
Phone 803-896-6208 Fax 803-896-6138

	SC DEPARTMENT OF ARCHIVES & HISTORY DIVISION OF ARCHIVES & RECORDS MANAGEMENT REPORT ON RECORDS DESTROYED	1. STATE OR LOCAL AGENCY Butler County
	Return the original copy of this form to: SOUTH CAROLINA DEPARTMENT OF ARCHIVES & HISTORY RECORDS SERVICES BRANCH 8301 PARKLANE ROAD COLUMBIA, SC 29223-4905 FAX: 803-896-6138	2. RECORD GROUP NUMBER 67
		3. DIVISION OR OFFICE Treasurer
		4. DATE January 7, 2007

5. The records listed below have been disposed of in accordance with provisions of the PUBLIC RECORDS ACT, CODE OF LAWS OF SOUTH CAROLINA, 1976, Sections 30-3-10 through 30-3-140, as amended, and approved Records Retention Schedules.

SIGNATURE OF RECORDS OFFICER OR REPRESENTATIVE:

Dr. Anne Hays

6. RECORD SERIES TITLES	7. RECORD SERIES NUMBER	8. INCLUSIVE DATES	9. VOLUME (CU. FT.)	10. DATE OF DESTRUCTION
Tax Receipts	12-508.2	1992-1998	18.0	1-7-02
Banking Records	12-508.13	1995-1998	7.50	1-7-02
Bankruptcy Files	12-508.20	1980-1991	4.0	1-7-02
Holla Bene Lists	12-508.22	1990-1998	5.0	1-7-02
Claims	12-508.23	1994-1998	6.0	1-7-02
			40.50	11. TOTAL CU. FT. DESTROYED

INSTRUCTIONS FOR COMPLETING THE FORM REPORT ON RECORDS DESTROYED

Please read the instructions carefully before completing this form.

After completion, your agency must return this form to the State Archives, Records Services Branch, and retain a copy for reference to document the legal disposition of your records.

AGENCY means any state or local government entity.

This form should be used to report the destruction of records covered under a specific and/or general record retention schedule. Generally, this form should be completed by the agency records officer or authorized representative.

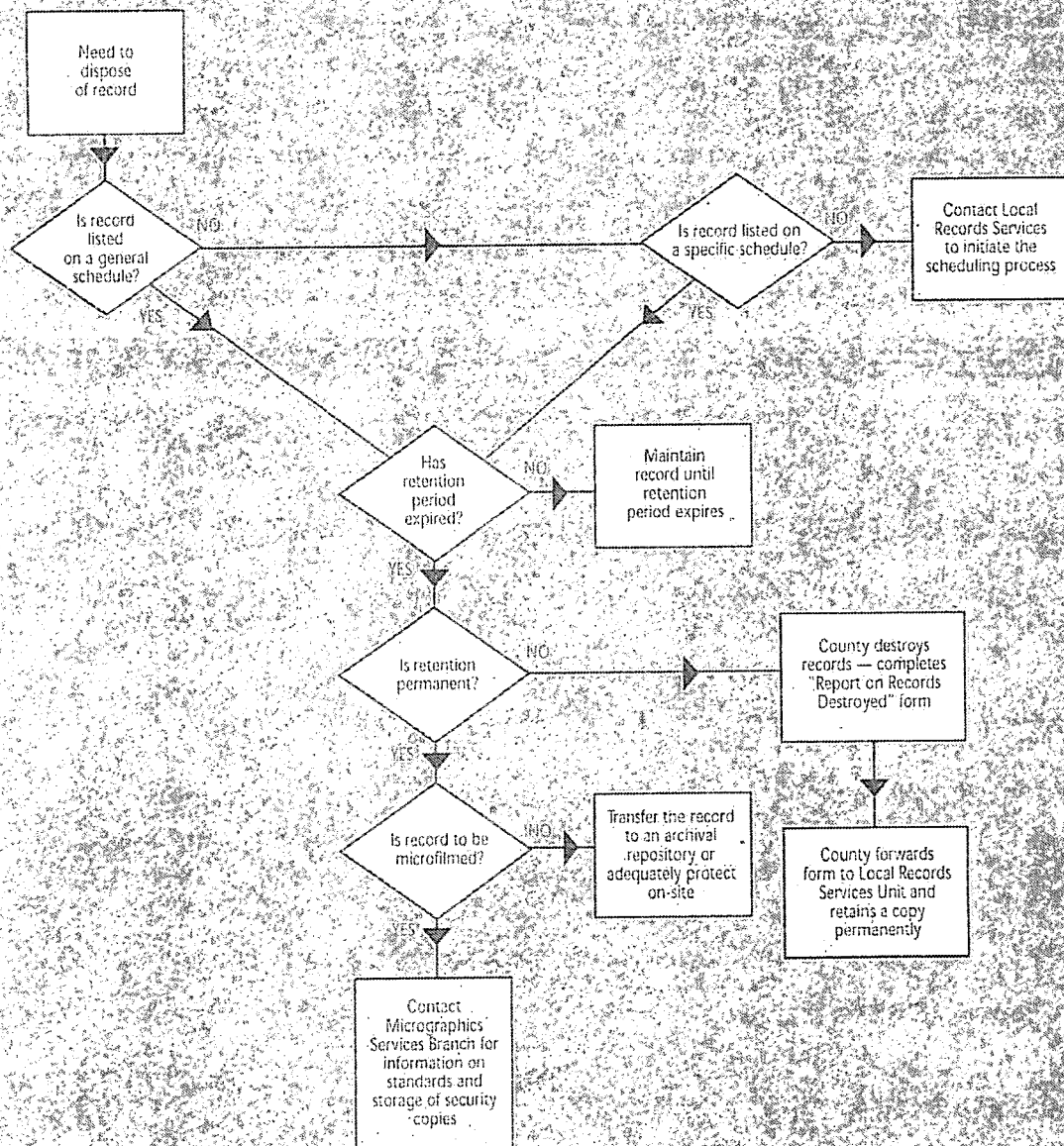
1. Enter your agency's name (Department of Health and Environmental Control) or the name of your political subdivision (Lexington County Sheriff's Office).
2. Leave block 2 blank. This block will be completed by SC Department of Archives and History Record Analysts upon receipt of this form by the Records Services Branch.
3. Enter any division or office identification which will clarify the records destroyed (Retirement System, State Law Enforcement Division).
4. Enter the date your agency prepares this form.
5. The official making the report should sign here. The approving authority must be the agency's chief administrative officer or authorized representative. In most state agencies, this authorized representative may be the agency records officer. In local agencies this authorized representative may be the manager, administrator, elected department head or other designated official.
6. Enter the exact record series title. Each series title should correspond to the one cited in the record retention schedule.
7. Enter the appropriate record series number for each record series destroyed.
8. Enter the earliest and latest dates covered by the records destroyed (2/1992-5/1993; or 1987-1990).
9. Enter the volume (in cubic feet) of records destroyed. *See 11 below.*
10. Enter the date (month and year) of destruction (3/1993; 1/1987; 12/1980).
11. Enter the total volume of records destroyed. Add figures entered in column 9.

TABLE OF VOLUMES

	QTY.	ITEM/SIZE	CAPACITY
C A B I N E T S	1	vertical letter-size file drawer	1.5 cubic feet
	1	vertical legal-size file drawer	2.0 cubic feet
	1	lateral legal-size file drawer	2.5 cubic feet
B O X E S	1	standard Records Center box	1.0 cubic foot
S H E L V E S	1	letter-size open shelf—36" long	2.0 cubic feet
	1	legal-size open shelf—36" long	2.5 cubic feet
C A R D F I L E S	10	12" rows of 3" x 5" cards	1.0 cubic foot
	6	12" rows of 4" X 6" cards	1.0 cubic foot
	4	12" rows of 5" x 8" cards	1.0 cubic foot
	5	14" boxes of tab cards	1.0 cubic foot

CUBIC FOOT EQUIVALENCY FORMULA

$$\frac{L \times W \times H \text{ (in inches)}}{1728 \text{ inches}} = \text{cubic feet/unit}$$

Records disposal process

General Retention Schedule for County Records

12-500. Introduction and general matters; application of schedule.

The following general schedules contain minimum records retention periods for the official copy of the records. These retentions and dispositions apply regardless of physical format, i.e., paper, microfilm, electronic storage, digital imaging, etc. Convenience, informational or duplicate copies are not governed by this regulation and may be destroyed when no longer needed for reference. To destroy records in accordance with this regulation, county governments must complete and submit a report of records destroyed form to the Department of Archives and History after eligible records have been destroyed. These forms are available from the Department's Division of Archives and Records Management. Before disposing of public records under these general schedules, county governments should insure that the records have no further audit, legal, or fiscal value. These general schedules supersede all schedules approved previously for the same records series. However, county governments may opt out of these general schedules and request the continuing use of existing schedules or the establishment of specific retention schedules for their records when appropriate, necessary, or in order to avoid conflict with other laws or regulations.

Subarticle 1. Register of Deeds

12-501.1. Grantor and Grantee Index to Conveyances

A. Description: A finding aid to instruments in the conveyance book series. Information includes name of grantee and grantor, book and page number where document is recorded, day and year of execution, month, day and year of recordation, number of acres or lots and a description of the land.

B. Retention: Permanent. Microfilm for security.

12-501.2. Conveyances (Deeds, Titles to Real Estate)

A. Description: Documents real property transactions plus infrequent entries involving personal property. Information includes grantor, grantee, location and description of land, monetary consideration, encumbrances (if any), signature of grantor, notary, and witnesses (or facsimiles thereof), date recorded, and plats (where applicable).

B. Retention: Permanent. Microfilm for security.

12-501.3. Mortgagor and Mortgagee Index to Real Estate Mortgages

A. Description: A finding aid to instruments in the real estate mortgage book series. Information includes name of mortgagee and mortgagor, book and page number where document is recorded, and the date.

B. Retention: Permanent. Microfilm optional.

12-501.4. Real Estate Mortgages and Satisfactions

A. Description: Records the transfer of property, serving as a security for a debt which becomes void when the debt is paid according to the terms of the mortgage. Information includes name of mortgagor and mortgagee, description of the property, date of instrument, date of recording and satisfaction of mortgage (where applicable).

B. Retention: Permanent. Microfilm optional.

12-501.5. Index to Plats

A. Description: A finding aid to plats. Information includes name of owner and surveyor, date filed, date surveyed, volume and page number, property location, description, map number.

B. Retention: Permanent. Microfilm for security.

12-501.6. Plats

A. Description: Documents the legal survey and mapping of lands for grants and conveyances. Information includes location, boundaries and divisions, date of survey, certificate of surveyor, scale, property owners, date of recording, and plat.

B. Retention: Permanent. Microfilm for security.

12-501.7. Index to Miscellaneous Records

A. Description: A finding aid to instruments in the miscellaneous record series. Information includes name of party, book and page number.

B. Retention: Permanent. Microfilm optional.

12-501.8. Miscellaneous Records

A. Description: Various instruments filed with the office, including charters, contracts, options, agreements, powers of attorney, covenants, articles of association, articles of mergers between corporations, notices of forthcoming mergers, assignments of contract to mortgages, limited partnership agreements, and notices of intent to petition.

B. Retention: Permanent. Microfilm optional.

12-501.9. Index to Uniform Commercial Code Financing Statements.

A. Description: A finding aid for liens on personal property under the Uniform Commercial Code adopted for South Carolina as of January 1968. Information includes name of debtor, date of personal debt, date of maturity, character of debt, and description of personal property pledged.

B. Retention: 1 year after all entries have been terminated or lapsed, then destroy.

12-501.10. Uniform Commercial Code Financing Statements

A. Description: Original papers recording liens on personal property under the Uniform Commercial Code adopted for South Carolina as of January 1968. These replace chattel mortgages. Information includes file number, debtor's name and address, secured party, filing date, time, number, and officer, types of property covered, signature of party and signature of clerk.

B. Retention:

(1) Financing statements where transmitting utility is the debtor: 1 year after termination statement has been filed, then destroy. If a microfilm or other photographic record of the financing statement and any related statements (continuation, assignment, release) exist, originals may be destroyed immediately after receipt of termination statement. Microfilm or other photographic records may then be destroyed one year after termination statement has been filed.

(2) Other financing statements: 1 year after statement has lapsed or termination statement has been filed, then destroy. If a microfilm or other photographic record of the financing statement and any related statements (continuation, assignment, release) exist, originals may be destroyed immediately after statement has lapsed or after receipt of termination statement. Microfilm or other photographic records may then be destroyed one year after statement has lapsed or termination statement has been filed.

12-501.11. Charters

A. Description: Consists of information on charters which have been recorded in the office of the Secretary of State. Information includes name of organization, incorporators, date, place of activities, capital, stock, increases in capital stock and cancellations.

B. Retention: Permanent. Microfilm optional.

12-501.12. Chattel Mortgages and Indexes

A. Description: Defunct series containing original papers recording liens on personal property by chattel mortgages. Information includes debtor's name and address, secured party, filing date, time, number, officer, types of property covered, signature of party, signature of notary. These have been replaced by Uniform Commercial Code Financing Statements.

B. Retention:

- (1) Records concerning chattel mortgages for rural electric cooperatives and Public Service Commission regulated utilities: Until termination statement is filed, then destroy.
- (2) Other records: Destroy.

12-501.13. Index to Federal Tax Liens

A. Description: Finding aid to federal tax liens. Information includes name of taxpayer, address of taxpayer, date of filing, hour of filing, and amount of tax with interest.

B. Retention: Permanent. Microfilm optional.

12-501.14. Federal Tax Liens

A. Description: Standard forms filed in the office against personal property as a means of collecting delinquent federal taxes. Information includes period ending, type and amount of taxes owed, amount of penalty, amount of interest, total taxes, name/address of taxpayer, warrant number, date of notice and demand, date signed, and signature of tax official.

