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.

RESPONSE BRIEF OF APPELLANT/RESPONDENT, DESA BALLARD

McCulloch & Schillaci, Attorneys at Law

Joseph M. McCulloch (SC Bar No. 3760)
Kathy R. Schillaci (SC Bar No. 17248)
Post Office Box 11623
1513 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 779-0005
Fax: (803) 779-0666
joe@mccullochlaw.com
kathy@mccullochlaw.com

Attorneys for the Appellant/Respondent

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I. DID THE TRIAL COURT ERR IN FINDING THAT NEWBERRY COUNTY VIOLATED THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT BY FAILING TO PRODUCE RECORDS?

STATEMENT OF THE FACTS

On December 2, 2014, Appellant/Respondent Desa Ballard ("Ballard"), a licensed South Carolina attorney, made a request to Newberry County ("the County") for numerous documents in accordance with the Freedom of Information Act, S.C. Code Ann. Section 30-4-10 *et. seq.* ("FOIA"). (R. p. 37, ¶6). At the heart of the FOIA request was emails and text messages from the county administrator ("Administrator Adams") with the pre-March 2014 period of time the most relevant to Ballard, a fact she made known to the County. (Id., pp. 37-38, ¶¶4, 10).

The County produced some documents in response to the request but claimed it did not have or had not maintained a number of the documents Ballard requested. Specifically, the County informed Ballard that Administrator Adams' computer had crashed in March 2014 and those emails had not been archived. (R. p. 38 ¶9). In responding to the FOIA request, the county attorney "did not ask Administrator Adams for hard copies of his emails" and did not inspect his computer as "I trust Mr. Adams to do the search and provide me with everything that he found." (Id., ¶11; p. 567, line 21- p. 568, line 1). This is notable as Administrator Adams testified he was "not that familiar" with Ms. Ballard's FOIA request. (R. p. 229, line 20 – p. 230, line 2).

Ballard filed this action seeking declaratory and equitable relief under FOIA for the production of the public records along with other relief. As set forth in her Complaint:

> 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.

(R. pp. 50-51, ¶21). She further requested pursuant to 30-4-100(a) an order prohibiting the County from actively disposing of public records and requiring the preservation of those public records. (R. p. 51 ¶22).

There is no dispute that the County is a public body subject to FOIA, the records sought were public records subject to FOIA, and Ballard has a right to inspect public records. (R. p. 37, ¶¶2, 4-5). Administrator Adams selected the county attorney, Jay Tothacer, as the "point person" in responding to Ballard's FOIA requests. (Id., p. 38, ¶7).

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 County answered, "none." (R. p. 504, Response to Request to Produce No. 2). Although Administrator Adams testified that he may have conducted county business via text message, none were provided in response to Ballard's FOIA request. (R. p. 39, ¶12). The County does not archive or save text messages in any way. (Id.) Moreover, while the county attorney testified he checked Administrator Adams' current cell phone for relevant text messages, Mr. Adams has had several county cell phones and these were not checked. (R. p. 236, lines 11-14; p. 280, line 4 – p. 281, line 4; R. p. 562, line 15 – p. 563, line 14.) There appears to have been no search of Administrator Adams' cell phones for email. (R. p. 280, lines 4- p. 281, line 4).

As of the trial date, 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; R. p. 270, line 16 – p. 271, line 25; p. 273, lines 10-21). The County admits it has no policies concerning the preservation or archiving of emails or text messages. (R. pp. 38-39, ¶8, 12).

The County's former Information Technology Director, Dylan Snyder, sought and was granted funds for email archiving prior to the 2014 crash of Administrator Adams' computer. (R. p. 209, line 25 – p. 211, line 3; p. 226, line 11 – p. 227, line 12; p. 285, lines 16-19; R. pp. 366-369). However, while approved for the 2013-2014 budget year, the system was never implemented. (R. p. 287, line 21 – p. 288, line 17; p. 289, line 22 – p. 291, line 16).

