THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2015-CP-36-00141

Desa Ballard..... Appellant/Respondent,

v.

Newberry County..... Respondent/Appellant.

APPELLANT'S BRIEF OF RESPONDENT/ APPELLANT NEWBERRY COUNTY

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STATEMENT OF ISSUE ON APPEAL

1. **Did the trial court err in finding that Newberry County violated the South Carolina Freedom of Information Act by failing to produce records that no longer existed on the date of the request at issue?**

STATEMENT OF THE CASE

On December 2, 2014, Desa Ballard submitted a request under the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10, *et seq.*, to Newberry County ("County"). (R. at 359-61). In that request, she specified that she was not seeking materials "that are protected by the attorney-client relationship or are otherwise privileged or materials that are exempt from disclosure by statutory law." (*Id.*). Item 7 sought electronic messages to or from the County Administrator, Wayne Adams, and members of County Council from 2010 through the date of the request. The County made several efforts at production through January and February 2015, ultimately producing approximately 2,000 documents. (R. at 37 (¶3), 605).

Ballard was dissatisfied with these responses, and on March 20, 2015, she filed a Complaint seeking declaratory relief for violations of FOIA and the South Carolina Public Records, Reports and Official Documents Act ("Records Act"), S.C. Code Ann. § 30-1-10, *et. seq.*, together with attorney's fees and costs. (R. at 47-62).[1] The Complaint alleges that the County's responses to items 6, 7, and 11 of the FOIA request were incomplete. The County answered on April 16, 2015, asserting a general denial and a defense that Ballard had failed to state a claim. (R. at 63-67).

The matter was tried without a jury on September 6-7, 2016. At that time, the parties reserved arguments and agreed to instead to submit proposed orders after receiving the transcript. (R. at 293). Following receipt of proposed orders, the trial court issued an order dated July 7, 2017. (R. at 4-13). Two amended orders followed pursuant to motions to reconsider made by the parties. (Amended Orders, R. at 20-30, 36-46). All three orders contain the same ¶ 14, which reads:

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[1] The County's appeal is limited to the trial court's finding in ¶ 14 of the Second Amended Order that there was a FOIA violation with respect to documents that may have been on Adams's crashed computer. The Statement of the Case and Facts here are limited to matters that bear on this issue.

> 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.

(R. at 7, 23, 39 (footnote omitted)).

Following receipt of the Second Amended Order on November 17, 2017 and Ballard's Notice of Appeal on November 27, 2017, the County served its Notice of Cross-Appeal on December 4, 2017 to challenge the legal finding in ¶ 14 which states that the County violated FOIA.

FACTS

For purposes of the County's appeal, the only facts that are relevant are those relating to the fate of Wayne Adams's computer in March 2014 and possible text messages between Adams and County Council. Ballard was informed of the crash in her initial phone call with the County attorney in December 2016 to discuss her FOIA request and in his follow-up letter to her. (R. at 128-29, 362-64).

The testimony at trial reflects that the computer crashed in March 2014 and emails from that computer were not archived on a separate server or other device at that time. (R. at 190, 195, 229, 38 (¶9)). Following the crash, County staff testified they examined the computer the same day and could not recover any data from the hard drive in-house as the motherboard and hard drive had both crashed. (R. at 192-93, 203-04, 38 (¶9)) (noting that County staff ran diagnostic tests on the computer and found that it was "completely toasted"). Staff further testified that he looked into sending the hard drive to a company in Asheville to recover the data and was told that would cost several thousand dollars and that even then it was doubtful whether anything would be recovered. (R. at 193-94) (stating with respect to recovery of data on an Apple hard drive, "the success rate on

those are slim to none"). The computer was sent to the landfill at that time. (R. at 195-97). These actions all occurred months before Ballard made her FOIA request in December 2014.

The record further reflects that the County produced emails after the March crash. (R. at 673-1196, 38 (¶9)). In addition, the evidence showed that the County produced emails from and to Adams in the pre-March 2014 time period when those emails could be found as hard copies or on the computers of other county employees. (*Id.*). In total, the County produced 139 emails from Adams. (R. at 673-1196).

