

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS FOR COUNTY OF AIKEN
THE SECOND JUDICIAL CIRCUIT

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SC Court of Appeals

HERMAN PERRY HOLCOMB)
Plaintiff,)
)
vs.)
)
CITY OF NORTH AUGUSTA,)
and MAYOR AND CITY)
COUNCIL OF NORTH AUGUSTA,)
Defendants.)
_____)

CIVIL ACTION FILE NO: 18-CP02-02705

ORDER

Date of Hearing: January 15, 2019
Presiding Judge: The Honorable Clifton B. Newman
Plaintiff's Attorney: Dionè C. Carroll, Esq.
Defendants' Attorneys: Danny C. Crowe, Esq.
Kelly F. Zier, Esq.
Court Reporter: Brenda J. Sigwald

THIS action came before this Court for an initial hearing, pursuant to Plaintiff's Amended Complaint brought under the South Carolina Freedom of Information Act ("FOIA") as codified in sections 30-4-10 to 30-4-165 of the South Carolina Code, including section 30-4-100, which requires an initial hearing within 10 days of service on all the parties in FOIA cases. The Amended Complaint seeks declaratory and injunctive relief associated with alleged inconsistencies with FOIA arising from the May 7, 2018 meeting of the City of North Augusta City Council.

The Court has jurisdiction over the parties and the subject matter of this action. The Defendants were properly served with the Summons, Complaint and Amended Complaint and associated documents. The parties were properly served with the Date, Time, and Place of the Hearing.

This Court held a hearing on January 15, 2019. The Plaintiff was present and represented by his above-referenced attorney. The Defendants were represented by the above referenced attorneys. Both parties presented testimonial and documentary evidence for the Court's consideration, and counsel for both parties made argument with respect to the issues raised by the request for declaratory and injunctive relief under FOIA.

Based upon an examination of the file and evidence presented, I make the following:

FINDINGS OF FACT

I find that the Plaintiff gave and Defendants received proper notice. I find that this Court has subject matter jurisdiction of this matter and personal jurisdiction over Plaintiff and the Defendants. I find that the requirements of the FOIA and South Carolina Rules of Civil Procedure and all other statutory and common law procedural requirements necessary to bring suit under FOIA have been met to the extent necessary to accomplish the relief ordered herein.

Defendants do not have a policy regarding the composition of City of North Augusta agendas. See Tr. at 70-71. And, FOIA does not contain a definition for "agenda." Plaintiff contends that Plaintiff's Exhibit 6, entitled the "Regular Agenda of May 7, 2018," constitutes the complete agenda for the May 7, 2018 City of North Augusta City Council meeting. Tr. at 6; Tr. at 49-52. On the City's web site, the link to this document is called Agenda 050718 Complete. See Plaintiff's Exhibit 4; Tr. at 49.

Defendants contend that Defendants' Exhibit 1 is the "agenda" for the City Council meeting held on May 7, 2018. Defendants' Exhibit 1 is a single page which can be found within Plaintiff's Exhibit 6. See Answer to Amended Complaint at ¶ 8; see Plaintiff's Exhibit 5; see Defendants' Exhibit 1; see Tr. at 49. Plaintiff takes the view Defendants' 1 is a less detailed

version of the agenda and that to see the full agenda you need to view the full Agenda 050718 Complete document posted on the City's web site. See Tr. at 49.

The Defendants assert that Plaintiff's Exhibit 6 is an "agenda packet" within the meaning of S.C. Code of Regulations R. 12-604.3 rather than an "agenda." See Answer to Amended Complaint at ¶ 8; Plaintiff's Exhibit 5; Defendants' Exhibit 1. However, Defendants' alleged "agenda packet" can be found on its web site at a link entitled "Agenda 050718 Complete." On its cover, the Agenda 050718 Complete is called the "Regular Agenda of May 7, 2018." Plaintiff's Exhibit 6. And, nothing in the Plaintiff's Regular Agenda of May 7, 2018 says it is an "agenda packet." Tr. at 50; see Plaintiff's Exhibit 6.

Plaintiff further contends that the Defendants amended and added to the agenda in violation of FOIA during the May 7, 2018 meeting of the City Council when it added an entirely new project to the complete agenda without adequate notice or findings. Tr. at 6-8; Tr. at 56; see Plaintiff's Exhibit 6; see Plaintiff's Exhibit 7. The New Savannah Bluff Lock and Dam Project was added to the list of projects contemplated by Resolution 2018-11 scheduled to be considered at the May 7, 2018 meeting of the City Council on the day of the meeting. Tr. at 6-8; Tr. at 49 - 56; Plaintiff's Exhibit 7; see Plaintiff's Exhibit 6.