Contrary to the County's assertion, the FOIA production that did occur was not timely. As part of her FOIA request, Ballard also requested non-privileged documents relating to *County of Newberry versus Abraham*. (R. p. 48, §10; R. pp. 359-364). These documents were not produced until after the filing of her Complaint. (R. p. 137, lines 14 – p. 138, line 5; R. pp. 359-364, pp. 367-369; R. pp. 81, 89-90).

Ballard requests this Court hold the trial court did not err in finding the County violated FOIA in failing to produce the emails and text messages.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN FINDING THAT NEWBERRY COUNTY VIOLATED THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT BY FAILING TO PRODUCE RECORDS

The FOIA Failure is Not Limited to the County Administrator's Crashed Computer

The County has artfully framed the issue as one involving public records that no longer existed at the time of the FOIA request and appears to limit its appeal "to documents that may have been on [the county administrator's] crashed computer." (Brief, p. 2, footnote 1). [1] The record does establish that the county administrator's ***computer*** was destroyed prior to the FOIA request. However, Ballard's FOIA request (for emails and text messages), requested relief, and the lower court's findings were not limited to one crashed computer. (R pp. 36-39, ¶¶1-14; R. pp. 50-51 ¶¶21-22). Due to the County's failure to put policies in place, there is no evidence as to *when* the public records – emails and text messages – were destroyed or purged aside from the date of one computer crash.

As the trial judge found, the county attorney as FOIA "point person" never asked Administrator Adams for **hard copies** of his emails and never inspected Administrator Adams' computer. (R p. 38, ¶11). The county attorney left it up to Administrator Adams

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[1] If this Court finds in favor of the County on its cross-appeal, which it should not, there will be no practical effect as it relates *to this case.* While the lower court found a violation of FOIA occurred as to the emails and text messages, it also found no relief was available and appears to have excluded the award of attorney fees and costs as it relates to the emails and texts as the issue "produced no benefit to Plaintiff." (R. p. 45). While cases are generally considered moot where there is no "practical legal effect upon the existing controversy," the public importance exception calls upon this Court to decide the issue for future guidance. *See* Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001), cert. denied, 535 U.S. 926 (2002); Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947). In addition, this issue is relevant to Ballard's request for (and award of) attorney's fees for bringing this action.

to provide responsive public records and yet, Administrator Adams testified he was "not that familiar" with Ms. Ballard's FOIA request. (R. p. 229, line 24 – p. 230, line 2).

Administrator Adams had multiple phones over the time in question 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).

The inability to determine or prove *when* public records were destroyed or deleted is a problem created by the County – not by Ms. Ballard. This is not a situation where the County purged public records (in this case emails and text messages on computers and phones) or failed to save them pursuant to established policy. The County has no document retention policy for public records in electronic form. (Id., p.38, ¶8). The County has no archiving policy for public records in electronic form. (Id.). Specifically, as it relates to electronic data (emails and text messages), the County readily admits it has no policies for retaining, archiving, purging, or FOIA compliance. (Id., pp. 38-39, ¶¶8, 12; R. p. 271, lines 8-16).

Similarly, this is not a situation where it followed FOIA guidelines or policies in responding to Ballard's requests. The County relied upon no FOIA policies, rules, or guidelines in responding to Ballard's FOIA requests. (R. p. 504, Response to Request to Produce No. 2). The issue here is broader than one crashed computer and this Court should not allow the issue to be so limited as the County suggests.[2]

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[2] Pursuant to Rule 220(c), SCACR. "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."

As such, this Court should find that the County violated the letter and spirit of FOIA in responding to Ballard's FOIA requests.

This Court Should Find on *De Novo* Review that Newberry County Violated FOIA by Failing to Produce Records.

The County argues that it has no obligation to produce what it doesn't have. This argument proves Ballard's point. A public body cannot intentionally or through neglect fail to preserve public records (and therefore violate the Public Records Act) as a means of avoiding its obligations to its citizens under FOIA. The situation here is wholly unlike the facts presented in *Kissinger*[3] or the several Attorney General opinions. Here, it is undisputed the records sought "are public records subject to FOIA." (R. p. 37, ¶4). Moreover, the lower court was presented with a situation where the 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)(emphasis added).