B. Retention: 10 years and 30 days after date of assessment or last extension, whichever is longer, then destroy.

12-501.15. Index to State Tax Liens

A. Description: Finding aid to state tax liens. Information includes name of taxpayer, address of taxpayer, date of filing, hour of filing, and amount of tax with interest.

B. Retention: 10 years, then destroy.

12-501.16. State Tax Liens

A. Description: Standard forms filed in the office against personal property as a means of collecting delinquent state taxes. Information includes period ended, type and amount of taxes owed, amount of penalty, interest, total tax, name/address of taxpayer, warrant number, date of notice and demand, date assigned, and signature of tax official.

B. Retention: 10 years, then destroy.

12-501.17. Index to Mechanics Liens

A. Description: Serves as the principal finding aid for locating mechanics liens. Information includes name of plaintiff, name of defendant, and file number.

B. Retention: 10 years after final entry has been executed, discharged, released, or dissolved, then destroy.

12-501.18. Mechanics Liens

A. Description: Records transcripts of mechanics' and contractor's claims filed as statutory liens on property to secure payment of debt for materials or labor used thereon. Information includes name of defendant, name of plaintiff, description of lien, recording date and time, book numbers and page number.

B. Retention: 10 years after final judgement to execute the lien, discharge, release or dissolution has been entered upon the registry, then destroy.

Subarticle 2. Sheriff/Detention**12-502.1. Incident Reports**

A. Description: Records the original report of a felony or incident and pertinent facts surrounding the offense. Information includes incident type, case number, NCIC entry, incident code, premise type, incident location, incident date, time date, reporting area, complaint, victim information, subject (suspect) data, arrest data, vehicle data, witness data, narrative, and UCR data administrative section.

B. Retention: 5 years, or until of no further legal or administrative value whichever comes later, then destroy.

12-502.2. Criminal History Records

A. Description: Records complete cumulative original history on any subject arrested for a crime by the Sheriff's department. Information may include any/all of the following: name, date of birth, physical description, FBI number, address, employment, marital status, education, date of arrests and releases, identification information (mugshots, fingerprints), facts surrounding investigation, final disposition.

B. Retention: Until death of the subject or 75 years, whichever comes first, then destroy.

12-502.3. Writ Book (Receipt Book for Civil Papers Served)

A. Description: Record of initial and intermediate civil processes served including writs, citations, subpoenas, notices, injunction, or warrants (19th century volumes may include criminal processes). Information includes parties names, attorneys, kind of writ, date of entry, by whom served, date of service, kind of service, sheriff's costs, general remarks.

B. Retention:

- (1) Pre-1921 volumes: Permanent. Microfilm optional.
- (2) Post-1920 volumes: 10 years, then destroy.

12-502.4. Execution Books

A. Description: Record of all final civil processes received by the sheriff for executions against property to satisfy judgements issued from the court. Information includes kind of process, when lodged, name of parties, debt and interest, attorneys' names, sheriff's receipts, date of levy, plaintiff's attorneys (Pre-1900 volumes may contain tax executions).

B. Retention:

- (1) Pre-1921 volumes: Permanent. Microfilm optional.
- (2) Post-1920 volumes: 10 years, then destroy.

12-502.5. Tax Execution Books

A. Description: Record of delinquent taxes turned over for execution. Information includes number of tax execution, name of defaulter, date of entry, amount of taxes and penalties collected (later volumes may contain property valuations).

B. Retention:

- (1) Pre-1901 Tax Execution Books: Permanent. Microfilm optional.
- (2) Post-1900 Tax Execution Books:
 - (a) When Corresponding Auditor's and Treasurer's Tax Duplicates are Both Missing: Permanent. Microfilm optional.
 - (b) When Corresponding Auditor's or Treasurer's Tax Duplicates Exist: 10 years, then destroy.

12-502.6. Sale Book

A. Description: Record of all relevant information pertaining to property sold by the sheriff for satisfaction of judgement or liquidation of confiscated and stolen goods. Information includes parties, date of advertisement, when sold, description of property, amount, and by whom sold.

B. Retention: Permanent. Microfilm optional.

12-502.7. Jail Book

A. Description: Record of persons incarcerated in the county jail. Information includes name of prisoner, offense, date of commitment, by whom committed, bond, releasing officer, date released, how released, and remarks.

B. Retention: Permanent. Microfilm optional.

12-502.8. Juvenile Booking Records

A. Description: Documents juveniles arrested and booked by county law enforcement. Information includes date, name, alias, address, nearest relative, relative's address, charge, arresting officer.

B. Retention: 3 years after subject reaches majority, then destroy.

12-502.9. Juvenile Case Files

A. Description: Documents juveniles taken into custody. Information includes evidence from SLED, fingerprint reports, exhibits, and statements.

B. Retention: 3 years after subject reaches majority, then destroy, unless there is legal reason to retain further.

12-502.10. Case Files

A. Description: Compilation of all relevant data necessary for the creation of a case against a defendant(s) on a particular crime. Information includes detailed investigative data on the offense and the defendant(s) compiled on several standard forms such as Incident Report and Booking Report.

B. Retention: 30 years, then destroy.

12-502.11. Evidence Case Files

A. Description: Property invoice and receipt showing evidence taken from crime scene and suspects. Information includes case number, crime type, victim name and address, suspect name and address, location, examination requested, lab case number, item number, quantity, description of property, chain of custody, and final release.

B. Retention:

(1) Death Penalty Cases: Until death of defendant or state Supreme Court rules on the case, whichever comes first, then destroy.

(2) Other cases: 1 year after the final action in the case, then destroy.

12-502.12. Booking Reports

A. Description: Record of all persons arrested and booked by the Sheriff's office. Information includes agency identification, case number, name, sex, date of birth, docket number, age, height, weight, hair, eyes, social security number, visible scars and marks, NCIC identification number, address, phone number, alias, drivers license number, occupation, next of kin and address, booking officer's name, current date, charge data, medical data, release date, time, and arresting officer.

B. Retention: 10 years, then destroy.

12-502.13. Arrest Cards

A. Description: Card system which serves as a record of arrests in the sheriff's department. Information includes race, height, sex, date of birth, social security number, age, date and place of birth along with case number, date arrested, charge, and disposition.

B. Retention: 5 years, then destroy.

12-502.14. Fingerprint Files

A. Description: Records fingerprints of persons arrested by the sheriff's department. These files are utilized for investigative and identification purposes. Information includes date, name and address of defendant, date of birth, social security number, race, sex, height, weight, eyes, hair, date arrested, charge/offense, signature of defendant, signature of officer, fingerprint impressions, information for FBI on reverse side.

B. Retention: Until notification of death of subject or 75 years, whichever comes first, then destroy.

12-502.15. Mug Shots

A. Description: Photographs of individuals who have been arrested and charged with various criminal offenses. These photographs are used by law enforcement personnel, victims, and witnesses to aid in identification of suspects. Information includes person's name, address, description, date, and photograph.

B. Retention: Until superseded or of no further value, then destroy.

12-502.16. Inmate Medical Forms

A. Description: Medical screening record created upon the incarceration of an inmate and compiled throughout the incarceration of the inmate. Information includes Receiving Screening Form, Display Medical Screening, nurse's and physician's notes, records from Emergency Room or other treatment facility, log of prescribed medication, distribution of medication, and log of taking the medication.

B. Retention:

(1) Adult Medical Records: 10 years after medical incident, then destroy.

(2) Juvenile Medical Records: 13 years after medical incident, then destroy.

12-502.17. Inmate Request Forms

A. Description: Record of inmate requests. Information includes date of request, inmate's name, cell location, date of birth, type of request.

B. Retention: 3 years, then destroy.

12-502.18. Inmate Visitor Log

A. Description: Record of each inmate's visitors. Information includes date, inmate's name, time in/out, visitor's name, relation to inmate.

B. Retention: 3 years, then destroy.

12-502.19. Inmate Accounting Records

A. Description: Listing of the inmates assigned to each cell. Information includes shift number, shift time, date, time of report, cell identification, max, act, booking number, name of inmate and comments.

B. Retention: 5 years, then destroy.

12-502.20. Arrest Warrants

A. Description: Sheriff's office copies of orders issued by judges or magistrates to arrest a subject for suspicion of a crime. Information includes name of county, name and address of defendant, date, description, description of offense, location of judge, date warrant issued, warrant number, witnesses, sex, race, social security number, height, weight, date of birth, defendant, preliminary hearing date, bail amount, disposition, and judge's signature. This series is summarized in the Index to Arrest/Booking Reports.

B. Retention: Until copy of the warrant is served; then forward the original to the issuing official.

12-502.21. Daily Shift Report

A. Description: Record of daily activities during each shift. Information includes employees working, shift, census report, custodial report, shift supervisor's signature.

B. Retention: 3 years, then destroy.

12-502.22. Training Files

A. Description: Summary training information of all commissioned personnel. Information includes appointment/commission; copies of application for Police Academy, including photo copies of High School Diplomas, GED or official transcript, certified copy of driver history, NCIC I and II, pre-placement medical history, and birth certificate; certification letter from Police Academy; list of training completed, including firearms, emergency vehicle operations, blood borne pathogens, cores, legal, baton certification, cap-stun certification, crime to courts (including written and practical exercises); any other outside agency training received while employed by the Sheriff's office; hepatitis B testing and results; equipment issue; equipment order; and disciplinary actions which relate to training.

B. Retention: 5 years after termination of employment, then destroy.

12-502.23. Dispatch Records

A. Description: Records each time an officer is dispatched in response to a citizen's call. Information includes complainant's name, complainant's address, and complainant's phone number.

B. Retention: 3 years, then destroy.

12-502.24. Complaint Cards

A. Description: Documents the complaints received by the Sheriff's Department. Information includes complaint number, nature/code complaint, date received, name of complainant, home address and telephone number, time received, action taken, time dispatched, and officer assigned.

B. Retention: 5 years, then destroy.

12-502.25. Polygraph Records

A. Description: Sheriff's Department copies of the South Carolina Law Enforcement Division's record of the testing of subjects who submit to a polygraph test in an effort to determine truthfulness regarding facts in an investigation of a criminal act. Information includes date of examination, name of subject, graphic responses to questions, and signature of examiner/operator.

B. Retention: 5 years after case is closed, then destroy.

12-502.26. SLED Lab Reports

A. Description: Report from SLED explaining preliminary examination of evidence submitted from the sheriff's department regarding crimes that have been committed. Information includes date, reference (case number, victim's name, subject, offense, local case number), content, signature of analyst, date, and location. The original is retained by SLED permanently.

B. Retention: 3 years, then destroy.

12-502.27. Property Receipts

A. Description: Records collection of personal property taken from abandoned vehicles, recovered stolen vehicles, and other stolen property. Information includes date, time, case number, description of property, name and address of owner (if available).

B. Retention: 3 years, then destroy.

12-502.28. Radio Logs

A. Description: Document all incoming and outgoing radio communications. Information includes date, time, broadcast from, broadcast to, signal number, message, dispatcher name, on duty time, and off duty time.

B. Retention: 2 years, then destroy.

12-502.29. Summons and Arrest

A. Description: Standard state form including the following information: driver's name, address, occupation, state licensed, license number, vehicle number, state, make of vehicle, year, name of trial officer, street and number, city, date of trial, time of trial, violation, section number, nature of offense, owner of vehicle, address of owner, date of arrest, date of violation, case, disposition, description of accused, sentence of court, committed to, arrest as a result of accident, certified correct, date, offense code, test refused, blood alcohol level, amount of fine, and amount of suspense.

B. Retention:

(1) DUI Offenses: 10 years after trial date, then destroy.

(2) Non - DUI Offenses: 5 years, then destroy.

12-502.30. Uniform Crime Reports

A. Description: Copy of the monthly statistics sent to South Carolina Law Enforcement Division outlining criminal activity within the county. Information includes date, case number, description of crime, subject name, victim name, officer number, received by, received from, receipt number, and released to date.

B. Retention: 3 years, then destroy.

Subarticle 3. County Council/Administration**12-503.1. County Council Meeting Tapes**

A. Description: Cassette tape recordings of county council meetings used in preparing county council minutes. Information includes date of meeting, meeting time, meeting place, council members present, order of business, business discussed and decisions made.

B. Retention: 2 years, then destroy/re-use, provided paper copies of the minutes have been produced.

12-503.2. County Council Minutes

A. Description: Record of proceedings at meetings of the county council which includes written descriptions of the financial and administrative business conducted. Information includes dates of meetings, names of councilmen present, claim approvals, petitions, bids, proposals, and other matters discussed by or brought to the attention of the council.

B. Retention: Permanent. Microfilm for security.

12-503.3. Ordinances

A. Description: Original ordinances passed by the county council representing local laws and regulations which pertain to the county only. Information includes ordinance number, ordinance, date, and signatures of the chairman and council clerk.

B. Retention: Permanent. Microfilm for security.

12-503.4. Resolutions

A. Description: Record of official actions authorized by county council through the passage of resolutions. Information includes resolution number, resolution, date, signature of chairman, and signature of county clerk.

B. Retention: Permanent. Microfilm for security.

12-503.5. Annual Budgets

A. Description: Printed copies of annual budgets showing projected receipts and expenditures from various offices. Approved budget appropriations are listed for each department.

B. Retention: Permanent. Microfilm optional.

12-503.6. Audit Reports

A. Description: Printed reports documenting the annual audit of county funds. These reports, prepared by an outside accounting firm, are categorized by the various county offices and further classified by accounts to which they relate. This series also includes semiannual and special audits. Information includes balance sheet, summary of revenue and expenditures, cash balances, statement of taxes, statement of delinquent taxes, statement of other receipts, statement of fines and fees.

