STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

REPLY BRIEF OF APPELLANT/RESPONDENT, DESA BALLARD

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ARGUMENT

I. Ballard is Entitled to Relief Under FOIA

The County cannot avoid its obligations under FOIA by failing to preserve public documents. The Public Records Act ("PRA") sets forth what records must be retained, and FOIA sets forth what documents must be made available to the public. In her complaint, Ballard sought relief pursuant to S.C. Code §30-4-30(A)(1) for an order prohibiting the County from actively disposing of public records and requiring the preservation of those public records. (R. p. 51, ¶22). Ballard sought relief under FOIA and has standing under FOIA.

As an initial matter, Ballard respectfully disagrees with the County's contention that "it is undisputed" that the County produced all of the documents in its possession that were responsive to Ballard's FOIA request. County's Response Brief, p. 2. Specifically, in the Second Amended Order, the lower court found the County "did not ask Administrator Adams for hard copies of his emails" and "did not inspect Administrator Adams' computer." Id., p. 38, ¶11. The lower court's factual findings are not challenged by the County on appeal (County's Initial Brief, p. 4).

Moreover, Administrator Adams had multiple phones and at best, only his most current phone was examined for text messages – not emails. (R. p. 236, lines 11-14; p. 280, lines 4- p. 281, line 4). Although Administrator Adams did conduct county business using text messages, none were provided in response to Ballard's FOIA request. (R. p. 39, ¶12). As the County had no procedures or policies in place with respect to FOIA or retention of electronic documents, the County is unable to ascertain *when* public records were deleted.

The lower court found that the records sought were "public records" under FOIA and that the County violated the Act. Id., p. 39, ¶14. The emails and text messages in dispute were, in the very least, "prepared," "owned," and "used" by the County. *See* S.C. Code Ann. §30-4-20(c)("'Public record' includes all books . . . or other documentary materials . . . prepared, owned, used, in the possession of, **or** retained by a public body.")(emphasis added). While the County attempts to limit the definition of "public records" to only those documents in the "possession of" public bodies, the General Assembly did not make such a limitation. That is simply not the law.

Pursuant to S.C. Code Ann. §30-4-30(A)(1), "A person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body. . . ." Id. That "right to inspect, copy, or receive" implies the existence of public records. It is illogical and contrary to the General Assembly's stated purpose to contend that a public body can comply with FOIA by simply not retaining public documents.

This is not a situation where the legislative intent is unclear. The General Assembly has stated the purpose of FOIA:

> 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. In the age of technology, how can the County perform public business "in an open and public manner" if it does not retain electronic documents? How

can the County comply with the public's "right to inspect, copy, or receive" under S.C. Code Ann. §30-4-30(A)(1) if it is actively deleting county emails and text messages?

The South Carolina Supreme Court in Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 746 S.E.2d 329 (2013) affirmed the vital role that FOIA plays in our democratic system of government: "The FOIA serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in government." Id., 404 S.C. 433, 450. As the Court correctly surmised:

> [S]ecret government activity creates fertile ground for fraud and corruption, especially in the area of public expenditures where, without transparency, the public can be kept unaware of misappropriations and conflicts of interest. As Justice Brandeis wrote, "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

Id. at 450-451 (internal citations omitted).

While the County did provide some documents to Ballard, the County is well aware that the specific documents Ballard was seeking were the ones *not provided*. (R. pp. 36-38, ¶¶3, 6, 9-10). Knowing the importance of Administrator Adams' emails and text messages in the context of Ballard's FOIA request, the County did not check Administrator Adams' several phones for email. It did not provide text messages. These are public records that will never see the "sunlight" or the "electric light" of public review because the County then and now chooses not to protect the public right to "inspect, copy, or receive" under FOIA.

Although the County had funding for electronic back-up at the time of the computer crash, the County chose not to implement its own solution. Even as late as the

trial in this case, the County "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." (R. p. 39, ¶13).

The Public Records Act exists as a mandate to public bodies. The remedy lies in FOIA. The two are intertwined. While the PRA can stand alone, FOIA cannot. Without the PRA foundation, FOIA falls. If the County is allowed to shutter public records from the "sunlight" of FOIA and extinguish the "electric light" of governmental transparency, we find ourselves on the slippery slope of a government allowed to function under the veil of darkness. This Court should find that Ballard is entitled to relief under FOIA to an order requiring the County to preserve public records and to prohibit it from actively disposing of public records.

