RECEIVED
Aug 24 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2015-CP-40-1805

Wendy Brawley, ... Respondent-Appellant,

v.

Richland County, South Carolina ..... Appellant-Respondent.

MOTION TO HOLD APPEAL IN ABEYANCE

Respondent-Appellant Wendy Brawley ("Brawley"), pursuant to Rules 240 and 241, SCACR, hereby moves this court for an order holding this appeal in abeyance and for the sole purpose of allowing the Honorable Deandre Gist Benjamin ("Judge Benjamin") to determine the amount of attorney's fees and costs due to Brawley. The basis for this motion is as follows:

1. On February 13, 2020, Judge Benjamin issued a Final Order on the Merits ("Final Order"), ruling in favor of Brawley on her South Carolina Freedom of Information Act (FOIA). As part of the Final Order, citing *Sloan v. Friends of Hunley, Inc.* 393 S.C. 152, 157-158, 711 S.E.2d 895, 897-898 (2011), Judge Benjamin found that Brawley was entitled to attorney's fees. A copy of the Final Order on the Merits is attached hereto as **Exhibit A**.

2. On February 24, 2020, Appellant-Respondent Richland County, South Carolina ("Richland County"), filed a Notice of Motion and Motion to Alter or Amend Order ("Motion to Alter or Amend"), seeking to alter or amend the Final Order's determination that Richland County violated FOIA and therefore, by extension, owed Brawley attorney's fees. A copy of Richland County's Notice of Motion and Motion to Alter or Amend Order is attached hereto as **Exhibit B**.
3. On July 16, 2020, Judge Benjamin issued an Order on Richland County Motion to Alter or Amend, modifying her Final Order regarding Brawley's entitlement to injunctive relief but finding that Brawley is "still entitled to reasonably[sic] attorney's fees incurred herein." A copy of Judge Benjamin's July 16, 2020 Order is attached hereto as **Exhibit C**.
4. On July 27, 2020 Brawley filed an affidavit of attorney's fees and costs, with specific South Carolina case law citations and application of that law to the fees incurred therein ("Affidavit of Attorney's Fees and Costs"). A copy of the Affidavit of Attorney's Fees and Costs is attached hereto as **Exhibit D**.
5. On August 11, 2020, Richland County filed a Memorandum Opposing Award of Attorney's Fees and Costs. A copy of Richland County's Memorandum Opposing Award of Attorney's Fees and Costs is attached hereto as **Exhibit E**.
6. On August 17, 2020, prior to the Circuit Court issuing an order regarding the amount of attorney's fees to be awarded to Brawley, Richland County filed the instant appeal.
7. The amount of attorney's fees and the issues raised in Richland County's Memorandum Opposing Award of Attorney's Fees are not currently before this court on appeal as they have not yet been ruled upon at the trial court level.

8. The Circuit Court has retained jurisdiction to determine the remaining attorney's fee dispute before it:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 241(a), *SCACR* (emphasis added).

9. The South Carolina Supreme Court has previously taken up this exact issue in *Jackson v. Speed,* 326 S.C. 289, 486 S.E.2d 750. In *Jackson*, the jury in the underlying action awarded the Jacksons actual and punitive damages on May 12, 1994 and the Jacksons thereafter moved for attorney's fees and costs to be determined by the court. *Id* at 299, 755. Defendants thereafter filed timely notices of appeal in June 1994. *Id.* On February 8, 1995, approximately 8 months after the appeal had been filed and during its pendency, the trial court held a hearing on the attorney's fees claim by the Jacksons. On appeal, the Supreme Court took up the issue of whether the "appellants' timely appeal of the jury verdict barred" the trial court's hearing on attorney's fees, ultimately concluding "[a]lthough service of notice of an intent to appeal divests the lower court of jurisdiction over the order appealed, the lower court retains jurisdiction over matters not affected by the appeal." *Id.* at 311, 761 (Citing Rule 204, SCACR; *Andrick Development Corp. v. Maccaro,* 280 S.C. 103, 311 S.E.2d 95 (Ct.App.1984)).

Under these circumstances, it is appropriate and necessary that this appeal be held in abeyance while the circuit court is allowed to deliberate on the remaining attorney's fees and costs

determination pending before it. Respondent-Appellant Brawley therefore respectfully requests an order holding this appeal in abeyance until the trial court has issued its ruling on its award of attorney's fees and costs.

Dated this 24th day of August, 2020.

ROGERS LEWIS JACKSON MANN & QUINN, LLC

By: s/ Jenkins M. Mann
Jenkins M. Mann #74894
Shaun C. Blake #76349
1901 Main Street - Suite 1200
Post Office Box 11803
Columbia, South Carolina 29211
(803) 256-1268
Email: jmann@rogerslewis.com
Email: sblake@rogerslewis.com
Counsel for Respondent-Appellant

Other Counsel of Record:

Andrew F. Lindemann #13030
LINDEMANN, DAVIS & HUGHES, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldh-law.com

Counsel for Appellant-Respondent Richland County

EXHIBIT A

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
Wendy Brawley,	)	
	)	Civil Action No. 2015-CP-40-1805
Plaintiff,	)	
	)	
v.	)	
	)	**FINAL ORDER ON THE MERITS**
Richland County, South Carolina,	)	
	)	
Defendant.	)	
	)	

THIS MATTER CAME BEFORE THE COURT on September 5, 2019 for a hearing on the merits pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq.*[1] Present at the Trial and appearing on behalf of Plaintiff Wendy Brawley ("Ms. Brawley") were Shaun C. Blake, Esq. and Jenkins M. Mann, Esq. Present at the bench trial and appearing on behalf of Defendant Richland County was Andrew F. Lindemann, Esq.

On March 27, 2016, the Plaintiff filed a Complaint seeking declaratory and injunctive relief. The Defendant Richland County filed a Motion to Dismiss which was heard by Judge Clifton Newman. By Form Order filed August 14, 2015, Judge Newman granted that motion and dismissed the Plaintiff claim for injunctive relief. Later, with respect to the remaining claim for declaratory relief, the Defendant County filed a motion for summary judgment. By Order filed October 24, 2016, that motion was granted in part and denied in part by Judge Clifton Newman. Judge Newman resolved three of the four FOIA requests. The fourth FOIA request sought the production of "a copy of the application and supporting documentation Richland County submitted to the USDA Rural

[1] This case is controlled by the Freedom of Information Act as it was codified in 2014, which was prior to the significant amendments to FOIA as adopted as part of 2017 Act No. 67, which became effective on May 19, 2017.

Development for grant and loan funding for the Lower Richland Sewer Project." In his Order filed October 24, 2016, Judge Newman determined that "there appears to be a genuine issue of material fact in dispute that precludes the resolution of this claim at the summary judgment stage." That is the remaining claim for declaratory relief that proceeded to trial before this Court.

FACTS

After careful consideration of the testimony and exhibits presented at trial as well as the legal arguments of counsel both during the trial and in proposed orders, the Court makes the following findings of fact.

Prior to February 2013, Richland County applied for a loan and grant from the USDA Rural Development office to fund the majority of what is known as "Phase I" of the Lower Richland Sewer Project (hereinafter, the "Grant"), which includes planning, acquiring easements, and installing the infrastructure to provide Richland County sewer service to Lower Richland. (Transcript at 97, Salley Testimony). Richland County's utilities department, grants coordinator, and general administration had roles in applying for the Grant. (Transcript at 97, Salley Testimony; Transcript at 114, Metts Testimony).