Even as late as the trial date with funding in place for email back-up, the County has not implemented its own solution for protecting public documents. As the trial judge found:

> 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.

(R. p. 39, ¶13)(emphasis added).

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[3] Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980).

The County will not correct the problem until it is required to do so by this Court. While the County paints the failure here as a "technical, computer malfunction," (County brief, p. 5) the failure does not lie in the hardware. The County had approved funding for computer back-up prior to the "computer malfunction" and yet, the county administrator failed to implement a back-up system. (R. p. 287, line 21 – p. 288, line 17; p. 289, line 22 – p. 291, line 16). Even after the problem was raised through litigation, there was no attempt to correct the problem or implement the approved budget for archiving county emails.

The County is essentially asking this Court to hold that it does not have an obligation to its citizens under the letter and spirit of FOIA to retain public records, which could include documents showing how and where public money is being spent. While it may be more comfortable for public officials to avoid scrutiny and work in the dark with public money and public trust, our democracy cries for accountability, accessibility, and competence. So does South Carolina law.

In South Carolina, FOIA is for the benefit of our citizens – not for the sole benefit the public bodies or the state government as a whole. South Carolina's General Assembly sets out its unambiguous intent that public records be made accessible. The FOIA statute 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.

As this Court held in Glassmeyer v. City of Columbia, "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). "The essential purpose of FOIA is to protect the public from secret government activity." Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014). The right to inspect and copy public records under FOIA presumes an effort by public officials to preserve and retain those records for inspection. *See* S.C. Code Ann. §30-4-10, *et. seq.*

The lower court, listening to the testimony and reviewing the evidence, found a violation of FOIA (R. pp. 36-39, ¶¶1-14). This Court, on *de novo* review, should liberally construe FOIA to require public bodies to carry out the vital purpose of FOIA as mandated by the General Assembly, and find that the County violated both the letter and spirit of this democratic safeguard.

If this Court agrees with the County that it was not obligated under FOIA to provide records that it successfully destroyed, it would incentivize public entities to intentionally (or otherwise) violate the Public Records Act, because there would be no remedy for the public and no consequence for the public entity. The County is essentially arguing that it told Ballard before she filed the lawsuit that it didn't have the documents, that Ballard did not have a right to file this action seeking documents or requesting a determination that the County had violated FOIA. Under the County's theory, a public entity need only respond to a FOIA request by saying, "we don't have those documents, sorry we violated the law," and the inquiry ends there. That is not what the General Assembly had in mind when it enacted FOIA. It is respectfully submitted that the FOIA

legislation was not intended to incentivize public entities to destroy public documents so they would not have to produce them.

CONCLUSION

For the reasons set forth above, Ballard requests that this Court find the lower court did not err in finding a violation of FOIA. Further, Ballard requests that in this technological age with text messages and emails on phones, that this Court not limit the issue on appeal to a single crashed computer.

Respectfully Submitted,

McCulloch & Schillaci, Attorneys at Law

Joseph M. McCulloch (SC Bar No. 3760)
Kathy R. Schillaci (SC Bar No. 17248)
Post Office Box 11623
1513 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 779-0005
Fax: (803) 779-0666
joe@mccullochlaw.com

Attorneys for Appellant/Respondent,
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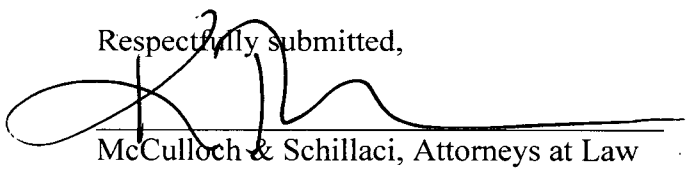
CERTIFICATE OF COUNSEL

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

Respectfully submitted,



McCulloch & Schillaci, Attorneys at Law

Joseph M. McCulloch (SC Bar No. 3760)
Kathy R. Schillaci (SC Bar No. 17248)
Post Office Box 11623
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Columbia, South Carolina 29201
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Fax: (803) 779-0666
joe@mccullochlaw.com
kathy@mccullochlaw.com

Attorneys for the Appellant/Respondent

June 7, 2018