B. Retention: Permanent. Microfilm optional.

12-503.7. General Ledgers

A. Description: One or more series of financial ledgers providing final year-to-date summary accounting data and a permanent audit trail for all fiscal receipt and disbursement transactions affecting any and all county funds and accounts, including receipts and expenditures from all revenue sources, both public and private. For computer generated ledgers, must include annual accounting code data and computer system documentation needed to access accounting information.

B. Retention:

- (1) Computer Generated Ledgers: Permanent. Microfilm.
- (2) Non-Computer Generated Ledgers: Permanent. Microfilm optional.

12-503.8. Claims

A. Description: Cancelled claims which were issued as payment for goods and services required by the county. Information includes date, person presenting, check number, claim number, amount, and approval signatures.

B. Retention: 3 years, then destroy.

12-503.9. Paid Invoices

A. Description: Filed copies of invoices submitted by various vendors supplying goods and services to the county. These invoices are filed together with copies of the county checks and/or claim forms containing descriptions of the items purchased. Information includes Invoice: vendor name, address, date of purchase, purchase order (if any), invoice number, item(s) or service(s) purchased, amounts, total. Check Copy: vendor name, address, date of check, amount, check number. Claim Form: date, account number(s), description of item(s), amount(s), approval, and signature(s).

B. Retention: 3 years, then destroy.

12-503.10. Purchase Orders

A. Description: Office copies of purchase orders for goods and services paid for by the county, or for goods and services yet to be delivered to the county. Information includes vendor number, project number, date of purchase order, department, vendor name and address, shipping instructions, quantity ordered, general ledger account number, unit price, extended price, purchasing agent signature, individual who signs for receipt of goods/services and date received, and notations regarding any shortages in shipment.

B. Retention: 3 years; then destroy.

12-503.11. Receipts

A. Description: Copies of receipts issued to persons turning over money. Information includes receipt number, date, from whom received, amount, purpose, and signature of clerk.

B. Retention: 3 years, then destroy.

12-503.12. Banking Records

A. Description: Cancelled checks and deposit slips written by the county along with the statements issued by the bank. Information includes checks: date, to whom paid, amount, check number, authorized signature; bank statements: list of checks for one month period, dates, beginning balance, ending balance; deposit slips: date, amounts of deposits, and total deposit.

B. Retention: 3 years, then destroy.

12-503.13. Agenda Packets (Council, Boards, and Commissions)

A. Description: Record of items submitted for consideration to the county council and other boards and commissions. Information includes meeting number, date, locale and time; order and description of proposed business.

B. Retention: Permanent. Microfilm optional.

12-503.14. Various Board and Commission Minutes

A. Description: Meeting minutes of various boards and commissions, including records of proceedings and written descriptions of business conducted. Information includes dates of meetings, names of members present, and other matters discussed.

B. Retention: Permanent. Microfilm optional.

12-503.15. General Correspondence and Subject Files

A. Description: Copies of incoming and outgoing correspondence to and from the office with businesses and other government offices and citizens, studies, reports, memorandums, statistics, policies, and manuals. For the purpose of retention scheduling, the files are broken down as follows:

(1) *Policy and Program Records.* These records document the formulation and adoption of policies and procedures and the implementation or management of the programs or functions of the office or department. Included are such records as correspondence with citizens and government officials regarding policy and procedures development or program administration; annual or ad hoc narrative or statistical reports on program activities, achievements or plans; organizational charts and mission statements; studies regarding department or office operations; circular letters, directives or similar papers addressed to subordinate units or staff concerning policies, procedures, or programs; and records related to significant events in which the department or office participated. Records may include photographs, published material, audio tape, or other record forms.

(2) *General Administrative Records.* These records are of a general facilitative nature created or received in the course of administering programs. Included are such records as correspondence of a routine or repetitive type, such as request for information; reference materials, sometimes of a

technical nature, used, but not created by, the office; daily, weekly, or monthly office activity reports which are summarized in annual reports or which relate to routine activities; personnel data on office staff which are duplicated in personnel office files; purchase orders, travel expense statements or similar financial papers which are duplicated in fiscal office files; daily or weekly work assignments for office staff; suspense or follow up files which duplicate copies of papers filed elsewhere; circular letters, directives or similar papers received from other offices; and rough drafts or notes created in compiling reports or studies.

(3) *General Housekeeping Files*. These records are of a general "housekeeping" nature created or maintained by an office which do not relate directly to the primary program responsibility of the office. Included are such records as charitable fund raising drive materials; custodial services request; emergency evacuation procedures; notices of holidays; parking space assignment lists; telephone installation requests; and lists showing the distribution of keys.

B. Retention:

- (1) *Policy and Program Records*: Permanent. Microfilm optional.
- (2) *General Administrative Records*: 5 years, then destroy.
- (3) *General Housekeeping Files*: Until no longer needed for reference, then destroy.

Subarticle 4. Finance

12-504.1. Audit Reports

A. Description: Printed reports documenting the annual audit of county funds. These reports, prepared by an outside accounting firm, are categorized by the various county offices and further classified by accounts to which they relate. This series also includes semiannual and special audits. Information includes balance sheet, summary of revenue and expenditures, cash balances, statement of taxes, statement of delinquent taxes, statement of other receipts, statement of fines and fees.

B. Retention: Permanent. Microfilm optional.

12-504.2. General Ledgers

A. Description: One or more series of financial ledgers providing final year-to-date summary accounting data and a permanent audit trail for all fiscal receipt and disbursement transactions affecting any and all county funds and accounts, including receipts and expenditures from all revenue sources, both public and private. For computer generated ledgers, must include annual accounting code data and computer system documentation needed to access accounting information.

B. Retention:

- (1) Computer Generated Ledgers: Permanent. Microfilm.
- (2) Non-Computer Generated Ledgers: Permanent. Microfilm optional.

12-504.3. Annual Budgets

A. Description: Printed copies of annual budgets showing projected receipts and expenditures from various offices. Approved budget appropriations are listed for each department.

B. Retention: Permanent. Microfilm optional.

12-504.4. Payroll Register

A. Description: Documents wages paid to county employees for services rendered. Information includes name of employee, social security number, date of check, hourly or salaried amount, overtime, number of hours worked, volunteered and other deductions.

B. Retention:

- (1) Year End Payroll Registers: 60 years, then destroy.
- (2) Other Payroll Registers: 1 year, then destroy.

12-504.5. Payroll Check Registers

A. Description: Check registers summarizing the information on payroll checks issued. Used for balancing accounts, internal fiscal control, and external audits. Information includes employee name, social security number, amount of check, state and federal income tax deductions, other deductions, and year-to-date totals per pay period.

B. Retention: 3 years, then destroy.

12-504.6. South Carolina Retirement System Quarterly Report

A. Description: Quarterly report of contributions made by county employees to the South Carolina Retirement System. Information includes employer's name, address, date of quarter, employee's name, active member register numbers, non-member notations, retirement contributions and social security numbers.

B. Retention: 60 years, then destroy.

12-504.7. Deduction Registers

A. Description: Summarizations of information on deductions from payroll checks. Used for balancing accounts, internal fiscal control, and external audits. Information includes employee name, social security number, state and federal income tax deductions, and year-to-date deductions per pay period.

B. Retention: 3 years, then destroy.

12-504.8. Account Payable Check Registers

A. Description: Documents check payments to vendors/contractors for services/materials sold to the county. Information includes date, vendor number, purchase order number and date, account number, amount, date of invoice, transaction date, transaction number, and control number.

B. Retention: 5 years, then destroy.

12-504.9. Banking Records

A. Description: Cancelled checks and deposit slips written by the county along with the statements issued by the bank. Information includes checks: date, to whom paid, amount, check number, signature of finance officer; bank statements: list of checks for one month period, dates, beginning balance, ending balance; deposit slips: date, amounts of deposits, and total deposit.

B. Retention: 3 years, then destroy.

12-504.10. Claims

A. Description: Office copies of documents establishing a claim on the county for goods and services. It may also include copies of checks and invoices.

B. Retention: 3 years, then destroy.

12-504.11. Revenue Sharing Claims

A. Description: Claims presented to the finance office and paid from Federal and State Revenue sharing funds. Information includes claim number, date filed, name, address, amount, charge to, and date approved.

B. Retention: 3 years, then destroy.

12-504.12. Receipts (Receipt Carbons)

A. Description: Copies of receipts issued by the office to persons turning over funds. Information includes date, number, from whom received, amount, purpose, and authorizing signatures.

B. Retention: 3 years, then destroy.

12-504.13. W-2 Forms

A. Description: Employer's copy of employee's total earnings and withholdings for the calendar year reported to the Internal Revenue Service. Information includes employer's identification number, employer's name and address, employee's social security number, federal income tax withheld, FICA taxes withheld, total FICA wages and state income tax withheld.

B. Retention: 5 years, then destroy.

12-504.14. Budget Files

A. Description: Preparation materials used in the formulation of the county budget. Information includes budget requests and supplemental information justifying budget requests.

B. Retention: 3 years, then destroy.

12-504.15. Chart of Accounts

A. Description: Used to provide a cost accounting system to satisfy legal and stewardship requirements connected with handling public funds. Information includes balance sheet accounts, revenue accounts, and expenditure accounts.

B. Retention: 5 years, then destroy.

12-504.16. Fixed Assets

A. Description: Provides an inventory of fixed assets (office equipment, furniture, motor vehicles, weapons, radios, computers, etc.) for each department. Information includes department name, item description, account number, invoice number, vendor number, check number; completed by, asset description, serial number, class code, asset number, department location, department sub-location, comments, acquisition information: date, cost, code, and condition; vehicle number, employee assigned vehicle, key number, inspection month, fuel code, insurance code, odometer reading, license number, and odometer code.

B. Retention: 3 years after property disposal, then destroy.

12-504.17. Grant Files

A. Description: Background application information and action taken on federal and state grants awarded to the County. Information includes grant number, date, amount, Federal or State grant, filing guidelines, grant application, contracts, correspondence, reimbursement requests, progress reports, and final reports.

B. Retention:

(1) Applications, Grant Contract Agreements, and Annual and Final Grant Project Reports for Significant Projects: Permanent. Microfilm optional.

(2) Other Records: 3 years after completion of grant project, then destroy.

12-504.18. Journal Entries

A. Description: Various types of journal entries created by the finance department, used to review and adjust various accounts before transferring information to the General Ledger. Information includes name of department, account number, description, voucher number, date, reference number, debit, credit, and date.

B. Retention: 3 years, then destroy.

12-504.19. Balance Sheets

A. Description: Monthly summary of accounting data, assets, liabilities, and net worth. Information includes account number, assets, reserve and fund balances, liabilities, totals, and net worth.

B. Retention: 1 year, then destroy.

12-504.20. Trial Balances

A. Description: Summary information of receipts and expenditures from various accounts used in balancing the General Ledger. Information includes date, account number, name, month to date balance, and year to date balance. For computer-generated ledgers this annual accounting code data and computer system documentation is needed to access accounting information.

B. Retention: 3 years, then destroy.

12-504.21. Landfill Billing Invoices and Weight Tickets

A. Description: Used to bill for services at the county landfill. Information includes invoice number, date, description, weight, and total amount due.

B. Retention: 3 years, then destroy.

Subarticle 5. Purchasing**12-505.1. Requisitions**

A. Description: Request forms from the various county offices and departments which describe goods or services to be ordered by the purchasing department. Information includes number, department, delivery location, date, date required, item number, quantity, description, known suppliers, and authorizing signature.

B. Retention: 3 years, then destroy.

12-505.2. Purchase Orders

A. Description: Office copies of purchase orders for goods and services paid for by the county, or for goods and services yet to be delivered to the county. Information includes vendor number, project number, date of purchase order, department, vendor name and address, shipping instructions, quantity ordered, unit of issue, description of good/services ordered, general ledger account number, unit price, extended price, purchasing agent signature, individual who signs for receipt of goods/services and date received, and notations regarding any shortages in shipment.

B. Retention: 3 years, then destroy.

12-505.3. Paid Invoices

A. Description: Filed copies of invoices submitted by various vendors supplying goods and services to the county. These invoices are filed together with copies of the county checks and/or claim forms containing descriptions of the items purchased. Information includes invoice: vendor name, address, date of purchase, purchase order (if any), invoice number, item(s) or service(s) purchased, amounts, total; check copy: vendor name, address, date of check, amount, check number; and claim form: date, account number(s), description of item(s), amount(s), approval signature(s).

B. Retention: 3 years, then destroy.

12-505.4. Bids

A. Description: Record of each bid submitted by vendors selling goods and/or services to the county. Information includes request for quotation, bid spread sheet and bid award letter.

B. Retention: 3 years, then destroy.

12-505.5. Vendor Files

A. Description: Listing of vendors with whom the county currently conducts business. Information includes vendor's name, number, address and federal identification number.

B. Retention: Until superseded, then destroy.

12-505.6. Contracts

A. Description: Contracts made between the county and another party. Information includes date, type of contract, explanation of agreement, signature of parties, and notarization.

B. Retention: 3 years after contract expires, then destroy.

Subarticle 6. Personnel**12-506.1. Application File (Not Hired)**

A. Description: Application forms submitted by persons applying for jobs with the county who were not hired. Information includes name, address, education and work experience.

B. Retention: 2 years from the date of rejection, then destroy.

12-506.2. Employment Files

A. Description: Forms and materials relating to individuals employed with the county. Files include salary information, attendance and leave records, workmen's compensation reports, performance evaluations, and complete employment history.