On September 9, 2014, at a Richland County Council Meeting, Ms. Brawley submitted four (4) separate written South Carolina Freedom of Information Act ("FOIA") requests to the Defendant Richland County. (Transcript at 23-27 and 81, Brawley Testimony). Of the four requests, only one remains at issue; the one in which Ms. Brawley sought "a copy of the application and supporting documentation Richland County submitted to the United States Department of Agriculture (USDA) Rural Development for grant and loan funding for the Lower Richland Sewer Project" (hereinafter "Loan Documentation FOIA Request"). (Transcript at 28-29, Brawley Testimony; Exhibit 1).

The Defendant informed Ms. Brawley by letter dated October 1, 2014 that they were researching her Loan Documentation FOIA Request and expected to have data available within the next few weeks. (Transcript at 29-31, Brawley Testimony; Exhibit 2). The October 1, 2014 letter provided, in part, "The information requested will be released." (Transcript at 83, Brawley Testimony; Exhibit 2).

a) The County's Response to Ms. Brawley's Loan Documentation FOIA Request

By letter dated October 8, 2014, Defendant informed Ms. Brawley that her request was forwarded to the Richland County Clerk of Council, Procurement Department, Utility Department, and Finance Department for review and that she would be provided documents as a response to the Loan Documentation FOIA Request. (Transcript at 32, Brawley Testimony; Exhibit 3). The October 8, 2014 letter also informed Ms. Brawley that "Richland County has no further information regarding this matter". (Exhibit 3). The October 8, 2014 letter included six (6) pages of documents consisting of the following:

a) A one (1) page Application for Federal Assistance on Form 424, as signed by County Administrator J. Milton Pope;
b) Two (2) pages of instructions for the SF-424 and SF-424c;
c) Two (2) pages of "assurances" dated March 16, 2010; and
d) A one (1) page budget.

(Hereinafter "Original Response Documents"). (Transcript at 33-34, Brawley Testimony; Exhibit 4).

The Application included with the Original Response Documents specifies the type of submission is "Non-Construction," the type of application is marked as a "Continuation," and the estimated federal funding requested was $20,961,360. (Exhibit 4). Further, the documents provide that "Continuation" is defined as "an extension for an additional funding/budget period for a project with a projected completion date." (Transcript at 93, Brawley Testimony; Exhibit 4).

On March 25, 2015, Ms. Brawley filed the instant lawsuit pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq* seeking the production of

all responsive documents to the Loan Documentation FOIA Request. On June 3, 2015, the Defendant produced 55 pages of additional documents. The documents provided were:

a) Application for Assistance dated July 18, 2012;
b) Instructions for the SF-424
c) Budget Information – Construction Programs;
d) Instructions for HUD-424C;
e) Richland County Utilities Department - Lower Richland Sewer System - Preliminary Engineering Report - July 2012 – Cost Estimate – Phase I;
f) SC WEP Guide 1 – Processing the Initial Application;
g) Certification of Outstanding Debts dated July 18, 2012;
    - Richland County – Ratios of Outstanding Debt by Type – Last Ten Fiscal Years;
    - Richland County – Direct and Overlapping Governmental Activities Debt– As of June 30, 2011;
    - Richland County – Legal Debt Margin – Last Ten Fiscal Years;
    - Richland County – Ratios of General Bonded Debt Outstanding – Last Ten Fiscal Years;
h) Lower Richland Sewer Revenue/Expenditure Projections;
i) Balance Sheet (Governmental Funds; Capital Projects Fund; Water/Sewer Enterprise Fund) and related documents;
j) Lower Richland Water/Sewer – Statement of Net Assets;
k) Hopkins Utility System Enterprise Fund – Statement of Net Assets;
l) Letter dated October 20, 2010 to the United States Department of Agriculture Rural Development from Richland County;
m) Memorandum entitled "Richland County for Richland County/Utilities Department" dated February 23, 2007;
n) Memorandum entitled "Information Needed for Organizational Review"
o) Minutes of a Meeting Hopkins Community Water Project – Hopkins Park – Monday 28 August 2006;
p) Letter dated April 12, 2010 to the United States Department of Agriculture Rural Development from South Carolina Budget and Control Board;
q) Memorandum entitled "Lower Richland Community Sewer System Project";
r) Memorandum entitled "Development of a Richland County Owned and Operated Sewer System to Serve Lower Richland County";
s) Lower Richland Sewer – Monthly User Fee and New Customer Connection Rate Comparison;
t) Three (3) USDA Memoranda with Subject referring to "Richland County Utilities Department – Lower Richland County Sewer Project";

(Transcript at 42-57, Brawley Testimony; Exhibit 5) (Hereinafter "June 2015 Discovery Documents").

In February 2016, Ms. Brawley was allowed inspection of Richland County's Lower Richland Sewer Project file at Mr. Lindemann's office as part of discovery process for this action. (Transcript at 57-58, 88, Brawley Testimony). In reviewing the County's files, Ms. Brawley identified roughly 120 pages of additional, relevant documents which were not produced during the original Loan Documentation FOIA Request, or as part of the June 2015 Discovery Documents. (Transcript at 57-58, Brawley Testimony).

The newly discovered documents found by Ms. Brawley included:

a) "New" Application for Federal Assistance SF-424 for Sewer System Improvements, Hopkins Service Area (Exhibit 7);
b) "New" Application for Federal Assistance for Sewer System Improvements, Hopkins Service Area dated July 18, 2012 (Exhibit 17);
c) "Continuation" Application for Federal Assistance SF-424 for project affecting "Hopkins Community, Lower Richland Community, Town of Eastover" (Exhibit 8);
d) "New" Construction Application for Federal Assistance for Lower Richland County Sewer System, that included (i) Budget Information – Construction Programs, (ii) Certification Regarding Debarment, Suspension, and Other Responsibility Matters, and (iii) Certification of Outstanding Debts (Exhibit 9);
e) "Continuation" Non-Construction Application for Federal Assistance for Sewer System Improvements for Hopkins Community, that included Budget Information – Construction Programs dated March 16, 2010 (Exhibit 10);
f) Letter of Transmittal dated June 7, 2010 from Wilbur Smith indicating sending (i) Environmental Assessment for USDA (client copy); (ii) HUD Modified Environmental Assessment (client copy), among other items (Exhibit 11);
g) South Carolina Rural Infrastructure Authority Grant Checklist (Exhibit 18);
h) Letter from the USDA to Richland County dated January 5, 2011 providing comments to the revised "PER dated July 2012" (Exhibit 19);
i) Letter from the USDA to Richland County dated August 2, 2012 providing comments to the revised "PER dated July 10" (Exhibit 13);
j) Letter from the USDA to Richland County dated January 30, 2013, 21 pages in total, providing conditions which Richland County "must understand and agree to before further consideration may be given to [Richland County's] application." (Exhibit 21);
k) Letter from Richland County to the USDA dated February 4, 2014 confirming Richland County is moving forward with the sewer project and is working to meet all "items contained in the Letter of Conditions dated January 30, 2013" (Exhibit 23);

(Transcript at 59-81, Brawley Testimony) (Hereinafter "February 2016 Located Documents").

b) Richland County's Efforts in Responding to Loan Application FOIA

At trial, Sara Salley, the former grants coordinator for Richland County, testified that she accumulated and provided the documents that were given to Ms. Brawley in the Original Response Documents provided on October 8, 2014. (Transcript at 101, Salley Testimony). Ms. Salley testified that the documents she provided were from a collection of what was in her office, but her office did not have the "full application file". (Transcript at 101 and 98, Salley Testimony). Ms. Salley's office was not in the same building as the Utilities Department and Salley did not search files in the Utilities Department or Finance Department. (Transcript at 99-100, Salley Testimony).