The New Savannah Bluff Lock and Dam Project had never before been presented at a City of North Augusta City Council meeting as a possible project to be paid for with the anticipated continuation of the Capital Projects Sales Tax as contemplated by the Resolution 2018-11. See Tr. at 55. It was discussed for the first time in the City Council's Study Session, which was held one hour before the regular City Council meeting. See Tr. at 55.

Final action was taken on the agenda item at the May 7, 2018 meeting to amend and pass Resolution 2018-11 and submit the list of projects to the Aiken County Sales Tax Commission for inclusion in the 2018 referendum. Tr. 54-55; see Exhibit 7. The final action taken included adding the brand new New Savannah Bluff Lock and Dam Project to the complete agenda. Tr. at 54-55; see Plaintiff's Exhibit 6, "Regular Agenda of May 7, 2018," at Resolution 2018-11; cf. Plaintiff's Exhibit 7, Minutes of May 7, 2018 (amending the list of projects to add "New Savannah Bluff Lock and Dam" and passing the Resolution as amended).

The City of North Augusta is required to publish its City Council Agendas on the web site. Tr. at 71. Defendants presented the Regular Agenda of May 7, 2019 as a complete agenda on its web site. It amended the complete agenda when it added the New Savannah Bluff Lock and Dam Project to the list of projects contemplated by Resolution 2018-11. It did so without twenty-four hours prior notice or a finding of emergency or exigent circumstances. Tr. at 54-56; see Plaintiff's Exhibit 7. Final action was taken with respect to the agenda item on May 7, 2018. Tr. at 55; Plaintiff's Exhibit 7.

CONCLUSIONS OF LAW

A. THE PURPOSE OF FOIA IS TO PROTECT THE PUBLIC BY PROVIDING DISCLOSURE OF INFORMATION. DISCLOSURE IS THE DOMINANT OBJECTIVE OF THE ACT, AND THE ESSENTIAL PURPOSE OF FOIA IS TO PROTECT THE PUBLIC FROM SECRET GOVERNMENT ACTIVITY.

The South Carolina Freedom of Information Act ("FOIA") is codified as sections 30-4-10 to 30-4-165 in the South Carolina Code. See S.C. Code Ann. §§ 30-4-10 to 30-4-165. Our Legislature explicitly provided in enacting FOIA that disclosure is the dominant objective of the Act. Specifically, the Act says:

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 persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15.

According to Burton v. York Cty. Sheriff's Dep't, 358 S.C. 339, 347, 594 S.E.2d 888, 892 (Ct. App. 2004),

The essential purpose of the FOIA is to protect the public from secret government activity. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); see also Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001) ("FOIA was enacted to prevent the government from acting in secret."); Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 535 n.4, 500 S.E.2d 783, 785 n.4 (1998) (noting that "the purpose of the FOIA is to protect the public from secret government activity").

The FOIA meets the demand for open government while preserving workable confidentiality in governmental decisionmaking. Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991); Campbell, 354 S.C. at 281, 580 S.E.2d at 166.

Burton v. York Cty. Sheriff's Dep't, 358 S.C. 339, 347, 594 S.E.2d 888, 892 (Ct. App. 2004).

South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government. See Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). Last minute agenda changes are inconsistent with this obligation. FOIA creates an affirmative duty on the part of public bodies to disclose information. Bellamy, 305 S.C. at 295, 408 S.E.2d at 221; Campbell, 354 S.C. at 281, 580 S.E.2d at 166. The purpose of the FOIA is to protect the public by providing for the disclosure of information. Id. FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. Campbell, 354 S.C. at 281, 580 S.E.2d at 166; Burton v. York Cty. Sheriff's Dep't, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004). It has also been recognized that any exception to FOIA's

applicability must be narrowly construed. Evening Post Publ'g Co. v. City of North Charleston, 363 S.E. 452, 457, 611 S.E.2d 496, 499 (2005).

B. FOIA REQUIRES THAT AN AGENDA MUST BE POSTED ON A PUBLIC WEBSITE FOR REGULARLY SCHEDULED MEETINGS. NO ITEMS MAY BE ADDED TO THE AGENDA WITHOUT AN ADDITIONAL TWENTY-FOUR HOURS NOTICE WITHOUT A TWO-THIRDS VOTE AND A FINDING OF EMERGENCY OR EXIGENT CIRCUMSTANCES.

Pursuant to the FOIA, every meeting of all public bodies shall be open to the public unless closed pursuant to section 30-4-70 of the FOIA Chapter. S.C. Code Ann. § 30-4-60. And, although FOIA did not always, by direction of the legislature in 2015 by Act No. 70 of 2015, FOIA now requires agendas for regularly scheduled meetings and sets forth a specific procedure for amending agendas during meetings. S.C. Code Ann. § 30-4-80(A); see Brock v. Town of Mount Pleasant, 415 S.C. 625, 629 n.4, 785 S.E.2d 198, 201 (2016).