B. Retention: 5 years after termination of employment, then destroy.

12-506.3. Time Cards

A. Description: Record of hours worked by county employees. Information includes employee name, date, and hours worked.

B. Retention: 2 years, then destroy.

12-506.4. Time Sheets

A. Description: Verification of the number of hours worked by each employee. Information includes employee's name, employee number, hourly wage, days and hours worked and department head approval.

B. Retention: 3 years, then destroy.

12-506.5. State and Local Government Information Reports (EEO-4)

A. Description: Annual report monitoring internal programs for insuring equal employment opportunities. Information includes number of employees by job categories, by race, by sex, by salary and number of part-time and newly-hired employees during the fiscal year.

B. Retention: Permanent. Microfilm optional.

12-506.6. Earnings Record

A. Description: Summarized list of earnings for each county employee. Information includes social security number, name, gross pay, net pay, federal taxes, state taxes, local taxes, FICA, and retirement deductions.

B. Retention: 3 years, then destroy.

12-506.7. Deduction Registers

A. Description: Summarizations of information on deductions from payroll checks. Used for balancing accounts, internal fiscal control, and external audits. Information includes employee name, social security number, year to date tax deductions.

B. Retention: 3 years, then destroy.

12-506.8. Leave Records

A. Description: Record of leave balances for each employee. Information includes name, social security number, leave accrued, leave used, and balances.

B. Retention: 3 years, then destroy.

12-506.9. Employee Insurance Files

A. Description: Record of insurance coverage selected by employees of the county. Information includes Certificate of Election, Notice of Election Form, Rejection Notice, and coverage termination form.

B. Retention: 3 years after inactive, then destroy.

12-506.10. Log and Summary of Occupational Illnesses and Injuries

A. Description: Record required by the Occupational Safety and Health Act of 1970, used to record pertinent information concerning work-related deaths, injuries, and illness. Information includes annual average employment, total hours worked, nature of business, month of OSHA inspection, recordable injuries and illness, occupational illness and injury, and title, signature, phone number, date, and comments of person preparing report. These reports are forwarded to the South Carolina Department of Labor.

B. Retention: 5 years, then destroy, unless needed for further reference.

12-506.11. Workman's Compensation Records

A. Description: Case files containing records and reports generated as a result of employment related accidents involving county employees. Information includes date, employee name, address, claim number, description of injury and accident, date of accident, insurance company.

B. Retention:

- (1) Employer's First Report of Injury: 3 years after settlement, then transfer to employee files.
- (2) Other Records: 3 years after settlement, then destroy.

12-506.12. Grievance Hearing Files

A. Description: Materials relating to the reviewing, hearing and disposing of employee grievances and appeals of adverse personnel actions and disciplinary measures. Information includes letters of appeal, documentation from department heads, copies of complaints, investigations reports, hearing transcripts or summaries and related correspondence.

B. Retention: 5 years after settlement of issue, then destroy.

Subarticle 7. Auditor**12-507.1. Auditor's Tax Duplicates**

A. Description: Detailed schedule and assessment of all taxable property in the county. Information includes name and address of taxpayer, number and value of all types of taxable personal property, number and value of acres and buildings in the country, number and value of lots and buildings in cities, total personal property, total real property, total tax levy, tax map number, total taxes, and remarks.

B. Retention:

- (1) Pre-1921 Tax Duplicates: Permanent. Microfilm optional.
- (2) Post-1920 Tax Duplicates:
 - (a) When Corresponding Treasurer's Tax Duplicates are Missing: Permanent. Microfilm optional.
 - (b) When Corresponding Treasurer's Tax Duplicates Exist: 10 years, then destroy.

12-507.2. Auditor's Tax Duplicates (Motor Vehicles)

A. Description: Record of personal property tax assessments for motor vehicles in the county. Information includes name and address of registered owner, make of vehicle, vehicle identification number, tag number, district, receipt number, assessed value, and total taxes.

B. Retention: 10 years, then destroy.

12-507.3. Tax Returns

A. Description: Individual returns of all taxable real and personal property in the county. These returns are used by the county auditor to compile the tax duplicate books each year. Information includes name and address of taxpayer, school or tax district, city property, country property, personal property, South Carolina Tax Commission assessments, total, real estate acquired since last return, real estate transferred or sold since last return, signature of taxpayer, and signature of county auditor.

B. Retention: 5 years, then destroy.

12-507.4. Auditor's Conveyance Books

A. Description: Auditor's record of county land conveyances which is used for tax assessment and assessment change purposes. Information includes township, date of sale, date of entry, name of seller, name of purchaser, number of acres, number of lots, number of buildings, price paid, assessed value, percentage of valuation, and remarks.

B. Retention: Permanent. Microfilm optional.

12-507.5. Vehicle Registration

A. Description: Auditor's copies of vehicle registrations which are used for tax assessment purposes. Information includes date, license number, serial number, weight, body, model, year make, title number, county, school district, class, annual fee, name, address, and total.

B. Retention: 3 years, then destroy.

12-507.6. List of Boat Owners

A. Description: Lists printed and distributed by the South Carolina Wildlife and Marine Resources Department's Division of Boating which include the names and addresses of all boat owners in the county along with a description of the boats owned by them. Information includes owner's name, street address, city, state, zip code, number, make, year, length, hull, and type.

B. Retention: 2 years, then destroy.

12-507.7. Abstracts of Duplicates

A. Description: Auditor's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of the information contained in the auditor's tax duplicate books.

B. Retention: 3 years, then destroy.

12-507.8. Abstracts of Real Property

A. Description: Auditor's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of real estate returned for taxation in the county.

B. Retention: 3 years, then destroy.

12-507.9. Abstracts of Personal Property

A. Description: Auditor's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of personal property returned for taxation in the county.

B. Retention: 3 years, then destroy.

12-507.10. Abstract of Additional

A. Description: Auditor's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of additional taxes assessed and paid in the county.

B. Retention: 3 years, then destroy.

12-507.11. Abstracts of Abatements

A. Description: Auditor's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of abatements granted to taxpayers in the county.

B. Retention: 3 years, then destroy.

12-507.12. Abstracts of Penalties

A. Description: Auditor's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of penalties imposed upon delinquent taxpayers in the county.

B. Retention: 3 years, then destroy.

12-507.13. Homestead Exemption Applications

A. Description: Copies of applications filed by persons who have been residents of the state for at least one year, are sixty-five years of age and over, or are totally and permanently disabled, or are legally blind who are seeking homestead tax exemptions. Information includes control number, TMS number, date of application, applicant's name and address, birth date, social security number, if property is jointly owned name of joint owner, whether spouse, telephone number of applicant, location of dwelling, whether permanent home, whether any commercial property or multi-family dwelling on property, whether mobile home, whether property has been leased or rented in past year or will be leased or rented during the year for which the homestead is claimed, number of persons who share ownership if jointly owned, whether located within a municipality, name of municipality, source of proof of age, type of disability, signature of applicant, signature of county auditor, date, and homestead exemption application number.

B. Retention: 3 years after inactive, then destroy.

12-507.14. Abatements

A. Description: Record of abatements granted to taxpayers in the county. Information includes a detailed assessment of taxes on an individual's property, both real and personal.

B. Retention:

(1) Abatements for Manufacturing Plants: Permanent. Microfilm optional.

(2) Abatements for other Taxpayers: 10 years, then destroy.

12-507.15. Abstracts of Annual Settlements

A. Description: Auditor's copies of the abstracts which are forwarded to the Comptroller General each year. The abstracts summarize the annual settlements of the Auditor's and Treasurer's records.

B. Retention: 3 years, then destroy.

12-507.16. Affidavit and Notification of Sales of Motor Vehicles

A. Description: Auditor's copy of the form supplied by automobile dealerships documenting sale of motor vehicles. Information includes date, amount of purchase, name of dealership, make of car, and name of buyer.

B. Retention: 1 year, then destroy.

12-507.17. Affidavit of Motor Vehicle High Mileage

A. Description: Claim for high mileage discounts on personal property taxes for qualifying vehicles. Information includes total miles, vehicle make, model, year, identification number, signature of owner, date filed, and notary statement.

B. Retention: 3 years, then destroy.

12-507.18. Auditor's Monthly Reports

A. Description: Copies of the Auditor's monthly reports submitted to the treasurer showing record of fees collected. Information includes amounts, types of fees collected, and signature of auditor.

B. Retention: 3 years, then destroy.

12-507.19. Business Personal Property Returns

A. Description: Record of personal property tax returns for businesses in the county. These are used by the county auditor to compile the tax duplicate books. Information includes name of owner, property location, tax district, type of business, cost of furniture, fixtures, and equipment, accumulated depreciation for income tax purposes, net book value, 10% cost of all items which have depreciated more than 90%, signature of owner, phone number, and date.

B. Retention: 5 years, then destroy.

12-507.20. Business Personal Property Assessment Records

A. Description: Auditor's copies of personal property assessments made by the South Carolina Tax Commission for businesses in the county. Information includes file number, document location, address, business location, school location, furniture and fixture assessments, penalty, grand total, and date.

B. Retention: 5 years, then destroy.

12-507.21. Supplemental Tax Returns

A. Description: Tax returns that list property tax assessments which were not included on the original return. The information is the same as the regular tax returns and is contained in the auditor's tax duplicates.

B. Retention: 3 years, then destroy.

12-507.22. Rollbacks

A. Description: Rollback of tax assessments due to changes in the use of the property to a lower assessment usage. Information includes parcel number, legal owner, owner's name, address, soil types, market value, remarks, date and initials, district tax year, assessment, and previous owner.

B. Retention: 5 years, then destroy.

12-507.23. Homestead Exemption Records

A. Description: Records documenting homestead exemptions in the county. Information includes lists of persons who have applied for the exemption, reports of homestead tax exemptions and property values, records pertaining to state reimbursement for homestead exemptions, supplemental homestead exemption lists, homestead corrections lists, and uncompleted homestead exemptions.

B. Retention: 3 years, or until superseded, then destroy.

12-507.24. Military Personnel Automobile Tax Exemptions

A. Description: Tax exemption forms showing vehicles owned by military personnel who are stationed in the county, but are legal residents of other states and are subject to taxes in the state of legal residence. Information includes owners name, address, vehicle year, make, model, VIN number, date, social security number, signature of owner, signature of commanding officer.

B. Retention: 3 years, then destroy.

12-507.25. Mobile Home Records

A. Description: Records created by the Auditor pertaining to mobile homes in the county. Types of records may include mobile home moving permits, mobile home permits, and mobile home titles.

B. Retention: 3 years, then destroy.

12-507.26. Refunds

A. Description: Record of refunds extended for real and personal property tax overpayments. Information includes receipt number, license plate number, vehicle information, name, address, assessment, refund due amount, check number, dates, and signatures.

B. Retention: 3 years, then destroy.

12-507.27. Property Tax Returns on Aircraft

A. Description: Record of property tax returns on aircraft owners in the county. Information includes name of registrant, address, owner's name, purchase date, registration date, aircraft home and base address, make of aircraft, serial number, model of aircraft, year of aircraft, estimated market value and signature of person giving information.

B. Retention: 5 years, then destroy.

12-507.28. List of Deceased County Residents

A. Description: Record of deceased county residents over age 17 sent to the Auditor. Lists originate from the County Probate Judge's Office, Health Department, and Comptroller General. Information includes name of deceased, social security number, date of death, and address.

B. Retention: 2 years, then destroy.

12-507.29. Address Changes

A. Description: Record of address changes sent by county residents or returned mail by the post office. Information includes name, old address, and new address.

B. Retention: 2 years, then destroy.

12-507.30. Vehicle Listing

A. Description: Computer printout list of all automobiles in the county. Information includes name, street, city, state, zip, license number, year, make, body, issue date, type, vehicle ID number, value plus ten percent, and signatures.

B. Retention: Until superseded, then destroy.

Subarticle 8. Treasurer**12-508.1. Treasurer's Tax Duplicates**

A. Description: Schedule of all taxable real and personal property in the county with collections included. Information in the record is similar to that contained in the auditor's tax duplicate books with the exception of the payment date, which is found in the treasurer's tax duplicate books only. Information includes name of taxpayer; township or school district; address; date of payment; number and value of acres, lots, and building; value of all taxable real estate; value of all taxable personal property; total value of all taxable property; total tax levies; tax map number; and total for collection.

B. Retention

(1) Pre-1921 Tax Duplicates:

(a) When Corresponding Auditor's Tax Duplicates Exist: Destroy.

(b) When Corresponding Auditor's Tax Duplicates are Missing: Permanent. Microfilm optional.

(2) Post-1920 Tax Duplicates: Permanent. Microfilm optional.

12-508.2. Treasurer's Tax Duplicates (Motor Vehicles)

A. Description: Record of personal property tax assessments and collections for motor vehicles in the county. Information includes name and address of registered owner, make of vehicle, vehicle identification number, tag number, district, receipt number, assessed value, total taxes, and date of payment.

B. Retention: 10 years, then destroy.

12-508.3. Tax Receipts

A. Description: Treasurer's copies of the receipts issued to taxpayers upon payment of county property taxes. Information includes receipt number, valuation of real property, total real, total personal, total tax levy, property tax, poll tax, road tax, dog tax, total taxes, penalty, total costs, total, name, address, location, district, and number and value of acres, lots and buildings.

B. Retention: 3 years, then destroy.

12-508.4. Abstract of Annual Settlements

A. Description: Treasurer's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts summarize the annual settlements of the auditor's and treasurer's records.

B. Retention: 3 years, then destroy.

12-508.5. Abstract of Personal Property

A. Description: Treasurer's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of personal property returned for taxation in the county.

B. Retention: 3 years, then destroy.

12-508.6. Abstract of Additional

A. Description: Treasurer's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of additional taxes assessed and paid in the county.