The Plaintiff also presented the testimony of Andy H. Metts. Mr. Metts is the former Director of Richland County Utilities and was involved in locating the documents responsive to the Plaintiff's FOIA request at issue. Mr. Metts testified that files on the Grant "could have been" in the finance department office, procurement department office, and administration. (Transcript at 108, Metts Testimony). Mr. Metts is listed on both applications as point of contact for Richland County. (Transcript at 177-178, Metts Testimony; Exhibit 8; Exhibit 4). Mr. Metts testified that he was aware of the following:

a) A Grant application and supporting documentation were given to the USDA prior to August 18, 2010. (Transcript at 133, Metts Testimony).
b) The County submitted a USDA Application in July 2012 related to the Grant. (Transcript at 142-145, Metts Testimony; Exhibit 17).
c) In August 2012, USDA requested additional information and explanations, which were likely provided by Richland County. (Transcript at 152-155, Metts Testimony).
d) Richland County obtained and submitted preliminary engineering reports and revised preliminary engineering reports as part of the Grant. (Transcript at 150-152, Metts Testimony).
e) In July 2012, Richland County received and Metts reviewed a 21-page letter from the USDA with requirements and conditions that must be met prior to the USDA further considering the Grant request. (Transcript at 158-162, Metts Testimony; Exhibit 21).
f) Likely correspondence between Richland County and the USDA regarding the USDA's need for proof that Richland County held public meetings about the project. (Transcript

at 175, Metts Testimony).

g) The County's full application included numerous documents provided as part of the June 2015 Discovery Documents. (Transcript at 197, Metts Testimony).

In regards to Richland County record keeping practices, Mr. Metts further testified as follows:

a) Documents and correspondence created as early as June 7, 2010 as part of the Grant were likely kept as part of Richland County's file. (Transcript at 129, Metts Testimony).
b) Metts general mode of operation involved printing off important emails and keeping them in his files. (Transcript at 141, Metts Testimony).
c) Metts likely did not destroy preliminary engineering reports obtained by Richland County for the Grant and submitted to the USDA, and such is "sure" to be somewhere in the Utilities Department's files. (Transcript at 150-151, Metts Testimony).
d) Mr. Metts further admitted that he possessed miscellaneous documents associated with the Grant and submitted to the USDA as part of the application on his computer that he never deleted, which were not part of the Original Response Documents. (Transcript at 211-212, Metts Testimony).

Mr. Metts further testified that he interpreted the Loan Documentation FOIA Request made by the plaintiff on September 9, 2014 to be seeking just "the USDA application that was signed and submitted". (Transcript at 256, Metts Testimony). Accordingly, in response to the Loan Documentation FOIA Request, after Mr. Metts and his staff could not locate a USDA application in records within the Utilities Department, Mr. Metts contacted Ms. Salley. (Transcript at 112, 166, Metts Testimony). After obtaining the aforementioned pages from Ms. Salley, Mr. Metts and Richland County provided the Original Response Documents to Ms. Brawley as their complete and final response. (Transcript at 222, Metts Testimony). Mr. Metts did testify that in his search for the grant application within the records of the Utilities Department, that he found documents related to the application which were not produced to Ms. Brawley as part of the Original Response Documents. (Transcript at 206-208, 211-215, 226-227, 231-234, 266, and 272 Metts Testimony).

As such, Ms. Brawley seeks a declaration that FOIA requests are deemed approved, that Richland County failed to fully provide the Loan Documentation FOIA, immediate FOIA responses for the Plaintiff, and that the Plaintiff is entitled to recover costs and reasonable attorney fees.

LEGAL ANALYSIS

In the present case, the central question is whether Richland County's response to Ms. Brawley's Loan Documentation FOIA Request violated the South Carolina Freedom of Information Act (FOIA). The South Carolina Freedom of Information Act requires disclosure of records held by a "public body" unless the documents fall within enumerated exemptions set forth in S.C. Code Ann. § 30-4-40(a). *See*, *Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888, 892 (Ct. App. 2004). "FOIA was designed to guarantee the public reasonable access to certain activities of the government" with the purpose of "protect[ing] the public by providing for the disclosure of information." 594 S.E.2d at 893. S.C. Code Ann. § 30-4-15 (2014) provides as follows:

> 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.

Our supreme court has found that the clear legislative intent is for FOIA to be liberally construed to carry out its purpose. *Pope v. Wilson*, 427 S.C. 377, 384-385, 831 S.E.2d 442, 446 (Ct. App. 2019) (*quoting Evening Post Publ'g. Co. v. Berkeley Cty. Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011)).

Pursuant to S.C. Code Ann. § 30-4-30(a) (2014), "Any person has a right to inspect or copy any public record of a public body . . . in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(c) (2014) further provides:

> Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the

> receipt of any such request notify the person making such request of its determination and the reasons therefor. Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

As such, the clear language of the "FOIA creates an affirmative duty on the part of public bodies to disclose information." *Bellamy v. Brown,* 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).

1. Defendant Failed to Provide All Responsive Documentation.

a) Richland County Failed to Produce all Documents in its Possession in Response to the Loan Documentation FOIA

The record demonstrates Richland County failed to provide the application and supporting documents in their possession in response to the Loan Documentation FOIA Request. In replying to the Loan Documentation FOIA Request, Richland County informed Ms. Brawley that, "The information requested will be released." (Transcript at 83, Brawley Testimony; Exhibit 2). Per S.C. Code Ann. § 30-4-30(c) (2014), the County's response constitutes the final opinion of the public body. As such, Ms. Brawley was entitled to receive or have access to "a copy of the application and supporting documentation" related to the Lower Richland Sewer Project per her request.

Richland County provided a total of 6 pages in response to the request and informed Ms. Brawley "Richland County has no further information regarding this matter". (Exhibit 3). Exhibits 5-15, 17, and 19-23, are all responsive FOIA documents which were not provided to Ms. Brawley in the Original Response Documents. S.C. Code Ann. § 30-4-20(c) (2014), defines a "Public record" to include "all . . . documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." Accordingly, this Court finds the Defendant failed to provide all of the documentation that was contained in its files at the

time of the Loan Documentation FOIA Request. In addition, during discovery Richland County also provided Ms. Brawley a June 2015 Discovery Documents that included the July 18, 2012 Application for Federal Assistance, that was not part of the Original Response Documents.

b) The Defendant's Contention that its FOIA Response was Sufficient is without merit.

Richland County contends that it did not violate FOIA, arguing that it is only required to produce those documents it created or retained, and is not required to obtain documents from a third-party or to duplicate or to re-create documents. In support of this argument, Defendant cites *Trask v. South Carolina Dept. of Public Safety*, 2012 WL 10864175 (S. C. Ct. App. 2012) (unpublished), which references, *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 152 (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"). Defendant's reliance on *Trask* and *Kissinger* concerning the recreation of documents is inapplicable to the facts before this Court.

