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.

RESPONDENT'S BRIEF OF RESPONDENT/ APPELLANT NEWBERRY COUNTY

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STATEMENT OF ISSUES ON APPEAL

1. **Did the trial court correctly rule that the South Carolina Public Records, Reports and Official Documents Act does not provide a private right of action because it does not contain any language creating an express right of action nor can such a right be implied?**

2. **Did the trial court abuse its discretion in providing a less than total attorney's fee award in this case where the Appellant/ Respondent achieved less than total recovery on her claims?**

ARGUMENT[1]

It is undisputed that Newberry County (the "County") produced all of the documents in its possession that were responsive to Desa Ballard's ("Ballard") December 2, 2014 South Carolina Freedom of Information Act ("FOIA," S.C. Code Ann. § 30-4-10, *et seq.*) request. There is no finding to the contrary in any of the trial court's orders. As noted by the trial court, this production totaled 2,000 documents, which included 139 e-mails from or to the County Administrator. (R. at 37 (¶3), 673-1196). The crux of this dispute is whether relief is available under FOIA with respect to documents that no longer existed due to the crash of the County Administrator's computer in March 2014.

In its Appellant's brief, the County presented its arguments relating to its argument that FOIA does not reach documents that no longer exist. Ballard has argued in her Appellants' brief that she is seeking relief as to these documents under FOIA, that she has standing to do so, and that the trial court erred in failing to award her a recovery for all of her claimed attorney's fees in this action.

I. FOIA only applies to a "public record." Here, there is no evidence that the County failed to provide any material "owned, used, in the possession of, or retained by" the County at the time the request was made on December 2, 2014.

Ballard has argued she did not seek relief under the South Carolina Public Records, Reports and Official Documents Act ("Records Act," S.C. Code Ann. § 30-1-10, *et. seq.*), but rather under FOIA. For the reasons set forth in its Appellant's brief, the County disagrees that any relief is available.

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[1] The County incorporates by reference the Statements of the Case and Facts included in its Appellant's brief. It does not acquiesce to Ballard's "Statement of the Case" found in her Appellant's brief.

FOIA provides in S.C. Code Ann. § 30-4-30 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**. . . .

S.C. Code Ann. § 30-4-20(c) (emphasis added). The language of these two sections is geared toward the production of existing items and FOIA does not impose any independent retention schedules on public bodies. For this reason and as further set forth in its Appellant's brief, the County contends that Ballard is not entitled to relief under FOIA with respect to the items in question. There is no evidence in the record that the County failed to produce "any public record" responsive to Ballard's request.

II. There is no private right of action under the Records Act and, even if there were, the testimony shows that the County complied with the Records Act requirements.

The specific issue of whether Ballard could pursue a claim for failure to retain documents was repeatedly raised by the County, starting with its memorandum in opposition to Ballard's motion for summary judgment. (R. at 73-76). Following the denial of that motion at the trial of this matter, the parties reserved arguments and agreed instead to submit proposed orders after receiving the transcript. (R. at 293). Both proposed orders addressed the issue of whether Ballard could pursue relief under the Records Act. (R. at 332-33, 351-52 (¶20)). Thus, this issue was squarely before the trial court and there was nothing *sua sponte* about the trial court's order on this point.

Ballard argues that she has standing under FOIA to address concerns under the Records Act, but this argument fails to address the underlying ruling by the trial court that there is no private right

of action under the Records Act. (R. at 16, 39-41). When Ballard raised these standing arguments to the trial court, the trial court responded, "[a]lthough the Court appreciates Plaintiff's well-reasoned argument, it is not persuaded that the Legislature created a private right of action for individuals under the Public Records Act . . . ." (R. at 16). Thus, the underlying issue is not a basic standing question but rather whether relief is available to Ballard under Records Act.

The Records Act, however, does not create a private right of action, and nothing in FOIA changes this conclusion. In addition, the Records Act does not provide any requirements relating to the retention of the items Ballard sought, so even if she had the ability to pursue a FOIA claim for Records Act violations, there is no Records Act violation.

A. The Records Act and FOIA are not the same statutory scheme, and the trial court correctly found that there is not a private right of action under the Records Act.