South Carolina Code section 30-4-80(A) requires of a public body in part that,

An agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings. . . . Once an agenda for a regular, called, special, or rescheduled meeting is posted pursuant to this subsection, no items may be added to the agenda without an additional twenty-four hours notice to the public, which must be made in the same manner as the original posting. After the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, it only may be added to the agenda by a two-thirds vote of the members present and voting and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda.

S.C. Code Ann. § 30-4-80(A)(emphasis supplied). And, S.C. Code Ann. section 30-4-100(A)

allows:

A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later.

S.C. Code Ann. §30-4-100(A).

Defendants admit an agenda was posted in advance of the meeting. See Answer to Amended Complaint. The statute requires that the agenda be posted on a website maintained by the City. The City posted both a summary agenda and what it represents as an agenda 050718 complete on its website. Neither the complete agenda identified by Plaintiff as the agenda nor the shorter document identified as the agenda by Defendants at trial included any reference to the New Savannah Bluff Lock and Dam. See Plaintiff's Exhibit 6, the "Regular Agenda of May 7, 2018." The Act requires twenty-four hours notice to add items to an agenda. See S.C. Code Ann. § 30-4-80(A). No new or additional notice was given before the May 7, 2018 hearing.

After the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda. See S.C. Code Ann. § 30-4-80(A). Although the first prong, a two-thirds vote, appears to have been satisfied, no finding was made by the body that an emergency or an exigent circumstance existed. See Plaintiff's Exhibit 7, Minutes of May 7, 2018. Without satisfying both prongs, the amendment attempted by the Defendants at the May 7, 2018 City Council meeting violates FOIA, entitling Plaintiff to declaratory and injunctive relief and consequently attorney's fees and costs. Cockrell v. Trs. of Dist. 20 Constituent Sch. Dist., 299 S.C. 155, 156, 382 S.E.2d 923, 924 (1989)(under section 30-4-100 the only prerequisite to an award of attorney fees and costs is that the party seeking relief must prevail, in whole or in part).

Since Defendants told the public on the City website there was a complete agenda, by calling the document agenda 050718 complete, it was only reasonable for the public to rely on that document in preparing for a meeting. In fairness, and the spirit of the liberal construction required when applying FOIA, Defendants must treat what they call an “agenda” on their website as an agenda for FOIA purposes. The complete agenda was amended by the Defendants at the City Council meeting when it added the New Savannah Bluff Lock and Dam Project. Twenty-four hours notice was not given, and no finding that an emergency or an exigent circumstance existed was made. Defendants have, therefore, violated FOIA and are subject to declaratory and injunctive relief.

CONCLUSION

The public and the people who make up the public, like Plaintiff Holcomb, have a right to know. Taxpayers have a right to know how their government is functioning. They have a right to attend public meetings, to obtain public records at the lowest possible cost and the right to know how the tax money they pay is being spent.

When a City like the City of North Augusta presents its agenda in a way that misleads, it undermines FOIA. Defendants made up a detailed agenda it called “Regular Agenda of May 7, 2018.” Defendants put the Regular Agenda of May 7, 2018 on the City website under a tab called “Agenda 050718 Complete.” Defendants included in this complete agenda an apparent comprehensive list of projects, never mentioning any other project that might be added, and never having a prior publicly noticed meeting where the possibility of the New Savannah Lock and Dam Project being added was discussed until the hour before the City Council meeting. In this manner, Defendants gave Plaintiff and other members of the public confidence that they

knew what was on the agenda, thus providing comfort that the decision that was being made was clear and not a secret.

Then, without warning or adequate legal notice, Defendants suddenly added a very significant project. It did so on the day final action was taken, during a City meeting. And, it amended the list of projects without making a finding of emergency or exigent circumstances. In this manner, Defendants violated FOIA and failed to fulfill their obligations to the public and the Plaintiff.

For the foregoing reasons this Court declares the conduct of Defendants in amending a document represented to the public as an agenda to add an item, without adequate process, a violation of FOIA. It enjoins¹ Defendants from future similar violations, and awards Plaintiff reasonable attorney's fees and costs.

IT IS SO ORDERED.

_____, 2019
Aiken, South Carolina

Clifton B. Newman
Presiding Judge

¹ This is not the first FOIA violation by the City of North Augusta that has been addressed by the courts. See Donahue v. City of N. Augusta, 412 S.C. 526 (SC 2015). The court may order equitable relief as it considers appropriate. A violation of FOIA must be considered irreparable injury. Burton v. York Cty. Sheriff's Dep't., 358 S.C. at 355.



Aiken Common Pleas

Case Caption: Herman Perry Holcomb VS North Augusta City Of , defendant, et al
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So Ordered

s/ Clifton B. Newman, 2127

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