First, the Defendant has asserted that the June 2015 Discovery Documents were obtained from the USDA after the instant suit was brought. There is no testimony or evidence before this Court supporting the origin for June 2015 Discovery Documents. Defendant's reliance on its own counsel's transmittal letter for the June 2015 Discovery Documents is not evidence establishing the origin of these documents. Furthermore, neither Defendant's counsel, nor any witness, testified that the June 2015 Discovery Documents originated from the USDA.

Second, the February 2016 Located Documents which were not produced to Ms. Brawley prior to filing suit, but are unique from the June 2015 Discovery Documents, and are responsive to the Loan Documentation FOIA Request. The Defendant contends that the Plaintiff cannot establish

that the February 2016 Located Documents were in the Defendant's possession at the exact moment that it responded to her FOIA request. However, the law places no such burden on the Plaintiff.

In a civil case, proof of circumstances warranting a given inference is sufficient to prove a fact. *See generally*, *Eickhoff v. Beard-Laney,* 20 S.E.2d 153, 155 (S.C. 1942) (*citing Leek v. New South Exp. Lines*, 192 S.C. 527, 7 S.E.2d 459). "In the absence of a statute or a valid contractual provision to the contrary, circumstantial evidence is regarded by law as competent to prove any given fact in issue in a civil case *and is sometimes as cogent and irresistible as direct and positive testimony." Id.* (*quoting* Am. Jur, Volume 20 at 259-260) (emphasis included in original) (*see also*, *Graves v. CAS Med. Sys., Inc.,* 401 S.C.63, 80, 735 S.E.2d 650, 658 (2012) (providing "the general rule is any fact can be shown through circumstantial evidence, and it is up to the trier of fact to determine whether it alone is worth as much merit as direct evidence.") The testimony in the present case provides that the loan application documentation involved numerous submittals and documents, that Richland County Utilities Department generally kept copies of important documents, that supporting documentation was likely within Richland County's files and that these very same documents were present in the Defendant's file when Ms. Brawley was allowed to search it in February 2016. No evidence or testimony was presented by Richland County to the contrary.

Finally, the legislative intent is that FOIA "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 (2014)). FOIA is to be liberally construed to carry out its purpose (*Pope*, 427 S.C. at 384-38). As such, under FOIA, a public body should make reasonable and diligent efforts to locate and/or identify the location of public records requested.

Accordingly, based on the foregoing, I find that in failing to conduct a reasonable investigation to obtain and/or locate all relevant documents, the Defendant committed a violation of the South Carolina Freedom of Information Act (FOIA). Federal law supports this analysis. In *Ethyl Corp. v. U.S. Envtl. Prot. Agency,* 25 F.3d 1241, 1246 (4th Cir.1994), the Court held that "in judging the adequacy of an agency search for documents the relevant question is . . . whether the agency has demonstrated that it has conducted a search reasonably calculated to uncover all relevant documents." (citations and quotations omitted). In *Ethyl Corp.*, the Court found that to comply with FOIA the agency must demonstrate that the search conducted include a search of all files likely to contain responsive materials; the agency cannot merely aver that the search was consistent with customary practices and procedures. *Id.* at 1246-47. Accordingly, based on the foregoing, I find that FOIA in South Carolina requires that a public body take, at a minimum, must undertake reasonable investigative measures to provide requested public records.

2. Richland County is ordered to provide all applicable documents.

Per section 30-4-100(a) (2014) of the South Carolina Code, A violation of FOIA is "considered to be an irreparable injury for which no adequate remedy at law exists." "The court may order equitable relief as it considers appropriate." *Id.* I hereby order that the Defendant conduct a reasonable examination of its records for any heretofore unidentified, responsive documents and produce those to Ms. Brawley within **15 days** of the date of this order.

3. The Plaintiff is entitled to Attorney's Fees.

Per section 30-4-100(b) (2014) of the South Carolina Code, Ms. Brawley is entitled to reasonably attorney's fees incurred herein. *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 157-158, 711 S.E.2d 895, 897-898 (2011). Accordingly, the Plaintiff is to submit a schedule of fees and a motion to support the amount of fees and costs incurred herein. The Defendant will have **15**

days to respond to the Plaintiff's motion.

IT IS SO ORDERED!

The Honorable DeAndrea Gist Benjamin
Presiding Circuit Court Judge
Fifth Judicial Circuit

February 13, 2020
Columbia, South Carolina

Richland Common Pleas

Case Caption: Hopkins And Lower Richland Citizens United Inc , plaintiff, et al vs Richland County

Case Number: 2015CP4001805

Type: Order/Other

So Ordered

s/DeAndrea Gist Benjamin, #2161

EXHIBIT B

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	)	
Wendy Brawley,	)	
	)	Civil Action No. 2015-CP-40-1805
Plaintiff,	)	
	)	
v.	)	**NOTICE OF MOTION AND**
	)	**MOTION TO ALTER OR AMEND ORDER**
Richland County, South Carolina,	)	
	)	
Defendant.	)	
	)	

TO: THE HONORABLE DEANDREA GIST BENJAMIN

JENKINS M. MANN AND SHAUN C. BLAKE, COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant Richland County will move before the Honorable DeAndrea Gist Benjamin at such time and place as may be set by the Court, for an Order, pursuant to Rule 52(b) and Rule 59(e), SCRCP, altering, amending, and reconsidering the Final Order on the Merits filed on February 13, 2020.

The Defendant Richland County's counsel received written notice of entry of the Final Order on the Merits filed on February 13, 2020.

The Defendant Richland County's motion is based on the following grounds:

1. The Court awarded injunctive relief which was no longer before the Court at trial. As the Court was correct in initially recognizing, "[b]y Form Order filed August 14, 2015, Judge Newman granted that motion [to dismiss] and dismissed the Plaintiff's claim for injunctive relief." The Court even recognized that only a "claim for declaratory relief" remained for trial. The Court, however, did not apply that law of the case. The Court proceeded to award injunctive

relief despite the fact that Judge Clifton Newman had dismissed the claim for injunctive relief, and all that remained was a claim for declaratory relief. The Court is requested to reconsider its Order and delete the award of injunctive relief.

2. In the order filed February 13, 2020, the Court failed to recognize that the burden of proof rests with the Plaintiff to prove a violation of the Freedom of Information Act (FOIA). It is, therefore, incumbent on the Plaintiff to show that any reasonably responsive documents were actually in the Defendant Richland County's possession at the time the FOIA request was made but were not then disclosed in response. The Court is requested to amend its Order to find that the Plaintiff did not sustain her burden of proof in this regard. Moreover, the Court erred in concluding that there was circumstantial evidence to support the Plaintiff's claim. The fact that documents were in the County's project file on February 10, 2016, is not direct or circumstantial evidence that those documents were present and available in September 2014, when the FOIA request was made. With respect to Plaintiff's Exhibits 7, 8, 9, 10, 11, 13, 17, 18, 19, 21, and 23, which the Court refers to as the "February 2016 Located Documents," the Plaintiff only offered evidence that those documents were in the project file on February 10, 2016. She was unable to testify that those documents were in the County's possession in September 2014, when she made her FOIA request. (Tr. 92). Whether the documents were in the County's possession in February 2016 is not the dispositive issue and is immaterial to the ultimate question before the Court. The Court also erred in shifting the burden of proof by stating that "no evidence or testimony was presented by Richland County to the contrary."