The question of whether the legislature intended to create a private cause of action for either violation of a statute or failure to perform a statutory duty is determined based on the statute itself. *Patterson v. I.H. Servs. Inc.*, 295 S.C. 300, 368 S.E.2d 215 (Ct. App. 1988). The primary consideration in deciding whether a private cause of action should be implied under a statute is legislative intent. *Dorman v. Aiken Commc'ns, Inc.*, 303 S.C. 63, 398 S.E.2d 687, 689 (1990); *Whitworth v. Fast Fare Mkts. of S.C., Inc.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985). "Where a statute does not specifically create a private cause of action, one can be implied **only if the legislation was enacted for the special benefit of a private party**." *Adkins v. South Carolina Dept. of Corrections*, 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004) (emphasis in original, quoting *Citizens for Lee County v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)).

The Records Act was passed in 1973 for the benefit of all South Carolinians to protect the public records of this State "which has suffered repeated loss of her records by fire, theft, neglect, and the ravages of war . . . ." Act No. 291, 1973 S.C. Acts 350. The penalties provision

of the Records Act is criminal in nature only. S.C. Code Ann. § 30-1-140. In addition, "the legal custodian of the public records or the Director of the Archives may apply by verified petition to the court of common pleas in the county of residence of the person withholding the records and the court shall upon proper showing issue orders for the return of the records to the lawful custodian or the Director of the Archives." S.C. Code Ann. § 30-1-50. The Records Act does not otherwise create a private, civil right of action, nor can one be implied given its general purpose for the benefit of all South Carolinians. As found by the trial court, "[i]f the legislature intended for a private right of action, it could have easily stated so, and the fact that such language is missing from the statutory scheme indicates a legislative intent to not create a private right of action." (R. at 40).

FOIA was separately enacted in 1978. Act No. 593, 1978 S.C. Acts 1736. Unlike the Records Act, FOIA includes a provision allowing a private, civil action in S.C. Code Ann. § 30-4-100. The remedy provided FOIA is designed "to enforce the provisions **of this chapter** . . ." *Id.* (emphasis added). There is no reference to the earlier enacted Records Act, which is not contained within the same chapter as FOIA. Thus, it cannot be presumed that FOIA creates a right of action for enforcement of the Records Act. Ballard's arguments to the contrary ignore the plain language and intent of both statutes. There is nothing inconsistent or absurd about this construction of these statutes. Each creates separate obligations for public bodies, and each provides different mechanisms for enforcement of those obligations.

The case of *Brock v. Town of Mount Pleasant*, 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2014), *aff'd. as modified*, 415 S.C. 625, 785 S.E.2d 198 (2016), is consistent with these arguments. There, the town's obligations were addressed under FOIA with respect to public

notice and the handling of executive session and this Court separately found no obligation under the Records Act with respect to deleted emails.[2]

None of the standing doctrines argued by Ballard give rise to a private right of action under the Records Act. Therefore, the trial court's ruling must be affirmed.

B. There is no evidence showing the County violated the Records Act.[3]

The Records Act does not dictate how a local government should preserve records. Instead, the Records Act states:

> A records management program directed to the application of **efficient and economical management** methods and relating to the creation, utilization, maintenance, retention, preservation, and disposal of public records must be established and administered by the Archives...The head of each agency, the governing body of each subdivision, and every public records custodian shall cooperate with the Archives in complying with the provisions of this chapter and to establish and maintain an active, continuing program for the **economical and efficient management** of the records of the agency or subdivision."

S.C. Code Ann. § 30-1-80 (emphasis added). Thus, the Records Act recognizes that local governments like the County may consider economy and efficiency in determining how to protect and preserve their records. This reflects the practical realities faced by each county and honors the spirit of Home Rule. *See* S.C. Code Ann. § 4-9-25 (codifying Home Rule for counties); *see also Hospitality Ass'n. of South Carolina v. County of Charleston*, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995) (finding that Home Rule is the legislature's "realization that different local governments have different problems that require different solutions. . . . By

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[2] The South Carolina Supreme Court declined to grant certiorari as to the Records Act issue. *Brock v. Town of Mount Pleasant*, S.C. Sup. Ct. Order dated August 19, 2015.

