

THE 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

Thomas A. Russo, Circuit Court Judge

Case No. 2015-CP-36-00141

Desa Ballard..... Appellant/Respondent,

v.

Newberry County..... Respondent/Appellant.

**REPLY BRIEF OF RESPONDENT/ APPELLANT
NEWBERRY COUNTY**

HAYNSWORTH SINKLER BOYD, P.A.

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 I. THE COUNTY PRODUCED 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” THAT WERE RESPONSIVE TO BALLARD’S FOIA REQUEST. 1

 II. HAVING PRODUCED ALL RESPONSIVE PUBLIC RECORDS, THE COUNTY COMPLIED WITH FOIA. 2

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ARGUMENTS IN REPLY¹

- I. **The County produced 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” that were responsive to Ballard’s FOIA request.**

There is no finding that Newberry County (“County”) did not produce all of the public records (defined in S.C. Code Ann. § 30-4-20(c) as “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”) that were responsive to Desha Ballard’s request under the South Carolina Freedom of Information Act (“FOIA”, S.C. Code Ann. § 30-4-10, *et seq.*). Instead, the record and the trial Court’s orders reflect that the County produced approximately 2,000 documents, including 139 emails from the County Administrator, Wayne Adams, in the period before March 2014 that were either located as hard copies or on other users’ computers. (R. at 673-1196, 38 (¶¶ 3, 9, n.1)).

With respect to text messages, the evidence is that Adams may have sent some text messages relating to County business, albeit “very seldom,” but he did not archive them and they were not retained by his cell phone carrier. (R. at 230, 261, 39 (¶12)). In addition, the County Attorney checked Adams’s phone and found no responsive texts. (R. at 261). There is no evidence that any existing, responsive text messages were not produced.

With respect to Adams’s computer, the testimony at trial reflects that the computer crashed in March 2014, months before Ballard’s request. (R. at 185, 190, 229, 39(¶9)). Following the crash, County staff testified they examined the computer the same day and could not recover any data. (R. at 192-93, 203-04, 39(¶9)). The computer was sent to the landfill at that time. (Tr. at 85-87, R. at 195-97). As a result, there is no evidence that existing emails were not produced.

¹ The County incorporates here all arguments made in its Respondent’s brief.

II. Having produced all responsive public records, the County complied with FOIA.

Ballard has again failed to respond to the County's arguments relating to the language of FOIA and its definition of public records which contemplates existing documents ("prepared, owned, used, in the possession of, or retained by a public body"). As previously argued by the County, there is no document retention requirement in FOIA. There are requirements under state law relating to the keeping of public records, but those requirements arise under South Carolina Public Records, Reports and Official Documents Act ("Records Act," S.C. Code Ann. § 30-1-10, *et. seq.*), a separate statutory chapter.

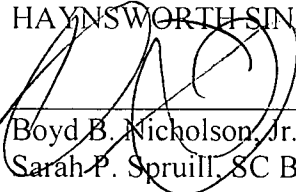
The County is not trying to "avoid scrutiny and work in the dark" as suggested by Ballard. It is simply seeking to clarify that it produced all of the public records in its possession as of the time of the request and therefore was in compliance with FOIA. Without citation to authority, Ballard has attempted to conflate FOIA and the Records Act to confer FOIA liability with respect to the keeping of public records. This is directly contrary to the separate and distinct statutory schemes enacted by the General Assembly.

CONCLUSION

For these reasons and those previously argued, the County asks that the portion of the trial court's order in ¶ 14 finding a FOIA violation be reversed.

Respectfully submitted,

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