3. The Court failed to consider or address the threshold issue in the case. As the County argued, the threshold issue is the scope of the request itself and whether the request was reasonably described such that the agency could understand what was requested. As a corollary

of that requirement, the Plaintiff had the burden of showing that a reasonable agency would understand that the contested documents were within the scope of the search. As the federal courts have explained, "[b]efore addressing the adequacy of the search under FOIA, a court must first ascertain the scope of the request itself." *Judicial Watch v. United States Department of State*, 681 Fed. Appx. 2, 3-4 (D.C. Cir, 2017). "A requester bears the burden of reasonably describing the records its seeks such that the agency is able to determine precisely what records are being requested." 681 Fed. Appx. at 4. "A FOIA request must reasonably describe the records requested." *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F.Supp.2d 59, 64 (D.D.C. 2003). "The agency's obligation to search is limited to the four corners of the request." *Id.* "Where a FOIA request is unclear, an agency processing a FOIA request is not required to divine a requester's intent." *Id.*

Therefore, as a threshold issue, the Court was required to assess the reasonable meaning and scope of the Plaintiff's FOIA request for "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project." The Court failed to engage in such analysis and made no findings of fact or conclusions of law in that regard. The Plaintiff sought an application submitted to the USDA Rural Development and "supporting documentation," the latter being the term that on its face is unclear and is subject to varying interpretations. Had the Court examined the plain and ordinary meaning of that request, it would be immediately recognized that there is no temporal aspect to the Plaintiff's request. In other words, the Plaintiff did not make it clear whether she was requesting solely documents that accompanied the application or whether she was seeking all documentation that was submitted to the USDA, regardless of whether the materials accompanied the application or were submitted at different times, separate and apart

from the application itself. The Court should have recognized that the lack of clarity in the request has given rise to the controversy between the parties. Andy Metts is the only witness who was questioned about his interpretation and understanding of the request.[1] Mr. Metts explained that he understood the request as seeking the Application for Federal Assistance as submitted to the USDA and the documents that accompanied that submission. (Tr. 256). He did not conclude that the request required the production of the following exhibits placed into evidence by the Plaintiff from her February 2016 review of the project file:

* A timeline that he did not prepare and was never submitted to the USDA (Pl. Ex. 6) (Tr. 237-238).

* Unsigned, incomplete and draft copies of applications that were never submitted to the USDA (Pl. Ex. 7-9) (Tr. 242-245).

* Letter of Transmittal not directed or sent to the USDA (Pl. Ex. 11) (Tr. 245)

* Emails from USDA personnel and between USDA personnel which were not submitted by the County to the USDA (Pl. Ex. 12-15, 19-20) (Tr. 245-248).

* USDA internal checklist (Pl. Ex. 18) (Tr. 124-127).

* Letter of Conditions dated January 30, 2013 from USDA to Richland County (Pl. Ex. 21). (Tr. 249).

* Loan Resolution (Pl. Ex. 22) (Tr. 249).

* February 4, 2014 letter (Pl. Ex. 23). (Tr. 249-250).

As a result, the Court should find that an objectively reasonable person attempting to respond to the Plaintiff's FOIA request as it was articulated would not conclude that the foregoing

[1] Sara Salley was not questioned as to her understanding of the meaning and scope of the Plaintiff's FOIA request.

documents were responsive to the request for "supporting documentation." Accordingly, the Plaintiff did not sustain her burden of proving that the County personnel should have properly determined that the documents at issue were responsive to her request and were withheld by the County in violation of FOIA.

4. Moreover, the Court should reject any contention that engineering reports and environmental studies associated with the project were also "supporting documentation" within the meaning and scope of the request. Unless those documents were submitted with the application and not at a later time, it was reasonable for the County personnel responding to the request to not consider engineering reports and environmental studies to be responsive to the request as "supporting documentation" of the application. The engineering reports and environmental studies were not presented as evidence, and as a result, the Court had no basis to determine if there was a sufficient temporal correlation to treat those documents as "supporting documentation" as a reasonable person would construe the term.

5. The Court identifies in the "Facts" section of the Order a list of the so-called "June 2015 Discovery Documents" consisting of twenty documents that made up Plaintiff's Exhibit 5. In the "Facts" section, the Court also specifically identifies Plaintiff's Exhibits 7, 8, 9, 10, 11, 13, 17, 18, 19, 21, and 23, which the Court refers to as the "February 2016 Located Documents" and calls them "additional, relevant documents." The Court never explains in the "Facts" section which of those 32 documents that the Court actually found were reasonably responsive to the FOIA request. The Court is respectfully asked to make those specific findings. By calling documents "additional" and "relevant" that may or may not mean that the Court ruled they were reasonably responsive to the FOIA request. In that regard, based on the testimony of Andy Metts, the Court should find that the "June 2015 Discovery Documents," with the

exception of the Application for Federal Assistance dated July 18, 2012, were not reasonably responsive to the FOIA request. Moreover, there is no evidence to support the Plaintiff's position that the "February 2016 Located Documents" fell within the reasonable meaning and scope of the Plaintiff's FOIA request for the reasons already discussed above. Later, in the "Legal Analysis" section, the Court does refer to "Exhibits 5-15, 17, and 19-23" as "all responsive FOIA documents which were not provided to Ms. Brawley in the Original Response Documents." There, the Court refers to more documents that what was addressed in the "Facts" section, which creates an inconsistency that should be reconsidered. The Court should make clear findings as to which documents it found to be responsive to the FOIA request and why. That will allow for meaningful appellate review. To reiterate, the Defendant submits that the Court erred in determining that Exhibits 5-15, 17, and 19-23 fall within the reasonable meaning and scope of the Plaintiff's FOIA request for "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project."

6. With respect to the different Application for Federal Assistance dated July 18, 2012, there was no evidence presented that a copy of that application was retained and existed in the County's files in September 2014, when the FOIA request was made. Andy Metts testified that, based upon the search conducted of the files, a copy of this application had not been retained and was not in the County's possession at that time. (Tr. 252, 257). The Plaintiff presented no evidence to contradict this. During the discovery process in this litigation, the County made a request to the USDA Rural Development Office to learn what was in their file. The County provided that information received from the USDA to the Plaintiff as part of discovery. The origin of those documents are clearly stated in discovery responses, but the Court

erroneously ruled that there was no evidence "supporting the origin for June 2015 Discovery Documents." The Court, however, improperly shifts the burden of proof here and requires the Defendant -- not the Plaintiff -- to prove whether those documents were in the County's possession in September 2014, when the FOIA request was made. The burden of proof lies with the Plaintiff, and the Plaintiff has not shown that the July 2012 application was in the County's possession in September 2014, such that a diligent search would have revealed its existence and the need for production. In short, the Court did not need to decide whether Defendant's representations made in discovery responses is evidence or not. However, the Court should not have shifted the burden of proof -- particularly to the extent that the Court is critical that defense counsel did not testify about the origin of documents produced in discovery. Of course, defense counsel is prohibited by the Rules of Professional Conduct from testifying. Additionally, as a matter of law, the Defendant was precluded by Federal law from being able to call an employee of the United States Department of Agriculture as a witness. *See*, January 3, 2017 letter from USDA Office of General Counsel.

7. The Court also erred in concluding that the Defendant failed "to conduct a reasonable investigation to obtain and/or locate all relevant documents." The Court overlooked that such a claim was not pled by the Plaintiff in her Complaint and thus was not an issue or claim for the Court to consider or adjudicate. Additionally, to the extent the issue was properly to be considered, the Court overlooked that the Plaintiff had the burden of proof on that issue or claim; yet, she presented only two witnesses, Andy Metts and Sara Salley, involved in the process of compiling the FOIA response. The record reflects that other persons, including employees of the Ombudsman's Office, were also involved in the process, but no other witnesses involved in the search for responsive documents were presented by the Plaintiff. Clearly, the

Plaintiff did not meet her burden of proof on a claim or issue that was not pled and should not have formed the basis for the Court's ruling.