B. Retention: 3 years, then destroy.

12-508.7. Abstract of Executions

A. Description: Treasurer's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of delinquent taxes that went into execution for collection by the delinquent tax collector.

B. Retention: 3 years, then destroy.

12-508.8. Abstract of Nulla Bonas

A. Description: Treasurer's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of property in the county for which no taxes could be collected.

B. Retention: 3 years, then destroy.

12-508.9. Annual Budgets

A. Description: Printed copies of annual budgets showing projected receipts and expenditures from various offices. Approved budget appropriations are listed for each department.

B. Retention: Permanent. Microfilm optional.

12-508.10. Audit Reports

A. Description: Printed reports documenting the annual audit of county funds. These reports, prepared by an outside accounting firm, are categorized by the various county offices and are further classified by the funds or accounts to which they relate. This series also includes semiannual and special audits. Information includes balance sheet, summary of revenues and expenditures, cash balances, statement of taxes, statement of delinquent taxes, statement of other receipts, statement of fines and fees.

B. Retention: Permanent. Microfilm optional.

12-508.11. General Ledgers

A. Description: One or more series of financial ledgers providing final year-to-date summary accounting data and a permanent audit trail for all fiscal receipt and disbursement transactions affecting any and all county funds and accounts, including receipts and expenditures from all revenue sources, both public and private. For computer generated ledgers, must include annual accounting code data and computer system documentation needed to access accounting information.

B. Retention:

(1) Computer Generated Ledgers: Permanent. Microfilm.

(2) Non-Computer Generated Ledgers: Permanent. Microfilm optional.

12-508.12. General Cash Books

A. Description: Monthly records of receipts and disbursements of state, county, and school taxes. Information includes debit (receipts): month, year, date, name, receipt numbers, explanation, state, county, schools, total; and credit (disbursements): date, name, claim numbers, explanation, state, county, schools, and total.

B. Retention:

(1) When Corresponding General Ledgers Are Missing: Permanent. Microfilm optional.

(2) When Corresponding General Ledgers Exist: 10 years, then destroy.

12-508.13. Banking Records

A. Description: Cancelled checks and deposit slips written by the county along with the statements issued by the bank. Information includes checks: date, to whom paid, amount, check number, signature of county treasurer; bank statements: list of checks for one month period, dates, beginning balance, ending balance; deposit slips: date, amounts of deposits, and total deposit.

B. Retention: 3 years, then destroy.

12-508.14. Receipt Books

A. Description: Copies of receipts issued by the treasurer to persons turning over funds to him. Information includes date, number, from whom received, amount, purpose, and signature of treasurer.

B. Retention: 3 years, then destroy.

12-508.15. Cancelled Bonds and Coupons

A. Description: Bonds and interest coupons issued by the county which have matured and been cancelled. Information includes county, title, amount, interest percentage, date issued, principal due date, interest payment dates, description, bond number, and authorizing signature.

B. Retention: One bond and one coupon from each series Permanent. Destroy remainder 10 years after cancellation.

12-508.16. Homestead Exemption Applications

A. Description: Copies of applications filed by persons who have been residents of the state for at least one year, are sixty-five years of age and over, or are totally and permanently disabled, or are legally blind who are seeking homestead tax exemption. Information includes control number, TMS number, date of application, applicant's name and address, birth date, social security number, if property is jointly owned name of joint owner, whether spouse, telephone number of applicant, location of dwelling, whether permanent home, whether any commercial property or multi-family dwelling on property, whether mobile home, whether property has been leased or rented in past year or will be leased or rented during the year for which the homestead is claimed, number of persons who share ownership if jointly owned, whether located within a municipality, name of municipality, source of proof of age, type of disability, signature of applicant, signature of county auditor, date, and homestead exemption application number.

B. Retention: 3 years after inactive, then destroy.

12-508.17. Abatements

A. Description: Record of tax assessment reductions for real estate taxes and personal property which were incorrect or no longer owed. Information includes year, date, receipt number, name, address account number, district, tax assessment, amount of tax abated, reason for abatement and authorizing signature.

B. Retention: 5 years then destroy.

12-508.18. Abstract of Delinquent Taxes

A. Description: Treasurer's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of delinquent taxes assessed and paid for one fiscal year.

B. Retention: 3 years, then destroy.

12-508.19. Abstract of Personal Property

A. Description: Treasurer's copies of the abstracts which are forwarded to the Comptroller General each year. These abstracts contain summary totals of personal property returned for taxation in the county.

B. Retention: 3 years, then destroy.

12-508.20. Bankruptcy Files

A. Description: Files of bankruptcy cases involving property located in the county. Information includes legal court documents, legal papers, attached signatures, copies of tax assessment on property and other legal papers. This information is filed with the United States Bankruptcy Court.

B. Retention: 10 years, then destroy.

12-508.21. Delinquent Tax Receipts

A. Description: Receipts for taxes not yet paid by property owners in the county. Information includes lot number, property number, year delinquent, delinquent amount, tax due, location of property, and name and address of property owner.

B. Retention: 3 years, then destroy.

12-508.22. Nulla Bonas List

A. Description: Lists of persons owing taxes that could not be collected. Information includes year, district, number, name, amount, and total.

B. Retention: 3 years, then destroy.

12-508.23. Claims

A. Description: Claims submitted to the Treasurer's Office requesting refunds of personal or vehicle taxes. Information includes receipt number, owner name, tax year, millage, property description, amount of taxes paid, date paid, reason for refund, owners' signature, mailing address, telephone number, social security number, refund information and signature of approving authority.

B. Retention: 3 years, then destroy.

12-508.24. Daily Abstract of Property and Poll Tax Collected

A. Description: Daily record of property and poll taxes collected within each school district. Information includes date, school district number, name of person, amounts paid, bank deposit amount and name of bank.

B. Retention: 3 years, then destroy.

12-508.25. Investment Records

A. Description: Reports all investments made by the county. Information includes type of investment, fund number, account number, document number, purchase date, and remarks. This information is summarized in the General Ledger.

B. Retention: Permanent. Microfilm optional.

12-508.26. Magistrate Reports of Fines and Fees

A. Description: Magistrates' monthly report to the county treasurer of fines and fees collected by their offices. Information includes record of fees, names, dates, criminal and traffic dockets with amounts, offenses, officers, dispositions, and receipt numbers.

B. Retention: 3 years, then destroy.

12-508.27. Rollbacks

A. Description: Rollback tax differences computed when use of property changes upon conveyance of property to a new owner. Information includes name/address, tax map number, tax district, date, class, percent, acres/lots, number of improvements, assessed value, years, market value, use value, value tax, rollback tax, year.

B. Retention: 5 years, then destroy.

12-508.28. Refund for Overpayment of Taxes

A. Description: Record of refunds granted for overpayment of taxes. Information includes date, receipt number, refund amount, name and address of taxpayer, and description/purpose of refund.

B. Retention: 3 years, then destroy.

12-508.29. Vehicle Tax Collection Register

A. Description: Record of taxes collected on vehicles owned by county residents. Information includes date, receipt number, name, district, levy, date, make, body, identification number, taxes and total taxes.

B. Retention: 3 years, then destroy.

Subarticle 9. Tax Collector**12-509.1. Tax Execution Books**

A. Description: Record of delinquent taxes turned over for execution. Information includes number of tax execution, name of defaulter, date of entry, amount of taxes, and penalties collected. Later volumes may contain property valuations.

B. Retention:

(1) Pre-1901 Tax Execution Books: Permanent. Microfilm optional.

(2) Post-1900 Tax Execution Books:

(a) When Corresponding Auditor's and Treasurer's Tax Duplicates Are Both Missing: Permanent. Microfilm optional.

(b) When Corresponding Auditor's and Treasurer's Tax Duplicates Exist: 10 years, then destroy.

12-509.2. Delinquent Tax Sales Book

A. Description: Documents the seizure, levy, and sale of property for the non-payment of taxes. Information includes name of delinquent taxpayer, address, description of property seized, record of taxes due on described property, district, acres or lots, buildings, value, and amount due, total, date of auction, date made out, signature of tax collector, dates advertised, total taxes, purchaser, advertising costs, bid price, amount overbid, mileage costs, redeemed by, date, auctioneer, deed made, total tax, and costs.

B. Retention: Permanent. Microfilm optional.

12-509.3. Abatement Lists

A. Description: List maintained by the tax collector of those county taxpayers receiving abatements on their taxes. Information includes record type, date, receipt number, abatement reason, name, and amount.

B. Retention: 3 years, then destroy.

12-509.4. Delinquent Tax Digest

A. Description: Schedule of all taxable real estate and personal property in the county which has not been collected and is now considered delinquent. Information includes name and address of property owner, description of property, tax year, receipt number, map and parcel number, number of acres, number of lots, number of buildings, assessment value, and total tax amount.

B. Retention: 10 years, then destroy.

12-509.5. Nulla Bonas

A. Description: Record documenting a request for change, addition, or deletion of taxes. Information includes date, taxpayer's name and address, year, receipt number, new receipt number, reason for change, old/new receipt number, original/new assessment, initials of staff person working with original receipts, date and owners signature.

B. Retention: 3 years, then destroy.

12-509.6. Delinquent Tax Settlement Records

A. Description: Copies of paid tax executions issued to taxpayers upon payment of taxes and penalties. Information includes tax execution receipt, name and address of owner, description of property, tax receipt number, taxes and penalties due, total amount due.

B. Retention: 3 years, then destroy.

Subarticle 10. Tax Assessor**12-510.1. Property Record Cards**

A. Description: Cards arranged by tax map sheet, block, and lot numbers which record past and present ownership, appraisal information, as well as current assessments for each parcel of property in the county. Information includes property use, record number, tax district, tax map sheet number, block number, lot number, location, subdivision or parcel number, lot size, ownership, address, deed references, sales price, aerial photo number, sheet, parcel, acreage, plat reference, assessment, acreage per planimeter.

B. Retention: Permanent. Microfilm optional.

12-510.2. Aerial Photographs

A. Description: Aerial photographs of all real estate in the county. These photographs are used by the assessor's office for composing the tax maps.

B. Retention: Permanent.

12-510.3. Tax Maps

A. Description: Originals and copies of maps graphically representing each parcel of property in the county. Information includes location, boundaries of individual parcels, tax map sheet numbers, block numbers, lot numbers, revisions, and scale.

B. Retention: Permanent.

12-510.4. Soil Maps

A. Description: Maps used by assessors to help determine assessment values for agricultural real property to be valued based on use. Information includes soil map numbers and contour lines with code numbers that are used to identify soil types.

B. Retention: Until superseded or no longer used, then destroy.

12-510.5. Applications for Special Assessment on Agricultural Real Property

A. Description: This series contains applications from those granted special tax assessments on real property used for agricultural purposes. Information includes name shown on property tax record, social security number, tax map sheet reference, location of tract of land, number of acres, tax district, purpose of use, portion used for non-agricultural purposes, signature of owner or agent, date, and information on soil class of timber and crop land.

B. Retention: Until superseded or no longer valid, then destroy.

12-510.6. Appraisal Records

A. Description: Used to determine appraisal values of all parcels of land in the county. Information includes parcel number, building, heat area, heat pump, electric, baseboard, add-ons, fireplace, garage, carport, basement finished/unfinished, yard improvements, concrete paving, asphalt paving, parcel identification number, class, type, date of appraisal, lump sum adjustment.

B. Retention:

- (1) Non-Computer Generated Appraisal Records: Permanent. Microfilm optional.
- (2) Computer Generated Appraisal Records: Permanent. Microfilm.

12-510.7. Property Transfer Records

A. Description: A record of property conveyances in the county, used to update tax records. Information includes name, address of seller and buyer, map number, deed reference, plat book reference number, sales price, amount sold (acreage, lots, buildings) and school district.

B. Retention: 3 years, then destroy.

12-510.8. Appeals of Assessment

A. Description: Record of appeals and proceedings created as the result of an appeal from a property owner concerning the amount of taxes assessed. Information includes name, tax map number, address, and reason for appeal.

B. Retention: 3 years, then destroy.

12-510.9. Assessment Change

A. Description: Record of corrections made on assessment tax errors. Information includes tax map number, name/address of property owner, location of property, mobile home class/appraisal/assessment, class, acres/lots, appraisal acres or lots, improvements.

B. Retention: 3 years, then destroy.

12-510.10. Notice of Classification, Appraisal, and Assessment

A. Description: Records notifying taxpayers of property assessments. Information includes market value, ratio, assessment, tax map number, prior market value, percent of increase, property location, subdivision, legal description, mailing address, reason for change, tax district, and date of notice.

B. Retention: 1 year, then destroy.

12-510.11. Rollbacks

A. Description: Used in creating the rollback tax bill which records a reduction in property taxes due to changes in the use of the property to a lower assessment usage. Information includes names, dates, map numbers, acreage, market value, use value, assessments, roll back amounts, and applicable year.

B. Retention: 5 years, then destroy.

12-510.12. Multiple Lot Discount Applications

A. Description: Applications submitted for a multiple lot discount. Information includes tax year, name of subdivision, total number of lots, total number of lots unsold, plat reference, deed book, deed book page, location, tax maps, tax district, improvements, mills per lot, and financing.

B. Retention: 3 years, then destroy.

12-510.13. Mobile Home Records

A. Description: Records created by the Assessor pertaining to mobile homes in the county. Type of records may include mobile home license applications, mobile home moving permits, mobile home record cards, mobile home decal applications, mobile home transfers, mobile home listings, mobile home values lists, and mobile home assessment forms.