[3] The County presents this argument pursuant to Rule 220(c), SCACR, which provides that this Court may affirm for any reason appearing in the record.

enacting statutes like § 4-9-25 . . . the General Assembly gave local governments the power to deal with these problems at the local level rather than at the State Capitol.").

At trial and in her proposed order, Ballard argued that the County violated the Records Act in three particulars: (1) not adopting its own document retention policy; (2) not properly backing up or archiving e-mail; and (3) not archiving text messages. She did not establish and the trial court did not find a violation of the Records Act under any of these theories. Therefore, even assuming Ballard could pursue a claim for violation of the Records Act, the trial court did not err in declining to rule in Ballard's favor.

1. The Records Act does not require the County to enact its own document retention policy.

Ballard argued that the County failed to enact its own document retention policy. The Records Act, however, does not require that the County promulgate such a policy. Instead, the Records Act allows a county to either follow the State Archive's document retention policy or adopt its own policy. *See* S.C. Code Ann. § 30-1-90(B) ("[G]eneral schedules for records series common to agencies and subdivisions may be issued by the Archives. Agencies and subdivisions must be allowed to opt out of these general schedules and proceed pursuant to the provisions of subsection (A) in the establishment of specific records schedules."); *see also* S.C. Code Ann. Regs. 12-500 ("These general schedules supersede all schedules approved previously for the same records series. However, county governments may opt out of these general schedules and request the continuing use of existing schedules or the establishment of specific retention schedules for their records when appropriate, necessary, or in order to avoid conflict with other laws or regulations."). Ballard conceded as much in her testimony. (R. at 179-80). The testimony demonstrated that the County chose to follow the State Archive's Document Retention

Policy rather than adopt its own. (R. at 234, 268). Thus, this was not a violation of the Records Act.

2. The Records Act does not require the County to archive e-mails.

Ballard also argued that the County did not properly back up or archive its e-mails. The Records Act does not mandate that local governments like the County store e-mail in any particular manner, or even that they maintain copies of e-mails. Indeed, the Records Act does not address storage of e-mails at all. Instead, the Records Act requires that local government adhere to minimum requirements relating to the construction of the facilities in which public records are kept, the environment surrounding these records, and the security and protection that local government is to provide. *See* S.C. Code Ann. Regs. 12-1002 ("Any facility or area thereof in which the records of a South Carolina public body are maintained shall meet the following minimum standards" with respect to (A) Construction, (B) Environment and (C) Security/Protection.). The County Administrator testified that the County met these standards (R. at 222-25), and Ballard offered no evidence to the contrary. Thus, as shown by the evidence, the County was in compliance with the minimum standards for records preservation.

Ballard has not presented any regulation or other South Carolina authority directing how e-mails must be kept during any applicable retention period. This is not a case of deleted e-mails, but rather a case of a failed computer. There is no basis under South Carolina law for imposing FOIA liability or finding a Records Act violation given these circumstances. Situations like this may be part of the reason the General Assembly has kept a public body's duties with respect to records separate from its duties under FOIA—the Legislature does not want to create civil liability when misfortune befalls a public body resulting in the loss of records whether it be fire, flood, or computer crash.

3. There is no evidence that the County violated the Records Act in its handling of text messages.

Ballard also argued that the County should have archived text messages. Again, this argument was unsupported by the evidence and South Carolina law. With respect to correspondence, the Document Retention Schedule for Counties under the Records Act describes three categories of documents – (1) Policy and Program Records[4] that must be stored permanently, (2) General Administrative Records[5] that must be stored for five years, and (3) General Housekeeping Files[6] that must be stored until no longer needed for reference. S.C. Code Ann. Regs. 12-503.15.

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[4] Policy and Program Records are defined as records which "document the formulation and adoption of policies and procedures and the implementation or management of the programs or functions of the office or department. Included are such records as correspondence with citizens and government officials regarding policy and procedures development or program administration; annual or ad hoc narrative or statistical reports on program activities, achievements or plans; organizational charts and mission statements; studies regarding department or office operations; circular letters, directives or similar papers addressed to subordinate units or staff concerning policies, procedures, or programs; and records related to significant events in which the department or office participated. Records may include photographs, published material, audio tape, or other record forms. S.C. Code Ann. Regs. 12-503.15(1).