8. The Court erred in overlooking or otherwise disregarding the applicable law that FOIA does not require a party to obtain documents from a third-party source to satisfy a request. *See*, *Kissinger v. Reporters Commission for Freedom of the Press*, 445 U.S. 136, 152 (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") (as cited in *Trask v. South Carolina Dept. of Public Safety*, 2012 WL 10864175, *1 (S.C. Ct. App. 2012) (unpublished). "FOIA is only directed at requiring agencies to disclose those 'agency records' for which they have chosen to retain possession or control." *Kissinger*, 445 U.S. at 151-152. "It is well settled that a FOIA request pertains only to documents in the possession of the agency at the time of the FOIA request." *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F.Supp.2d 59, 66 (D.D.C. 2003). An agency "is under no obligation to obtain a duplicate or to re-create a record in order to fulfill a FOIA request." *James v. United States Secret Service*, 811 F.Supp.2d 351, 358 (D.D.C. 2011). Consequently, the County was under no legal duty imposed by the FOIA to obtain any documents not in its possession from third parties or to try to re-create such records in response to a FOIA request.

9. The Court also erred in overlooking or otherwise disregarding the applicable law that "[a] challenge to any agency's search because it did not locate documents that may never have been created in the first instance, or may never have been retained as agency records, cannot succeed." *Saldana v. Federal Bureau of Prisons*, 715 F.Supp.2d 10, 23 (D.D.C. 2010). "An agency's failure to find a particular document does not necessarily indicate that its search was inadequate." *Id.* "In any case, an agency is not required to conduct interviews, to search in

places where the requested documents are not likely to be found, or to search exhaustively." *Id.*

10. The Court also erred in overlooking or otherwise disregarding the applicable law that "a mere technical error may not constitute a violation of the Act." *Piedmont Public Service District v. Cowart*, 319 S.C. 124, 459 S.E.2d 876, 878 (Ct. App. 1995). "[S]ubstantial compliance with the Act will satisfy its requirements where a technical violation has no demonstrated effect on a complaining party." *Multimedia, Inc. v. Greenville Airport Commission*, 287 S.C. 521, 339 S.E.2d 884, 887 (Ct. App. 1996). *See also*, *Donohue v. City of North Augusta*, 412 S.C. 526, 773 S.E.2d 140 (2015).

The Defendant Richland County's motion is based upon the pleadings filed in this case; the trial transcript and exhibits; the attached exhibits; the rules of court; and such other matters as may be properly presented to the Court at or before the time of the hearing.

The Defendant Richland County respectfully requests oral argument.

LINDEMANN, DAVIS & HUGHES, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldh-law.com

Counsel for Defendant Richland County

February 24, 2020

USDA United States Department of Agriculture
Office of the General Counsel

Eastern Region
1718 Peachtree Street, NW, Suite 576
Atlanta, Georgia 30309-2437

Telephone: 404-347-1060
Facsimile: 844-217-8320

January 3, 2017

Via facsimile transmission to (803) 806-8855

Andrew F. Lindemann
Davidson & Lindemann, P.A.
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568

Re: *Wendy Brawley v. Richland County, South Carolina*
Civil Action No. 2015-CP-40-1805
Common Pleas Court in the County of Richland, South Carolina
Trial Date: Wednesday, January 4, 2017, 9:00 a.m. (EDT)

Subpoena for Testimony and Document Production at Trial
Michele Cardwell, Acting State Director, Rural Development, USDA
Columbia, South Carolina

Dear Mr. Lindemann:

This office provides legal representation to United States Department of Agriculture ("USDA") agencies and personnel located in the southeastern United States, including Rural Development ("RD"). RD has contacted us in connection with a subpoena issued by you, or upon your request, commanding the appearance and testimony of a USDA employee in the above referenced action, as well as the production of certain documents. For the reasons outlined below, we request that the subpoena be withdrawn.

Please confirm your withdrawal of the subpoena in writing, by fax or email to the employee or agency contact. Their contact information is:

Agency Contact Name: Marty Bright-Rivera
Agency Contact Phone No.: (803) 253-3993
Agency Contact Fax No.: (855) 565-9479
Agency Contact Email: Martha.BrightRivera@sc.usda.gov

Employee's Name: Michele Cardwell
Employee's Phone No.: (803) 765-5138
Employee's Fax No.: (855) 565-9479
Employee's Email: michele.cardwell@sc.usda.gov

USDA's Touhy Regulations

Regulations governing appearances by USDA employees as witnesses in judicial or administrative proceedings are published in the Code of Federal Regulations at 7 C.F.R. §§

1.210-1.219. These regulations are authorized by 5 U.S.C. § 301 (formerly 5 U.S.C. § 22). *United States ex rel Touhy v. Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951); *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194, 1196-1197 (11th Cir. 1991).

> The purpose of [these regulations] is to ensure that employees' official time is used only for official purposes, to maintain the impartiality of [USDA] among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of [USDA].
>
> * * *
>
> The policy behind such prohibitions on the testimony of agency employees is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business. *Reynolds Metals*, 572 F. Supp. at 290. Because of the nature of the duties it exercises and programs it administers, the [USDA] is particularly vulnerable to the demands of private parties seeking information acquired as a result of official investigations concerning incidents such as that in the case *sub judice*. If [USDA officials] were routinely permitted or compelled to testify in private civil actions, significant loss of manpower hours would predictably result and agency employees would be drawn from other important agency assignments.

Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989).

Subpoenas *ad testificandum*

A USDA employee served with a subpoena or otherwise requested to appear as a witness on behalf of a party other than the United States, in a judicial or administrative proceeding to which the United States is not a party, may appear only if such an appearance has been authorized by the head of the employing USDA agency, with the concurrence of the General Counsel, based upon a determination that such an appearance is in USDA's interest. 7 C.F.R. § 1.214(b)(1). Such a determination is made by reference to the factors enumerated at 7 C.F.R. § 1.214(e) and any other relevant factors. An employee who testifies without such authorization violates the regulations and is subject to disciplinary action. 7 C.F.R. § 1.218.

The agency has reviewed the above-referenced subpoena and has determined that the employee's appearance is not in USDA's interest and is consequently not authorized. Should you elect not to withdraw the subpoena, the employee will be directed to appear at the stated time and place, produce a copy of the cited regulations, and respectfully decline to offer any testimony. The employee will also be instructed to demand payment of any and all appropriate fees and expenses in connection with the appearance. *See* 7 C.F.R. § 1.214(c). A federal employee may not be compelled to obey a subpoena contrary to instructions given by a federal employer pursuant to valid agency regulations. *Touhy, supra*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417; *Moore, supra*, 927 F.2d 1194, 1197; *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989).

Subpoenas *duces tecum*

Pursuant to federal regulations published at 7 C.F.R. § 1.215, subpoenas *duces tecum* for USDA records in judicial or administrative proceedings to which the United States is not a party are deemed to be requests for records under the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552. FOIA requests to USDA agencies are processed in accordance with regulations published at 7 C.F.R. §§ 1.1-1.23.