B. Retention: 3 years, then destroy.

Subarticle 11: Building/Planning and Development**12-511.1. Plans and Specifications**

A. Description: Consists of blueprints and other graphic illustrations of designs submitted by contractors for the construction, reconstruction or alteration of buildings within the county. These plans and accompanying specifications are submitted to ensure compliance with the county's building codes. Documents include site plan, scale of floor plan, elevation plan, electrical plan, typical wall section and foundation, and specifications.

B. Retention:

(1) Public Building Projects: Permanent. Microfilm optional.

(2) Other Building Projects: 1 year after issuance of certificate of occupancy, then destroy, unless needed for further reference.

12-511.2. Building Permits

A. Description: Documents permission granted by the county to construct buildings that comply with established building codes. Information includes permit number, name and address of real estate owner, location of building, type of work (i.e. new, alteration, repair, etc.) description of building, name of architect and of contractor, tax map number, zoning classification, water system, usage of property and signature of zoning administrator.

B. Retention: Permanent. Microfilm optional.

12-511.3. Planning and Zoning Commission Minutes

A. Description: Minutes of Planning and Zoning Commission meetings which include written descriptions of the administrative business conducted. Information includes dates of meetings, names of members present, matters discussed, and agenda packets.

B. Retention: Permanent. Microfilm optional.

12-511.4. Maps, Blueprints, and Drawings

A. Description: Maps, blueprints, and drawings submitted for building projects under construction. Information includes blueprints, maps, and drawings for commercial and residential projects.

B. Retention:

(1) Blueprints and/or Sepia for Public Building Projects: Permanent. Microfilm.

(2) Other Maps and Drawings for Public Building Projects: Permanent. Microfilm optional.

(3) Other Maps, Blueprints, and Drawings: Until no longer needed for reference, then destroy.

12-511.5. Permits – Gas, Electrical, Mechanical, Plumbing

A. Description: Records documenting permission granted by the county to perform electrical, mechanical, plumbing and gas work that complies with codes. Information includes application form, date, issued by, permit number, TMS number, decal number, fees, land owner, acreage, tax district, address of applicant, phone number, site address, directions, subdivision, business name, lot, block, type of work, heating/cooling, type of fuel, contractor, state license number, phone number, cost, completion date, signature of owner, contract or agent.

B. Retention: 3 years after completion of project, then destroy.

12-511.6. Sign Permits

A. Description: Records documenting permission granted by the county to erect a sign. Information includes application form, date, issued by, permit number, site address, business name, phone number, cost, completion date and signature of owner.

B. Retention: 3 years, then destroy.

12-511.7. Septic Tank Permits

A. Description: Documents permission granted by the county to builders or developers for installing septic tank systems that meet the county's building codes. Information includes tank size, size of drainfills, and property location.

B. Retention: 3 years, then destroy.

12-511.8. Inspection Records

A. Description: Documents inspections conducted to buildings under construction within the county to insure compliance with county building codes. Information includes builder's representative requesting each inspection, date performed, outcome of inspection, date completed, date utilities released, and notes from office staff to inspector.

B. Retention: 3 years, then destroy.

12-511.9. Subdivision Files

A. Description: Records documenting the planning and approval stages in the development of a subdivision in the county. Information includes subdivision plats, correspondence and approvals from the Planning Commission.

B. Retention: Permanent. Microfilm optional.

12-511.10. Zoning and Variance Materials

A. Description: Materials relating to zoning and variance requests within the county. Information includes copy of request, notes, resolutions passed, maps, charts, and opposition.

B. Retention: Permanent. Microfilm optional.

Subarticle 12. Veterans Affairs

12-512.1. Index to Veterans Files

A. Description: Serves as a finding aid to the Veterans Files. The index is arranged alphabetically by name of veteran and contains the following information: name, address, service number, date of entry into service, discharge date, and numerical references for veterans files.

B. Retention: Permanent. Microfilm optional.

12-512.2. Veterans Files

A. Description: Records used to assist ex-servicemen in securing the benefits to which they are entitled under the provisions of federal legislation and under the terms of insurance policies issued by the federal government for their benefit. Various types of forms account for most of the documents contained in these files although some correspondence is included.

B. Retention: Permanent. Microfilm optional.

Subarticle 13. Maintenance Garage/Fleet Maintenance**12-513.1. Maintenance and Repair Records**

A. Description: Record of maintenance and repairs performed on county owned vehicles. Information includes department, FRS class code, vehicle type/number, date in, time in, odometer reading, date completed, time completed, down time, hours, activity type, year, make, engine size, vehicle identification number, model, license number, transmission type, repair order instruction, mechanic number, hours, labor charge, labor total, driver comments, driver employee number, parts issued record, petroleum products issued, parts total, labor total, grand total, approved by, part number and description, price, accessories, total accessories, outside repairs, total outside repairs, vendor costs, name, address, city, customer order number, date, phone, order written by, terms, description of work, amount, gallons of gas, quarts of oil, pounds of grease, total labor, total parts, accessories, tax, total.

B. Retention: Until vehicle is disposed of or no longer in use, then destroy.

12-513.2. Fuel System Reports

A. Description: Report of the regular and diesel fuel dispensed at the county fuel depot. Information includes equipment number, date, time, employee number, card number, mileage, product code, quantity, expense charged and totals for equipment numbers.

B. Retention: 2 years, then destroy.

12-513.3. Work Orders

A. Description: Work orders for the repair and maintenance of vehicles and equipment. Information includes type of service requested, parts and labor required.

B. Retention: 3 years, then destroy.

12-513.4. County Vehicle Accident Files

A. Description: Documents accidents involving county vehicles. Information includes dates of accident, department involved, parties involved, vehicle county number, damage estimates, and settlements.

B. Retention: 3 years, then destroy.

Subarticle 14. Library**12-514.1. Library Board Meeting Minutes and Agendas**

A. Description: Record of proceedings at meetings of the Library Board. Information includes dates and times of meetings, members present, informational items, Director's Report Summary, Public Service Report Summary, financial information, policy approvals and motions made by the Board.

B. Retention: Permanent. Microfilm optional.

12-514.2. Patron List

A. Description: List of all library card holders. Information includes name and address, telephone number, place of employment (if applicable), school (if applicable), and signature of cardholder or parent.

B. Retention: Until superseded, then destroy.

12-514.3. Shelf List

A. Description: Record of each volume in the library. Information includes call number, author, title, publication date, acquisition date, description of book, and type book.

B. Retention: Until superseded, then destroy.

Subarticle 15. Emergency Services**12-515.1. Patient Care Form**

A. Description: Records consist of DHEC forms completed by the attending paramedic listing the drug usage and other relevant data on the emergency call. Also includes payment authorization/billing forms. Records may be used by attorneys in-litigation. Information includes patient identification, address, sex, race, date of birth, hospital transported to, disposition, safety equipment, patient status, incident location, preliminary impression, treatment procedure, drug used, site of trauma, advanced procedures, vital signs, comments, chief complaint, observation at scene, time record, DHEC permit number, auto plate number, attendant's signature and billing information.

B. Retention: 10 years, then destroy.

12-515.2. Dispatch Cards for 911 Emergency Calls

A. Description: Forms documenting emergency calls dispatched to the Fire Department, the Sheriff's Department, the Police Department or to Emergency Medical Services. Information includes dispatch number, location, incident type, caller name, call back number, unit and dispatch information or unit and response information.

B. Retention: 3 years, then destroy.

12-515.3. 911 Phone Logs

A. Description: Record of incoming calls to 911. Information includes name, address, phone number, time and date of call.

B. Retention: 3 years, then destroy.

12-515.4. Radio Logs

A. Description: Log of the calls received, calls dispatched, and other radio traffic. Information includes date, time, verbal communications, complainant's name, address and phone number, and responding officer's unit number.

B. Retention: 3 years, then destroy.

12-515.5. EMS Accounts Receivable

A. Description: Record of billing to health insurance companies and uninsured patients for emergency medical service. Information includes date, account number, charges, amount paid, balances, type of service, description of illness, ordered by, total miles driven, insurance company information, medicare information, medicaid information, transported from, transported to, paramedic, EMT, driver, and service/supplies.

B. Retention: 3 years, then destroy.

Subarticle 16. Animal Control**12-516.1. Animal Complaint Forms**

A. Description: Record of animal complaints and action taken. Information includes request made by (name, address, city), directions, nature of complaint, actions taken, date, phone number, and complaint number.

B. Retention: 3 years, then destroy.

12-516.2. Animal Control Release Form

A. Description: Records documenting the release of all animals from the owner to the Animal Control Office relinquishing all rights of ownership to the animal. This contract specifies that after 24 hours the animal will become the property of the county. Information includes name, address, signature, date, type of animal, breed, sex, animal's name (if any), reason for giving up animal, stray or unwanted and temperament.

B. Retention: 5 years, then destroy.

12-516.3. Adoption Agreement

A. Description: Record of animals adopted from Animal Control. Information includes adopter's information: name, address and phone number of person adopting the animal; Animal information: age, description, breed and sex of animal; adoption rules; date; signature; and fee.

B. Retention: 5 years, then destroy.

12-516.4. Euthanasia Drug Usage

A. Description: Records used to track the amount of drugs used per animal, as well as number of euthanized animals. Information includes date, number of cc's used, weight of animal, type of animal, control number, initials and time of day.

B. Retention: 5 years, then destroy.

12-516.5. Animal Violation Ticket

A. Description: Notification of violation of the Animal Control Ordinance. Information includes type of violation, violation date, time, location, breed of animal, color of animal, officer's name, owner's name and address, signature of officer and date.

B. Retention: 3 years, then destroy.

Subarticle 17. Voter Registration and Elections**12-517.1. Ballots**

A. Description: Consists of printed ballots from general elections. Information includes name of candidate, office running for, and space for write-in candidate.

B. Retention:

- (1) Marked Ballots for Uncontested Elections: 2 years after certification of election, then destroy.
- (2) Marked Ballots for Contested Elections: 2 years after decision on contested results is made, then destroy.
- (3) Unmarked Ballots: 30 days after election, then destroy.

12-517.2. Poll Managers Applications and Tests

A. Description: Record of individuals seeking position of certified poll manager, as well as poll manager test and test score. Information includes name, birth date, mailing address, telephone number, occupation, precinct, voter registration number, social security number, political party, applicant signature, test score, and date of application.

B. Retention: 5 years after date of test, then destroy.

12-517.3. Petitions and Petition Summary Sheets

A. Description: Used to nominate candidates for office, to certify political parties, to propose an ordinance, to call for referenda on ordinances, to call for a referendum, or to change the existing form of government. Information includes petition: county, purpose of petition, signature and address of voters, registration certificate of voter, and precinct of voter; and petition receipt: name of candidate, name of office, date of election, number pages, total number signatures, date submitted, time submitted, signature of election commission member or clerk, number of signatures needed for petition approval, number of signatures found to be valid, number of signatures submitted on petition, signature of member of registration board or clerk, and date.

B. Retention: Permanent. Microfilm optional.

12-517.4. Absentee Ballot Requests (Applications for Absentee Ballots)

A. Description: Documents official requests for sending out absentee ballot applications. Information includes request number, date, party, name of voter, voter's address, home address, precinct number, registration number, name of requester and address, name/address of voter's relative, phone number, comments, application number and date mailed.

B. Retention: 2 years after date of election, then destroy.

12-517.5. Election Material (Used)

A. Description: Materials used by the election commission during an election to document the collection of ballot box keys and to verify the election was run correctly. Information includes plastic key to ballot boxes, spoiled ballots, ballot box verification form name/address of verifier, red seal number (plastic key), type of election, name of witness, date, and computer diskettes used to tabulate election results.

B. Retention: 2 years after date of election, then destroy.

12-517.6. South Carolina Election Commission Voter List

A. Description: Listing of all registered voters in the county. Information includes election number, election date, county code, precinct code, names, certificate numbers, addresses, social security numbers, date of birth and descriptions.

B. Retention: 4 years after date of election, then destroy.

12-517.7. Inactive Voter List (Outdated Voter List)

A. Description: Listing of outdated registrations. Information includes names, certificate number, address, social security number, date of birth, occupation, registration, date, sex, race, height, weight and color of hair and eyes.

B. Retention: 2 years after date of election, then destroy

12-517.8. Election Results

A. Description: Computer printout listing the precinct totals for candidates for political office. Information includes number of votes for each candidate and the total votes cast for election.

B. Retention: Permanent. Microfilm.

12-517.9. Federal Post Card Application and Registration

A. Description: Post cards printed by the federal government used to mail information in to Voter Registration. Information includes name, social security number, home address, mailing address, date of birth and signature.

B. Retention: Permanent. Microfilm optional.

12-517.10. Political Maps

A. Description: Maps created by the Research and Statistical Services Office showing political boundaries and political numbers of political subdivisions.

B. Retention: Until superseded, then destroy.

12-517.11. Computer Printout Tallies

A. Description: Computer printouts generated by the State Election Commission showing a breakdown by race of the statistical data on various subdivisions. Information includes Decode, School Tally, City Council Tally, County Council Tally, Congressional District Tally, Senate District Tally, House District Tally, and Race Breakdown.

B. Retention: 10 years, then destroy.

12-517.12. Application to Register to Vote

A. Description: Documents persons registering to vote in county elections. Records are active and inactive; inactive-deceased; inactive-convicted; inactive-moved; and inactive-over 5 years. Information includes name, sex, race, social security number, address, date of birth, certificate number, and precinct assigned to.

B. Retention: Permanent. Microfilm optional.

Subarticle 18. Coroner**12-518.1. Index to Inquisitions**

A. Description: Serves as a finding aid to the Coroner's inquisition records. Information includes name of deceased, date of death, date of inquisition, and reference number of inquisition.

B. Retention: Permanent. Microfilm optional.

12-518.2. Inquisitions Records

A. Description: Records Coroner's inquests into sudden, violent, or unusual deaths. Information includes date of inquest, name of deceased, ages, cause, and manner of death.

