THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT
Appellate Case No.: 2012-208787

J. C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No.: 2008CP1003308

Stephen George Brock, ... Appellant,

v.

Town of Mount Pleasant, ... Respondent.

REPLY OF APPELLANT

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I. RESPONDENT'S ARGUMENTS MISCHARACTERIZE THE FACTS.

Respondent's brief misstates facts as well as the legal issues raised by Appellant in this case. The gravamen of the Appellant's complaint, as set forth in Count I, is that the Town of Mount Pleasant frequently violates the South Carolina Freedom of Information Act (FOIA) by announcing matters to executive session and then, upon reconvening in open session, takes action on matters without prior notice to the public. Respondent mischaracterizes the issue to cast Appellant as objecting to amendments of executive session agendas. To that end, Respondent argues: "Appellant contends the actions of the Town in adding matters to executive session and acting on those matters in public session violate FOIA" and "the circuit court correctly concluded that such actions did not violate FOIA". (Respondent's Brief, pp.13-14)

Contrary to Respondent's mischaracterization, circuit court's order makes no mention of executive session agendas. The precise issue described in Count I of the Amended Complaint is Town Council's pattern of announcing matters for executive sessions for legal advice or discussion and then, upon reconvening to open session, taking formal action on such matters without notice to the public as required by 30-4-80 of the South Carolina FOIA. The Order recognizes and rules solely on matters added to "meeting agendas" for action without notice - as did the ruling made on Appellant's Motion for Reconsideration. [2] Respondent's persistent argument that Appellant's cause of action involves adding matters to "executive sessions" rather than unnoticed actions in open sessions is, perhaps, intended to escape this Court's recent decision in Lambries. Lambries v. Saluda County Council, 398 S.C. 501 (Ct. App. 2012).

In Lambries, Saluda County Council appears to have amended its agendas by

parliamentary process, albeit without 24-hour notice as required by FOIA Section 30-4-80. As distinguished from Lambries, and perhaps more egregiously, Respondent acted on matters without notice and without amendment to the meeting agenda. Such is the case at the December 5, 2007 meeting of Town Council the Respondent described. (Respondent's Brief, p.11) Respondent attempts to have it both ways, taking a convenient position on the notice requirement of FOIA. By focusing its brief on executive session agendas, Respondent enjoys the privilege of unrestricted amendment without notice; then, by taking the position of voting on "actions authorized" by executive session, Respondent improperly claims exemption from the notice requirements of FOIA. (Respondent Brief, p. 3) The Town of Mount Pleasant consistently ignored the notice requirements of Section 30-4-80 - which include agenda, 24 hours in advance of the meeting - by adopting the stratagem of listing a matter for executive session only and then voting on it in the open meeting without notice. This practice is a clear violation of FOIA.

Respondent states, "Appellant contests"..... "actions authorized" by executive sessions. Respondent's theory offered at trial was that a published executive session agenda and/or announcement serves sufficient public notice for action following an executive session based on "implied" notice of action to follow the session (R. 92-102; 370-372). Contrary to the Town's argument, FOIA clearly provides that no actions may be authorized from or by an executive session. S.C. Code Section 30-4-70. As a result, no notice of action can be imputed merely because an item is listed for discussion in executive session.

With regard to the issue of failure to provide the specific purpose of matters for executive session, Respondent uses the terms "purpose" and "specific purpose" interchangeably. Appellant's Complaint cited the failure of Respondent to announce the "specific purpose" of an

executive session, a requirement that came with the 1987 amendment to FOIA, replacing the more general requirement for announcement of "purpose" in the earlier version. Respondent's reliance on Herald is misplaced. Herald Publishing Company, Inc., v. City of Barnwell, 291 S.C. 4, 351, S.E.2d 878, Ct. App 1986). Quality Towing and not Herald is controlling here. Quality Towing v. City of Myrtle Beach, 345 S.C. 156, 547 S.E. 2d 862, 2001. Respondent's argument fails to account for the meeting of Town Council on August 14, 2007 where following executive session, Town Council voted without notice to allow each member of Town Council to hire individual attorneys at Town expense. The matter was not announced as a specific purpose of the executive session as required by Section 30-4-70, nor was it noticed by the meeting agenda as required by Section 30-4-80.

Respondent's claim that executive sessions were scheduled "from time to time" at special meetings "so as not to inconvenience the public" is accompanied by the claim that "it is not unusual for Council meetings to last as late as 11PM". (Respondent's Brief, p. 3) During the period covered by this action (July 2008 to June 2009) no Town Council meetings lasted until 11PM. The latest meeting during that period ended at 10:07 PM.

II. RESPONDENT MISCHARACTERIZES THE TRIAL COURT'S RULING ON STANDING AS TO RECORDS RETENTION.

As to the issue of Appellant's standing regarding South Carolina Records Retention Act (RRA), at trial Respondent argued that the RRA allowed no private cause of action, however, the trial court implicitly found standing. Based on testimony and the depositions of the two Council members that e-mail was routinely deleted without restrictions or criteria, Respondent was

enjoined "to assure compliance" with the RRA, preventing further destruction of public records. Respondent did not appeal the injunction or the implicit finding of standing. The protection of public records provided by the Court in this case affirms the failure of Respondent to establish an e-mail public records policy prior to the filing of this case, as well as the beneficial result of Appellant's litigation.

III. RESPONDENT'S ARGUMENTS DO NOT STAND UP TO THE OVERRIDING INTENT AND PURPOSE OF FOIA.

Arguing the events of the December 5 meeting of Town Council, (Respondent's Brief, p. 19), Respondent attempts to resurrect "ratification" as it existed before the 1987 amendments to FOIA. It characterizes FOIA violation as "mistakes" rather than violations of a statute. Absence of a "cure" (ratification), it is alleged, will result in public bodies "powerless to correct mistakes" and "frustrate the ability of public bodies to attend to the to the efficient and effective conduct of the public's business" producing an "anathema to sound public policy". At the December 5 meeting, a contract approved by Respondent was clouded by a FOIA violation. At a subsequent, properly noticed meeting (December 17, 2007) only the defective contract was cured. It does not erase the FOIA violation and a finding of a violation certainly does not leave the Respondent powerless to correct its mistakes. It merely holds the Respondent accountable for the violation.

Respondent has sought to justify its violations of FOIA by various other interpretations of facts and law along with justifications of its action such as "not to inconvenience the public", the "best interests of the public" (R. 322) and for the "good of the public". (R. 369-370).

Modification of this or any statute is a function of the legislature, not the individual municipality. Regardless of the burden the Town perceives is imposed by FOIA, this is simply not the proper venue for it to complain:

> City Council contends that the outcome is unduly burdensome. Even if we agree with City Council's proposition, the General Assembly, based on its findings that public decision-making is vital to the functioning of the democratic process, has chosen to impose this burden on public agencies and City Council should direct that argument to the General Assembly rather than the courts.

Reading Eagle Co. v. Council of Reading, 627 A.2d 305, 307(Pa.Comm.1993).

CONCLUSION

Based on the foregoing, the relevant portions of the lower court's decision should reversed.

Respectfully submitted,

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December 18, 2013.

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CERTIFICATE OF COUNSEL

I certify that the Reply Brief of Appellant complies with Rule 211(b).

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CERTIFICATE OF SERVICE

I certify that I have on the 18th day of December, 2013, served the Final Brief of Appellant and Reply on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as follows:

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