A USDA employee served with an otherwise valid subpoena *duces tecum* is directed to appear at the stated time and place, respectfully decline to produce the records sought on the ground that such production is prohibited by 7 C.F.R. § 1.215, and state that the subpoena *duces tecum* will be processed by the agency as a FOIA request. *See* 7 C.F.R. § 1.215(b). A federal employee may not be compelled to obey a subpoena contrary to instructions given by a federal employer pursuant to valid agency regulations. *United States ex rel Touhy v. Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951); *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194, 1196-1197 (11th Cir. 1991), *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989).

In response to a FOIA request, a USDA agency will supply those documents, if any, which are responsive to the request and not exempted from disclosure. If the agency determines that the requested documents are exempted from disclosure, the requesting party will be notified of that determination and of his/her administrative appeal rights. *See* 5 U.S.C. § 552(a)(6)(A)(i). Should such a determination be upheld on administrative appeal, the requesting party would be notified of his/her right to seek judicial review. *See* 5 U.S.C. § 552(a)(6)(A)(ii).

If the subpoenas *ad testificandum* and *duces tecum* are not withdrawn, the United States may elect to remove the above-referenced action to federal district court and move to quash the subpoena.

We anticipate your prompt withdrawal of these subpoenas. Should you have any questions, please feel free to contact me at 404.347.1076. With best regards, I am

Sincerely yours,

Dorian Henriquez-Simons
Attorney

cc: Marty Bright-Rivera, Administrative Programs Director, Rural Development, Columbia, South Carolina

Michele Cardwell, Acting State Director, Rural Development, Columbia, South Carolina.

DHS/

EXHIBIT C

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Wendy Brawley,	)	
	)	Civil Action No. 2015-CP-40-1805
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
Richland County, South Carolina,	)	
	)	
Defendant.	)	
	)	

THIS MATTER CAME BEFORE THE COURT on September 5, 2019 for a hearing on the merits pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq.*[1] Present at the trial and appearing on behalf of Plaintiff Wendy Brawley ("Ms. Brawley") were Shaun C. Blake, Esq. and Jenkins M. Mann, Esq. Present at the bench trial and appearing on behalf of Defendant Richland County was Andrew F. Lindemann, Esq. A Final Order on the merits of the trial was filed on February 13, 2020. On February 24, 2020, the Defendant filed a Motion to Amend. After additional review of the record and relevant case law, this Court now addresses each of the grounds outlined in the Defendant's Motion to Amend.

1) **The Defendant contends that the Court awarded injunctive relief which was no longer before the court at trial.**

This Court ordered that the Defendant conduct a reasonable examination of its records and produce those to Ms. Brawley within 15 days of the date of the order. This Court also ordered the Defendant to pay attorney's fees.

Per section 30-4-100(a) of the South Carolina Code, any citizen may apply to the Court

[1] This case is controlled by the Freedom of Information Act as it was codified in 2014, which was prior to the significant amendments to FOIA as adopted as part of 2017 Act No. 67, which became effective on May 19, 2017.

for declaratory judgement, injunctive relief, or both. *See* S.C. Code Ann. § 30-4-100(a) (2014). The court may order equitable relief as it considers appropriate. *Id.* However, in 2016, Judge Newman determined that only a declaratory judgement proceeded to trial before this Court. As such, this Court will remove the injunctive relief requiring Richland County to provide the documents to the Plaintiff. The Plaintiff, Ms. Brawley, is still entitled to reasonably attorney's fees incurred herein. *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 157-158, 711 S.E.2d 895, 897-898 (2011). Accordingly, the Plaintiff is to submit a schedule of fees and a motion to support the amount of fees and costs incurred. The Defendant will have **15 days** to respond to the Plaintiff's motion.

2) **The Defendant contends that the Court failed to recognize that the burden of proof rests with the Plaintiff and the court erred in concluding there was circumstantial evidence to support the Plaintiff's claim.**

a) Burden of Proof

The Defendant asserts that the Court failed to recognize that the burden of proof rests with the Plaintiff. In an action under the Federal Freedom of Information Act (FOIA), state courts generally recognize that the public body has the burden of justifying the nondisclosure of requested records. *See generally* 37A Am. Jur. 2d Freedom of Information Acts § 514. In order to discharge this burden, the agency *1383 "must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *National Cable Television Ass'n, Inc. v. Federal Communications Comm'n*, 479 F.2d 183, 186 (D.C.Cir.1973).

In the present case, the Defendant wants the Plaintiff to prove that Richland County had the requested documents. However, since the requesting party (Plaintiff) did not have the documents, "placing the burden of proof upon the agency puts the task of justifying the

withholding of the records on the only party able to explain the withholding." 37A Am. Jur. 2d Freedom of Information Acts § 514. As such, this Court finds that the Defendant's burden shifting argument is meritless.

b) Circumstantial Evidence

The Defendant also asserts that the court erred in concluding there was circumstantial evidence to support the Plaintiff's claim. In a civil case, proof of circumstances warranting a given inference is sufficient to prove a fact. *See generally*, *Eickhoff v. Beard-Laney,* 20 S.E.2d 153, 155 (S.C. 1942) (*citing Leek v. New South Exp. Lines*, 192 S.C. 527, 7 S.E.2d 459). The adequacy of an agency's search for requested documents is judged by a standard of reasonableness, i.e., "the agency must show beyond material doubt ... that it has conducted a search reasonably calculated to uncover all relevant documents." *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1383 (8th Cir. 1985).

At trial, the main Richland County contact for the United States Department of Agriculture (hereafter USDA), Mr. Andy Metts, as well as the Richland County Grants Coordinator, Sara Salley, both testified on the record that documents may have been stored in other locations. However, per their testimony neither reached out to other offices to obtain records for the FOIA request by the Plaintiff. Moreover, given the nature of the information the Plaintiff was seeking (an application for a loan), the testimony by Mr. Metts and Ms. Salley (Transcript at 98-100, Salley Testimony), it seems likely that responsive documents would have been in other offices, such as finance, that were not included in the search. Therefore, this Court finds on the basis of the record and circumstantial evidence presented, it would have been reasonable for other offices with responsive documents to have been part of the search as provided by law.

3) **The defendant asserts that the Court failed to consider or address the threshold in the case.**

The defendant contends the threshold issue of this case was the scope of the request itself and whether the request was reasonably described such that the agency could understand what was requested. S.C. Code Ann. § 30-4-110(A) states that "[a] public body may file a request for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests. . ." Additionally, S.C. Code Ann. § 30-4-30 states that each public body, upon written request shall within ten days of the receipt of the request, notify the person making the request of its determination [to provide the documents]. This determination must constitute the final opinion of the public body as to the public availability of the requested public record. S.C. Code Ann. § 30-4-30 (2014).

In the present case, the Defendant informed Ms. Brawley by letter dated October 1, 2014 that "[t]he information requested will be released." (Transcript at 83, Brawley Testimony; Exhibit 2). No question concerning vagueness was made, nor did the Defendant file a request to the circuit court seeking relief from an overly broad request. Rather, the Defendant responded to the request with 6 pages of responsive information. Ms. Brawley, then brought the instant action. As such, the central question in the present case is whether Richland County's response to Ms. Brawley's Loan Documentation FOIA Request violated the South Carolina Freedom of Information Act (FOIA) as stated in the original order.