B. Retention: Permanent. Microfilm optional.

12-518.3. Case Files

A. Description: Contains some or all of the following documents relating to deaths reported to the Coroner: coroner's report, law enforcement report, autopsy report, evidence report, burial permits, death certificate, forensic request and report, investigative notes, photographs, medical and dental records, subpoenas, and newspaper clippings. Information includes names and addresses, times, dates, places, signatures, and titles.

B. Retention: Permanent. Microfilm optional.



ROA 00464

July 16, 2014

To: County Council Members
Fm: County Administrator
Re: Thomas Abraham v. Newberry County

The Honorable Frank R. Addy, Jr. of the Eighth Judicial Circuit has issued his Order in the above-named case. His full Order is attached as a separate document for your full review. What follows in this document are my summary and analysis of the Order.

Summary

Judge Addy took the position that appointments to the position of full-time magistrate and to the position of part-time magistrate are two separate and distinct types of appointments. In this sense, he reasoned that Tom Abraham was improperly demoted. In order for the change in Abraham's status from full-time to part-time to be considered proper, a new appointment to part-time magistrate – a separate appointment approved by the Governor – should have taken place. The damages the Court found, which totaled \$21,805, come entirely from the loss of pay Abraham suffered between the time he was improperly demoted and the time at which his tenure as magistrate expired, i.e., the time at which Senator Cromer chose not to reappoint him as a magistrate in any capacity.

The Court also found that part-time magistrates must be paid for the on-call time they actually spend on the job. This consists largely of weekend bond hearings, but can include other activities, such as being asked to issue warrants. Abraham had asserted that, due to restrictions on personal plans and activities, part-time magistrates on call should be paid their full salary for the entire time they are on

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call. While the Court rejected this, Council is advised to consider two caveats: 1) the Judge did say that part-time magistrates are probably due some compensation other than their full wage merely for having their plans and activities restricted by being on call, though he did not say what that level of compensation should be; 2) there is no way for the County to monitor how much on call time part-time magistrates actually spend working, meaning that claims for wages in this regard are essentially made on an honor system. The Judge did affirm that full-time magistrates are not eligible for on-call pay.

Analysis

Heretofore, the County has not paid part-time magistrates for on call hours worked, only for the mileage they incur to and from bond court. With this Order having been issued, the County can expect claims from past years by part-time magistrates for hours worked. While there is not a specific statute of limitations on such claims, the general wage and hour statute suggests three years. These claims, too, will be subject to an honor system.

This Order raises the cost of funding part-time magistrates, prospectively and at least potentially in terms of back-pay claims. Couple this with the fact that the County is already risking its status with the State's employee health insurance program by claiming a greater number of hours worked by part-time magistrates than is actual (30 per week), in order to retain coverage for them and their dependents, and the liabilities of having part-time magistrates may have now eclipsed the benefits of such a system.

State law allows for any county to petition its Senate delegation to change the types of magistrates, i.e., the mix of full-time and part-time magistrates that comprise its Summary Court system, provided that this must be done in accordance with Code Section 22-1-10 (A) of the South Carolina Code of Laws.

It should be noted that Abraham has thirty days to appeal Judge Addy's ruling, and that the County would refrain from paying the judgment until we know whether he intends to exercise that option. Further, this judgment is not covered under tort insurance, meaning that it will be a cash expense of the County.

Subject: Part-time magistrates -- CONFIDENTIAL

Date: Wednesday, August 6, 2014 at 3:45:20 PM Eastern Daylight Time

From: Wayne Adams

To: Buddy Livingston, Kirksey Koon, Les Hipp, Scott Cain, Bill Waldrop, Steve Stockman, John Caldwell

CC: Jay Tothacer, Laurie Renwick

Category: County Council



Gentlemen,

For Monday night's meeting of the Public Safety and Courts Committee, I have asked for an executive session. The purpose is to request permission to negotiate with the part-time magistrates who have potential claims against the County for back-pay pertaining to on-call hours worked. The attached spreadsheet details the compensation we would offer to the affected parties in exchange for their full releases of the County from any future claims in these matters. The second document is a draft letter to Senator Cromer that I am asking Council to consider sending him. That letter asks the Senator to change from the current mix of full-time and part-time magistrates to all full-time magistrates. My intention, with the Committee's approval, is to proceed with the letter from Monday night's meeting to the next meeting of full County Council, which is Wednesday, August 20. The discussion with full Council would also be in executive session; however, Council, if it so desires, could vote after the executive session to proceed with the letter to Senator Cromer.

Please understand that these matters are confidential, for a number of reasons.

Let me know if you have questions.

Thanks.

Wayne

ROA 00467

1/28/15

Part-Time Magistrates**On-Call Compensation (3 years)**

Name	Date of Hire	Current Pay (bi-weekly)	Current Pay (annual)	Sched. Hours (bi-weekly)	Hourly Rate	Hours to be Compensated	On Call Compensation	Adjustment for Previous Compensation *	Gross Pay for On-Call (3 years)
Rick Lail	4/22/02	479.72	12,472.72	16	29.98	600	17,989.50		17,989.50
Barry Koon	6/1/13	467.52	12,155.52	20	23.38	220	5,142.72		5,142.72
Art Jayroe	8/1/95	536.95	13,960.70	20	26.85	600	16,108.50	-13,500.00	2,608.50
TOTAL							39,240.72		25,740.72

* On-call supplement paid
by County Council

Name	Total from Above	Retirement Contribution (County) 13.41%	Social Security Contribution (County) 7.65%	Total Cost to County
Rick Lail	17,989.50	2,412.39	1,376.20	21,778.09
Barry Koon	5,142.72	689.64	393.42	6,225.78
Art Jayroe	2,608.50	349.80	199.55	3,157.85
Totals	25,740.72	3,451.83	1,969.17	31,161.72

ROA 00467

August 20, 2014

Senator Ronnie Cromer
SC Senate District 18
311 Gressette Building
Columbia, SC 29201

Re: Compensation, hours and location of magistrates [SC Code Section 22-1-10 (A)]

Dear Senator Cromer:

In accordance with Code Section 22-1-10 (A), Newberry County Council is requesting changes in the "number of full-time and part-time magistrate positions available in the county, the number of work hours required by each position, the compensation for each position, and the area of the county to which each position is assigned."

The County requests that its complement of magistrates be changed to include only full-time magistrates, beginning on the soonest date allowable under state statute. The payment of salaries for these magistrates would be as required under Code Section 22-8-40, et seq., and their location assignments would be as determined by the magistrate thereafter designated as chief magistrate.

This letter is written more than 90 days prior to the commencement of magistrates' terms, as required under Code Section 22-1-10 (A), and we request that you act upon it according to the appropriate timing.

ROA 00469

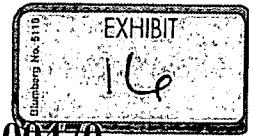
Thank you for your kind attention to this request.

With best regards,

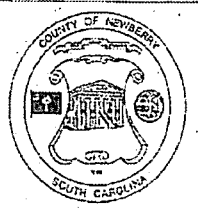
Chairman of Newberry County Council

**Cc: Newberry County Council
Newberry County Magistrates**

ROA 00469



ROA 00470



**NEWBERRY COUNTY COUNCIL
AGENDA
AUGUST 20, 2014
7:00 P.M.**

Call to order: Henry H. Livingston, III, Chairman
Invocation and Pledge of Allegiance: Wayne Adams, County Administrator

1. *Adoption of Consent Agenda*
2. *Additions, Deletions and Adoption of Agenda*
3. *Newberry County Service Award Presentations*

David Parnell, Director of Veteran Affairs – 5 years
Charles Verner, Public Defender – 10 years
Janice Allen, Clerk of Court's Office – 15 years

ROA 00470

4. **Ordinance #07-11-14:** An Ordinance authorizing the execution of an Equipment Lease-Purchase Agreement in the amount not exceeding \$1,265,000 relating to the purchase of certain equipment by Newberry County, authorizing the execution of other necessary documents and papers, and other matters relating thereto.
- a. Public Hearing
 - b. Second Reading

This Ordinance authorizes the following new purchases: upgrades to the fire service radio system (simulcast repeater "voting" system), 24 self-contained breathing apparatuses for firefighters, 15 solid waste compactors (for use in "single-stream" recycling), and 2 modular ambulances. Lease purchases of this kind are funded by annual debt issuance each fall, with amortization costs being reflected in the debt service levy portion of property tax bills. The County has utilized this process over the past four years, primarily to purchase public safety-related rolling stock (fire trucks, ambulances, and rescue trucks). All purchases proposed in the Ordinance were approved during the annual budgeting process.

5. **Consideration of Bids for Creek Crossings at Lynches Woods Park** - Crystal Waldrop, Purchasing Director and Kyle Clampitt, Alliance Consulting Engineers

	<u>Base Bid</u>	<u>Alt #1</u>	<u>Alt #2</u>	<u>Total</u>
Capital Construction, LLC	\$76,300.00	\$42,000.00	\$42,000.00	\$160,300.00
Martin & Son Construction	\$94,400.00	\$47,040.00	\$47,040.00	\$188,480.00

The Lynches Woods Committee has reviewed and approved the materials to be used by the low bidder in constructing the veneer of the bridges. Specifically, real stone will be used, not synthetic stone. Staff recommends approval of the low bid. (The low bidder is currently performing renovation work at the Courthouse.)

6. **Consideration of Disbursement of FY13/14 Funding by recommendation of Accommodations Tax Committee**— Ernest Shealy, Accommodations Tax Committee Chairman

The Accommodations Tax Committee met on July 18th to distribute funding from this revenue source based on a combination of statutory criteria and approved requests. By statute, the first \$25,000 collected is allocated to the County; in turn, the County appropriates that funding for the Opera House. The County also retains 5% of everything collected thereafter – \$2,406 – which is appropriated as general revenue of the County.

Beyond this, the balance of the funding is divided into two categories: Tourism and Promotional. The former is distributed retroactively, the latter prospectively.

Tourism-related funding is distributed on a backward-looking basis, utilizing funds that have already been collected. Thus, the year of revenue generation for the tourism-related funding currently being distributed was FY 13-14. The total amount available for distribution is \$31,549; requests totaled \$63,890. The Committee recommends the following purposes and the indicated amounts: Newberry Opera House, \$9,250; Newberry County Law Enforcement, \$3,000; Prosperity's Hoppin', \$900; Newberry County Historical/Museum Society, \$1,899; Little Mountain Reunion, \$3,000; Newberry Visitor's Center, \$6,000; Party in the Pines, \$2,000; Newberry Community Players, \$500; Ag Treasure Tour, \$2,000; Palmetto Trail, \$1,000; Antique Car Show and Veterans Salute, \$2,000.

Promotional-related funding is distributed continuously throughout the year on a percentage basis, as it is received. In the prior year, \$14,438 was distributed for this purpose, with the Newberry County Chamber of Commerce (statutory "lead agency") receiving 40%, the Prosperity Business Association receiving 15%, and Capital City Lake Murray receiving 45%. The Committee recommends the same distribution formula for FY 14-15.

7. *Appointments*

8. *Committee Meetings*

- a. Public Safety and Courts Committee 8/11/14 – Tommy Long, Emergency Services Coordinator

9. *Public Comments (by those who signed up at the meeting)*

10. *Executive Session (if needed)*

- a. §30-4-70(a)(2) SC Code of Laws: 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.

THIS PAGE AND A
PORTION OF THE
NEXT WERE REDACTED
AS IT RELATED TO
EXECUTIVE SESSION
MATTERS

11. *Comments/Request from Administrator*

12. *Comments/Request from Council Members*

13. *Future Meetings*

- a. Public Works and Planning Committee 8/25/14 @ 6:00 p.m.
- b. Council Work Session 8/27/14 @ 6:00 p.m.
- c. County Council 9/3/14 @ 7:00 p.m.

14. *Adjournment*

ROA 00475



COUNTY OF NEWBERRY

OFFICE OF THE COUNTY COUNCIL
COURTHOUSE ANNEX, 1309 COLLEGE STREET
POST OFFICE BOX 136
NEWBERRY, SOUTH CAROLINA 29108

VOICE: (803) 321-2100
FAX: (803) 321-2102

WEB: www.newberrycounty.net

COUNCIL MEMBERS:
HENRY H. LIVINGSTON, III, CHAIRMAN
KIRKSEY KOON, VICE-CHAIRMAN
JOHN E. CALDWELL
WILLIAM D. WALDROP
LESLIE (LES) HIPP
STEVEN C. STOCKMAN
SCOTT CAIN

COUNTY ADMINISTRATOR:
WAYNE ADAMS
COUNTY ATTORNEY:
A.J. TOFHACER, JR.
CLERK TO COUNCIL:
LAURIE N. RENWICK

August 21, 2014

Senator Ronnie Cromer
SC Senate District 18
311 Gressette Building
Columbia, SC 29201

Re: Compensation, hours and location of magistrates [SC Code Section 22-1-10 (A)]

Dear Senator Cromer:

In accordance with Code Section 22-1-10 (A), Newberry County Council is requesting changes in the "number of full-time and part-time magistrate positions available in the county, the number of work hours required by each position, the compensation for each position, and the area of the county to which each position is assigned."

Within the parameters of this statute, County Council requests that its full complement of magistrates be changed to include only full-time magistrates, with their terms commencing on May 1, 2015, or at whatever soonest date may be in keeping with the statute. The County understands that the statutory formula currently provides for Newberry County to have three full-time magistrates. Council wishes to discontinue the use of any part-time magistrates. The payment of salaries for the three full-time magistrates would be as required under Code Section 22-8-40, et seq., and their location assignments would be as determined by the magistrate thereafter designated as chief magistrate.