[5] General Administrative Records are defined as "records ... of a general facilitative nature created or received in the course of administering programs. Included are such records as correspondence of a routine or repetitive type, such as request for information; reference materials, sometimes of a technical nature, used, but not created by, the office; daily, weekly, or monthly office activity reports which are summarized in annual reports or which relate to routine activities; personnel data on office staff which are duplicated in personnel office files; purchase orders, travel expense statements or similar financial papers which are duplicated in fiscal office files; daily or weekly work assignments for office staff; suspense or follow up files which duplicate copies of papers filed elsewhere; circular letters, directives or similar papers received from other offices; and rough drafts or notes created in compiling reports or studies. S.C. Code Ann. Regs. 12-503.15(1).

[6] General Housekeeping Files are defined as "records ... of a general 'housekeeping' nature created or maintained by an office which do not relate directly to the primary program responsibility of the office. Included are such records as charitable fund raising drive materials; custodial services request; emergency evacuation procedures; notices of holidays; parking space assignment lists; telephone installation requests; and lists showing the distribution of keys." S.C. Code Ann. Regs. 12-503.15(3).

The testimony in the record showed and the trial court found that the County "very seldom," if ever, conducted business via text. (R. at 230, 39 (¶12)). Even if the County on occasion conducted business via text, there is no evidence that these texts implicate any of the required categories above that must be archived. Thus, Ballard did not show a violation of the Records Act related to text messages.

For all of these reasons, there was not a basis for Ballard to recover on any theory relating to the emails from the County Administrator's crashed computer or possible unarchived text messages. The County, after a diligent search, produced what it had in its possession, and in doing so, satisfied its FOIA obligations.

III. The trial court's attorney's fee award should remain in place.

Ballard was not fully successful in this matter. In fact, she was awarded relief only on her argument relating to executive sessions of County Council for which the purpose was not properly announced. She did not receive any recovery with respect to the County's production pursuant to her FOIA request.[7]

"Under FOIA, [i]f a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. As a general rule, the amount of attorneys fees to be awarded in a particular case is within the discretion of the trial judge." *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) (citation omitted); *Hueble v. S.C. Dept. of Natural Resources*, 416 S.C. 220, 785 S.E.2d 461 (2016) ("The specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed

[7] The County notes that it has appealed the portion of the trial court's order finding a FOIA violation with respect to the missing documents. In the event the County is successful in its appeal, that would provide further support for the trial court's determination that Ballard was only partially successful in bringing this action.

absent an abuse of discretion or an error of law."). In making its award, the trial court must consider: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Burton*, 358 S.C. at 358, 594 S.E.2d at 898.

The trial court undertook this analysis and found that the award should be reduced based on the fact that Ballard did not prevail on all elements of her claims. (R. at 44-45). The trial court noted that the great majority of this case dealt with Records Act matters, for which Ballard received no relief. By way of illustration, the combined trial transcript and the deposition transcript of the County Attorney that was submitted to the Court totaled 280 pages. Of those pages, only 54 pages, or less than 20%, dealt with the executive session issue—the issue on which Ballard prevailed.[8] Given the above, the trial court properly applied the law and exercised its discretion in making its fee award.

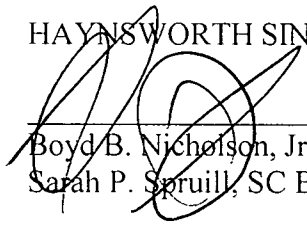
CONCLUSION

For these reasons, the County believes the trial court's findings relating to the Records Act and its attorney's fee award should be affirmed.

[8] The trial transcript consists of 185 pages, and the executive session issue was discussed (either in testimony or argument) in 27 of these pages (specifically, pages 5, 6, 14, 15, 22-27, 31-34, 63-68, 139-43, 158 and 159, R. at 111-294). The Tothacer deposition transcript consists of 95 pages, and the executive session issue was discussed in 27 of these pages as well (specifically, pages 64-91, R. at 507-601).

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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