With respect to text messages, the evidence is that Adams may have sent some, albeit "very seldom," but he did not archive them and they were not retained by his cell phone carrier. (Order at ¶ 12, R. at 230, 261, 39 (¶12)). There is no evidence that the County failed to produce any existing records in its possession.

ARGUMENT

The County does not challenge the trial court's factual findings, but instead challenges its conclusion of law that the County violated FOIA with respect to its production of documents in response to Ballard's request. (R. at 39(¶14)).[2] This Court "reviews all questions of law *de novo*." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). Based on the second sentence of ¶ 14 of the Second Amended Order, in which the trial court found "it appears from the evidence that such records were inadvertently destroyed," this finding relating to FOIA is limited to the documents lost when Adams's computer crashed in March 2014.

At trial, Ballard conceded the County's response was timely. (R. at 158). The County Attorney testified he believed the County had fully complied with this FOIA request. (R. at 599-

[2] The County raised these arguments to the trial court in the proposed order it submitted on October 12, 2016. (R. at 324-43).

600 ("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.")).

It is undisputed that the County produced responsive e-mails from Adams's post-crash computer (post-March 2014), 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 where available. (*See* R. at 673-1196). It is undisputed that the County produced 139 emails responsive to Item 7 of the FOIA request from the pre-crash period, totaling 376 pages and ranging in dates from May 2010 to December 2014. (*Id*). Regarding the text messages, the only testimony on this point comes from the County Attorney, who checked Adams's phone and found no responsive texts. (R. at 261). There is no evidence that the County failed to produce any responsive documents that remained in its possession, custody, or control at the time of the request.

The issue then becomes whether the County committed a FOIA violation when it failed to produce documents it no longer possessed due to a technical, computer malfunction. The trial court's sole citation in ¶ 14 is to S.C. Code Ann. § 30-4-100(a), which provides the general procedure for seeking declaratory relief under FOIA. It does not set forth a municipality's obligations with respect to responding to requests. Those obligations are found in S.C. Code Ann. § 30-4-30, which provides generally that "[a] person has a right to inspect, copy, or receive an electronic transmission of **any public record** of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules

concerning time and place of access." (emphasis added). For purposes of FOIA, a "public record" is defined as:

> "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, **owned, used, in the possession of, or retained by a public body**. Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act; nothing herein authorizes or requires the disclosure of those records where the public body, prior to January 20, 1987, by a favorable vote of three-fourths of the membership, taken after receipt of a written request, concluded that the public interest was best served by not disclosing them. Nothing herein authorizes or requires the disclosure of records of the Board of Financial Institutions pertaining to applications and surveys for charters and branches of banks and savings and loan associations or surveys and examinations of the institutions required to be made by law. Information relating to security plans and devices proposed, adopted, installed, or utilized by a public body, other than amounts expended for adoption, implementation, or installation of these plans and devices, is required to be closed to the public and is not considered to be made open to the public under the provisions of this act.

S.C. Code Ann. § 30-4-20(c) (emphasis added).

Both the right to inspect or receive "any public record" and the definition of "public record" contemplate the production of things that exist. They do not impose separate retention requirements, which are the subject of the Records Act.

Thus, the failure to produce documents that may have been "inadvertently destroyed" prior to a FOIA request does not constitute a FOIA violation. *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); 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) (indicating FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained") (quoted with approval in *Trask v. S.C. Dep't of Pub. Safety*, No. 2012-UP-623 (S.C. Ct. App. filed Nov. 21, 2012)). This is consistent with a party's discovery obligations to produce materials in their possession, custody, or control for purposes of Rule 34(a), SCRCP, which provides "[a]ny party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents, or electronically stored information (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.").

Quite simply, a public body, such as the County, cannot produce documents it does not have. Therefore, given the trial court's determination that the documents were "inadvertently destroyed" in March 2014 before Ballard's FOIA request in December 2014, it was error for the trial court to find there had been a FOIA violation with respect to those documents.

CONCLUSION

For these reasons, the County asks that the portion of the trial court's order finding a FOIA violation with respect to the "inadvertently destroyed" documents be reversed.

Respectfully submitted,

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