ROA 00475

ROA 00476

This letter is written more than 90 days prior to the commencement of magistrates' terms, as required under Code Section 22-1-10 (A), and we request that you act upon it according to the appropriate timing.

Thank you for your kind attention to this request.

With best regards,

Wayne Adams

Wayne Adams, Newberry County Administrator

Cc: Newberry County Council
Newberry County Magistrates

ROA 00476



ROA 00477

From: Wayne Adams wadams@newberrycounty.net
Subject: back pay consideration and future reporting of work hours
Date: August 28, 2014 at 12:11 PM
To: gjayroe@jayroacpa.com
Cc: Jay Tothacer jtothacer@newberrycounty.net, Buddy Livingston blivingston@newberry.k12.sc.us, Kirksey Koon kirkseykoon@yahoo.com, Les HIPP hippcouncil@bellsouth.net, Les HIPP lchipp@bellsouth.net, Scott Cain scain@newberrycounty.net, Steve Stockman sievestockman@att.net, Bill Waldrop dbwaldrop20@gmail.com, John Caldwell johnpatcaldwell@att.net, Laurie Renwick lrenwick@newberrycounty.net, Debbie Cromer dcromer@newberrycounty.net, Dirk Aydiette daydiette@gsblaw.net



Judge Jayroe On-Call Judge Jayroe:
Pay

Please find attached my letter concerning back pay consideration for part-time magistrates as well as future reporting requirements for hours worked.

Should you have any questions, don't hesitate to contact me or Jay.

Best,

Wayne Adams, Newberry County Administrator

ROA 00477



ROA 00478

COUNTY OF NEWBERRY

OFFICE OF THE COUNTY COUNCIL

POST OFFICE BOX 156

NEWBERRY, SOUTH CAROLINA 29108

(803)321-2100

FAX: (803)321-2102

COUNCILMEN:

HENRY H. LIVINGSTON, III, CHAIRMAN
KIRKSEY KOON, VICE-CHAIRMAN
JOHN E. CALDWELL
WILLIAM D. WALDROP
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STEVE STOCKMAN
SCOTT CAIN

WAYNE ADAMS
COUNTY ADMINISTRATOR
A. J. TOTHACER, JR.
COUNTY ATTORNEY
LAURIE N. RENWICK
CLERK TO COUNCIL

August 28, 2014

The Honorable Arthur L. Jayroe, Jr.
P.O. Box 95
Little Mountain, SC 29075

Sent by Email and US Mail

Dear Judge Jayroe:

The County recently determined that it might not have been fully compliant with the South Carolina Magistrate's Pay Act. Under the Act, part-time magistrates are entitled to call pay for hours worked over their set weekly hours. Unfortunately, no part-time magistrate has ever submitted an itemized request for call time payment or a time sheet showing any call hours worked. While it would be difficult, if not impossible, to determine with absolute accuracy what your total excess call hours are, the County has attempted to make a reasonable and fair determination based on your time in office and the County's understanding of the rotating call schedule over the last three years.

Based on our calculations, we intend to make a gross payment to you of \$2,608.50, subject to the usual wage withholdings. The County will also make its Social Security and State Retirement System contributions. Because the amount owed is uncertain and speculative, the County will require a signed release from you prior to payment. If you agree to accept the above amount, please sign the enclosed release and return it to the County Administrator's office. Once we have received your signed release, a payroll check will be issued to you.

Importantly, if you have received any other form of compensation for call time over the past three years, the amount referenced in the above paragraph reflects a corresponding prior

ROA 00478

reduction. Moreover, as of the date of this memorandum, the County is discontinuing any such payments.

ROA 00479

Going forward, part-time magistrates must report all on-call hours worked using the attached form. Completed forms must be submitted to the County's Director of Human Resources no later than noon Monday of each week following any call duty work pertaining to the prior week. Failure to properly record your hours could result in a delay or waiver of payment.

Should you wish to discuss this matter in more detail, please contact Jay Tothacer, Newberry County Attorney at 321-1415

Sincerely,


Wayne Adams
County Administrator

cc: County Council

ROA 00479

STATE OF SOUTH CAROLINA)
)
NEWBERRY COUNTY)

ROA 00480

GENERAL RELEASE

Arthur L. Jayroe, Jr. ("Mr. Jayroe") and Newberry County ("the County"), hereby agree as follows:

1. For and in consideration of the gross payment of wages to Mr. Jayroe in the amount of Two Thousand and Six Hundred and Eight and 50/100 Dollars (\$2,608.50), the net amount of which is One Thousand and Nine Hundred and Eighty-one and 63/100 Dollars (\$1,981.63), the undersigned Mr. Jayroe for himself, his heirs, executors, administrators, and assigns, intends to and does hereby release, acquit, forever discharge, and covenant not to sue the County, its present and past officials, employees, agents, and attorneys, from and/or with regard to any and all causes of action, claims, demands, costs, interest, attorney's fees, and all claims of any nature and kind whatsoever, known or unknown, from the beginning of time until the date hereof which Mr. Jayroe has or in the future may be entitled to have against the County, on account of or in any way arising out of or in connection with Mr. Jayroe's appointment and service as a Newberry County Magistrate. Mr. Jayroe agrees, as a further consideration and inducement for this Settlement Agreement and Release in Full (hereinafter "Release"), that it shall apply to unknown and unanticipated damages resulting from or in any way connected to his appointment and service as a Newberry County Magistrate to the date hereof as well as to those now disclosed.

2. This agreement is the compromise of doubtful and disputed claims and this Release is not to be construed as an admission of liability on the part of the County. The County expressly denies liability of any nature or kind whatsoever to Mr. Jayroe. Mr. Jayroe agrees that he will not assert or imply that the County has admitted any liability to him as a result of this agreement/and or payment made to him.

3. Mr. Jayroe hereby acknowledges that he has read and fully understands this Release, agrees that it incorporates all oral understandings and negotiations between him and the County, and that it is the entire agreement between them.

IN WITNESS WHEREOF, Mr. Jayroe has set his hand and seal below.

Arthur L. Jayroe, Jr.

Date: _____

ROA 00480

ROA 00481

PART-TIME MAGISTRATE WEEKLY TIME REPORT

NOTE: ALL CALL DUTY HOURS WORKED MUST BE RECORDED WEEKLY AND ALL HOURS RECORDED MUST HAVE BEEN WORKED. FAILURE TO REPORT ANY ERRORS IN YOUR WORK HOURS REPORTED OR PAID WITHIN 14 CALENDAR DAYS OF RECEIVING YOUR PAYCHECK MAY RESULT IN FORFEITURE OF ANY ADDITIONAL PAY THAT MAY BE DUE.

Name: _____

For the calendar week of _____ through _____, 20____

Sun ____/____ Hours worked: _____

Mon ____/____ Hours worked: _____

Tue ____/____ Hours worked: _____

Wed ____/____ Hours worked: _____

Thur ____/____ Hours worked: _____

Fri ____/____ Hours worked: _____

Sat ____/____ Hours worked: _____

TOTAL HOURS WORKED: _____

Signature: _____ Date: _____

ROA 00481

ROA 00482



COUNTY OF NEWBERRY

OFFICE OF THE COUNTY COUNCIL
POST OFFICE BOX 156
NEWBERRY, SOUTH CAROLINA 29108

(803)321-2100
FAX: (803)321-2102

COUNCILMEN:
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WAYNE ADAMS
COUNTY ADMINISTRATOR
A. J. TOTHACER, JR.
COUNTY ATTORNEY
LAURIE N. RENWICK
CLERK TO COUNCIL

August 28, 2014

The Honorable Arthur L. Jayroe, Jr.
P.O. Box 95
Little Mountain, SC 29075

Sent by Email and US Mail

Dear Judge Jayroe:

The County recently determined that it might not have been fully compliant with the South Carolina Magistrate's Pay Act. Under the Act, part-time magistrates are entitled to call pay for hours worked over their set weekly hours. Unfortunately, no part-time magistrate has ever submitted an itemized request for call time payment or a time sheet showing any call hours worked. While it would be difficult, if not impossible, to determine with absolute accuracy what your total excess call hours are, the County has attempted to make a reasonable and fair determination based on your time in office and the County's understanding of the rotating call schedule over the last three years.

Based on our calculations, we intend to make a gross payment to you of \$2,608.50, subject to the usual wage withholdings. The County will also make its Social Security and State Retirement System contributions. Because the amount owed is uncertain and speculative, the County will require a signed release from you prior to payment. If you agree to accept the above amount, please sign the enclosed release and return it to the County Administrator's office. Once we have received your signed release, a payroll check will be issued to you.

Importantly, if you have received any other form of compensation for call time over the past three years, the amount referenced in the above paragraph reflects a corresponding prior

ROA 00482

ROA 00483

reduction. Moreover, as of the date of this memorandum, the County is discontinuing any such payments.

Going forward, part-time magistrates must report all on-call hours worked using the attached form. Completed forms must be submitted to the County's Director of Human Resources no later than noon Monday of each week following any call duty work pertaining to the prior week. Failure to properly record your hours could result in a delay or waiver of payment.

Should you wish to discuss this matter in more detail, please contact Jay Tothacer, Newberry County Attorney at 321-1415

Sincerely,



Wayne Adams
County Administrator

cc: County Council

ROA 00483

STATE OF SOUTH CAROLINA)
)
NEWBERRY COUNTY)

GENERAL RELEASE

Arthur L. Jayroe, Jr. ("Mr. Jayroe") and Newberry County ("the County"), hereby agree as follows:

1. For and in consideration of the gross payment of wages to Mr. Jayroe in the amount of Two Thousand and Six Hundred and Eight and 50/100 Dollars (\$2,608.50), the net amount of which is One Thousand and Nine Hundred and Eighty-one and 63/100 Dollars (\$1,981.63), the undersigned Mr. Jayroe for himself, his heirs, executors, administrators, and assigns, intends to and does hereby release, acquit, forever discharge, and covenant not to sue the County, its present and past officials, employees, agents, and attorneys, from and/or with regard to any and all causes of action, claims, demands, costs, interest, attorney's fees, and all claims of any nature and kind whatsoever, known or unknown, from the beginning of time until the date hereof which Mr. Jayroe has or in the future may be entitled to have against the County, on account of or in any way arising out of or in connection with Mr. Jayroe's appointment and service as a Newberry County Magistrate. Mr. Jayroe agrees, as a further consideration and inducement for this Settlement Agreement and Release in Full (hereinafter "Release"), that it shall apply to unknown and unanticipated damages resulting from or in any way connected to his appointment and service as a Newberry County Magistrate to the date hereof as well as to those now disclosed.

2. This agreement is the compromise of doubtful and disputed claims and this Release is not to be construed as an admission of liability on the part of the County. The County expressly denies liability of any nature or kind whatsoever to Mr. Jayroe. Mr. Jayroe agrees that he will not assert or imply that the County has admitted any liability to him as a result of this agreement/and or payment made to him.

3. Mr. Jayroe hereby acknowledges that he has read and fully understands this Release; agrees that it incorporates all oral understandings and negotiations between him and the County, and that it is the entire agreement between them.

IN WITNESS WHEREOF, Mr. Jayroe has set his hand and seal below.

Arthur L. Jayroe, Jr.

Date: _____

PART-TIME MAGISTRATE WEEKLY TIME REPORT

NOTE: ALL CALL DUTY HOURS WORKED MUST BE RECORDED WEEKLY AND ALL HOURS RECORDED MUST HAVE BEEN WORKED. FAILURE TO REPORT ANY ERRORS IN YOUR WORK HOURS REPORTED OR PAID WITHIN 14 CALENDAR DAYS OF RECEIVING YOUR PAYCHECK MAY RESULT IN FORFEITURE OF ANY ADDITIONAL PAY THAT MAY BE DUE.

Name: _____

For the calendar week of _____ through _____, 20____

Sun ____/____ Hours worked: _____

Mon ____/____ Hours worked: _____

Tue ____/____ Hours worked: _____

Wed ____/____ Hours worked: _____

Thur ____/____ Hours worked: _____

Fri ____/____ Hours worked: _____

Sat ____/____ Hours worked: _____

TOTAL HOURS WORKED: _____

Signature: _____ Date: _____



Jay Tothacer

ROA 00486

From: Wayne Adams <wadams@newberrycounty.net>
Sent: Saturday, September 06, 2014 3:28 AM
To: Jay county attorney
Subject: Re: Jayroe response

Looks good.

Sent from my iPhone

> On Sep 5, 2014, at 11:45 AM, "Jay county attorney" <jtothacer@newberrycounty.net> wrote:

>

> Please see attached. Feel free to modify it as you see fit --, but I believe the response is straightforward and places the stipend payment squarely on him.

>

> Jay

> <Judge Jayroe response 2014.docx>

ROA 00486

Judge Jayroe,

I did not receive your request until it was forwarded to me by the Chairman. I do not know why it did not appear in my email.

In response to your question the only part time magistrate who was receiving any additional 'on call compensation' was you. I understand that before I began working with Newberry County Council authorized \$4500 to be split equally between two magistrates providing on call duties. It is also my understanding that when Judge English was no longer serving as a magistrate that you, in your capacity as Chief Magistrate, directed that the entire \$4500 stipend be paid to you and it has been done ever since you issued that directive. Since none of the other part time magistrates working on call received any portion of that stipend there was no corresponding reduction in the amount offered to compensate them for past work.

Moving forward, we have discontinued the stipend and will now compensate part time magistrates for actual on-call hours worked if the appropriate paperwork is completely and provided to HR in a timely fashion.

I hope this explanation answers your questions.

Please feel free to contact me or Jay Tothacer if you have any additional questions or concern.

Sincerely

Wayne Adams