II. In the Alternative, Ballard is Entitled to Relief under the PRA

This Court only gets to the issue of standing *under the PRA* if it finds FOIA does not require the County to *have records available* for the public "to inspect, copy, or receive." See S.C. Code Ann. §30-4-30(A)(1). If that is this Court's decision and if it finds the issue of standing was properly preserved, then Ballard argues, for all the reasons stated above, she still has standing under the PRA pursuant to the public importance exception.

In its brief, the County argues there is no evidence it violated the PRA. As the County maintains, "[t]hus, the Records Act recognizes that local governments like the County may consider economy and efficiency in determining how to protect and preserve their records." (County's Response Brief, at p. 6). Here, the County did not consider economy or efficiency. Indeed, it appears the County gave little thought to protection

and preservation of public records. The County cannot have an "efficient and economical management" system related to the retention, preservation and disposal of public records when it has no system. As the County's former Information Technology Director, Dylan Snyder, testified, "from a management standpoint, it's once an email is deleted its deleted in a type of environment that Newberry County runs." (R. p. 210, lines 2-15).

Moreover, Ballard respectfully disagrees with the County's assertion that "[t]his is not a case of deleted emails, but rather a case of a failed computer." (County's Response Brief, p. 8). The County did not provide emails or text messages from any of Administrator Adams' phones. The County has provided its employees no guidance on when they should preserve emails as opposed to delete them. "[County] 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." (R. p. 38, ¶8). "As Mr. Tothacer testified, the only e-mail archiving done by [County] is what individual users do on their computers." Id., p. 39, ¶13.

Further, this was not a matter of cost. The County approved funds for email archiving *prior to* the "failed computer," but it was never implemented. (R. p. 209, line 25 - p. 211, line 3; p. 226, line 11 – p. 227, line 12; p. 285, lines 16-19; p. 287, line 21 – p. 288, line 17; p. 289, line 22 – p. 291, line 16; R. pp. 366-369). Had the County implemented the email back-up as approved, the emails sought under FOIA would, presumably, have been retained. This Court can take judicial notice that computer crashes are common, and there are simple and inexpensive back-ups available such as thumb-drives, CDs, and the cloud. Additionally, in Newberry County, there is no

guidance on what documents must be retained or, in the alternative, what documents cannot be actively deleted.

Lastly, while the County argues there is no evidence that County text messages fall within one of the required categories under the PRA, there is no way to make that determination as they do not save text messages in any way. (R. p. 39, ¶12).

The County's failure to preserve public records for FOIA compliance – whether under FOIA or the PRA - is a misfortune of its own creation. This Court should find that the lower court erred in determining that Ballard lacked standing to seek declaratory relief to require the County to preserve public records.

III. The Lower Court Erred in Failing to Award the Full Amount of Attorney Fees Sought.

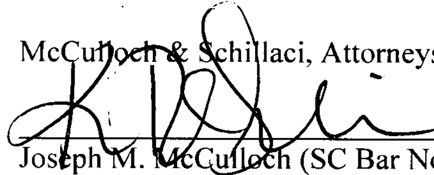
Should this Court find that Ballard has standing to seek relief for the County's failure to preserve documents as set forth above, then this Court should remand the issue of attorney fees to the lower court to determine the full amount of attorney fees to which Ballard is entitled.

CONCLUSION

For the reasons set forth above, Ballard requests the Court vacate the portion of the lower court's order concluding that Ballard lacked standing to seek an Order requiring the County to preserve public records to comply with the letter and spirit of FOIA. She further seeks a full award of attorney fees and costs.

Respectfully Submitted,

McCulloch & Schillaci, Attorneys at Law



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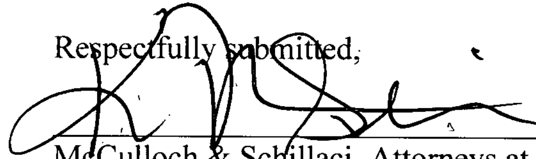
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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