4) **Moreover, the Defendant asserts that the Court should reject any contention that engineering reports and environmental studies associated with the project were also "supporting documentation" within the meaning and scope of the request.**

The Defendant contends that the Court should reject any contention that engineering reports and environmental studies associated with the project were within the meaning and scope of the request. The definition section of the South Carolina Freedom of Information Act codified

at S.C. Code Ann. § 30-4-20, states that a ""[p]ublic 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." To reject the contention that engineering reports and environmental studies *retained by the Defendant* are documentary materials that should be considered "supporting documentation" would go against the plain language of the FOIA statute. In the present case, testimony by witness Mr. Andy Metts specifically stated that there was "some form of the preliminary engineering report" that was reviewed in connection with the application and *retained* by the Defendant that was not provided to Ms. Brawley. (Transcript at 148-150, Metts Testimony). As such this Court, does not feel that the position that engineering reports and environmental studies were "supporting documentation" within the scope of the request requires amendment.

5) **The Defendant has also asked the Court to make those specific findings of the documents that were reasonably responsive to the FOIA request.**

Per the first ground for this Motion to Amend, injunctive relief has been removed. Since the injunctive relief requiring Richland County to provide the documents to the Plaintiff is no longer requisite, this Court finds no need to make specific findings regarding the documents that were to be provided to the Plaintiff per the injunctive relief order.

6) **The Defendant asserts that with respect to the Application for Federal Assistance dated July 18, 2012, there was no evidence presented that a copy of that application was retained and existed when the FOIA request was made.**

The Defendant contends that with respect to the Application for Federal Assistance dated July 18, 2012 (hereafter July 2012 Application), the Plaintiff presented no evidence that a copy of that application was retained and existed when the FOIA request was made. Mr. Andy Mett's testified that a copy of the July 2012 Application was not in *his* office's file at the time of the request (Transcript at 252, 257, Metts Testimony). He did not state whether the application was

or was not stored in the file of any other Richland County office. Further, upon Ms. Brawley's June 2015 review of the County files during the discovery process, the July 18, 2012, a copy of the application was found.

Counsel for the Defendant contends that during the discovery process for the present case, the County made a request to the USDA Rural Development Office to learn what was in their file. According to the Defendant, it is the information that was provided to the County from the USDA that Ms. Brawley found during discovery. However, there is no evidence in the record to support this origin of the documents found by Ms. Brawley.

As stated by the defense in the Motion to Amend, the Rules of Professional Conduct disallow counsel for the defense, to testify as to the origin of July 18, 2012 application and that USDA employees cannot be called as witnesses in judicial proceedings per 7 C.F. R. §§ 1.210 - 1.219. However, the 2012 application was found in the files during discovery and no evidence, other than Mr. Mett's testimony about his specific office, was presented to aid in determination of when the July 2012 application was added to the file. The Defendant's argument concerning burden of proof has been addressed above in Section 2 of this order. Therefore, conclusions by the court regarding the "June 2015 Discovery Documents" do not require amendment.

7) **The Defendant contends that the Court erred in concluding that the Defendant failed "to conduct a reasonable investigation to obtain and/or locate all relevant document."**

For the reasons outlined in the Section 2(a) of this order regarding Burden of Proof, this Court finds that the original language regarding the search stands. In *Ethyl Corp. v. U.S. Envtl. Prot. Agency,* 25 F.3d 1241, 1246 (4th Cir.1994), the Court held that "in judging the adequacy of an agency search for documents the relevant question is . . . whether the agency has demonstrated that it has conducted a search reasonably calculated to uncover all relevant

documents." (citations and quotations omitted). Further, in *Ethyl Corp.*, the Court found that to comply with FOIA the agency must demonstrate that the search conducted include a search of all files likely to contain responsive materials."

At trial, the Defendant did not provide any information from other Richland County (other than Andy Metts and Sara Salley) officials to show "a search reasonably calculated to uncover all relevant documents" was completed, despite testimony from both Ms. Salley (Transcript at 97- 100, Salley Testimony) and Mr. Metts (Transcript at 164, Metts Testimony) stating that there was other documentation that the County likely had but was not included in the 6 pages provided to Ms. Brawley. While the Defendant asserts that the Richland County Ombudsman office may have played a role in the search, the Defendant did not provide a witness from the Ombudsman office to that effect. Therefore, this Court finds that the original language regarding the search does not require amendment.

8) The Defendant asserts that the Court erred in overlooking or otherwise disregarding the applicable law that FOIA does not require a party to obtain documents from a third-party source to satisfy a request.

The Defendant contends that the Court erred in overlooking or otherwise disregarding the applicable law that FOIA does not require a party to obtain documents from a third-party source to satisfy a request. In the Motion to Amend filed before this Court, the Defendant's argument centers on *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980). In *Kissinger*, the U.S. Supreme Court held that under the FOIA, the U.S. State Department did not "improperly withhold" documents consisting of notes of telephone conversations of Secretary of State where, at time of request, such documents had been removed from State Department and donated to Library of Congress. The Supreme Court's rationale was

that the U.S. State Department did not have control of the documents, as at the time of the request, the documents were in possession of the Library of Congress.

In the present case, the Defendant is trying to make the argument that the USDA application was not in their possession to allow request response. However, no testimony was provided by the County that any documents found by Ms. Brawley during the discovery process had been removed from the Defendant's control at the time of the request, other than the grounds presented in Section 6 of this order. Therefore, the aforementioned ground regarding obtaining documents from third-parties does not necessitate amendment.

9) **The Defendant also contends that the Court erred in disregarding the applicable law that "[a] challenge to any agency's search because it did not locate documents that may never have been created in the first instance, or may never have been retained as agency records, cannot succeed."**

The Court also erred in overlooking applicable law that "[a] challenge to any agency's search because it did not locate documents that may never have been created in the first instance, or may never have been retained as agency records, cannot succeed." For the above-referenced ground, the Defendant relies on *Saldana v. Fed. Bureau of Prisons*, 715 F. Supp. 2d 10 (D.D.C. 2010), to question whether the requested documents were ever created. In *Saldana,* the Court held there was no reason to think that some of the documents the Plaintiff sought ever existed. Specifically, in *Saldana*, the Plaintiff (an inmate) presumed that a deputy marshal made handwritten notes of an alleged conversation with a judge that allegedly occurred approximately ten years before his FOIA request. However, in *Saldana*, there was no evidence of such notes being created. In the present case, testimony from both Andy Metts and Sara Salley, indicated that there were additional documents retained outside of the documents that were provided to Ms. Brawley. Therefore, the argument concerning creation does not require amendment.

10. The Defendant claims this Court also erred in disregarding the applicable law that "a mere technical error may not constitute a violation of the Act.

The Defendant claims this Court also erred in overlooking that "a mere technical error may not constitute a violation of the Act. For this argument, the Defendant relies on *Piedmont Public Service District v. Cowart*, 319 S.C. 124, 459 S.E.2d 876, 878 (Ct. App. 1995) and *Multimedia, Inc. v. Greenville Airport Commission*, 287 S.C. 521, 339 S.E.2d 884, 887 (Ct. App. 1996) to uphold its argument that a technical error does not constitute a violation of the FOIA Act. In *Piedmont*, the "technical error" reviewed by the Court was the act of Petitioner voting to terminate employment of the Respondent during an executive session meeting which was prohibited by a 1987 amendment to the FOIA statute. *See generally Piedmont Public Service District v. Cowart*, 319 S.C. 124, 459 S.E.2d 876, 878 (Ct. App. 1995). Similarly, in *Multimedia*, the Commission violated FOIA by holding its monthly April meeting without notice. However, the actions at the April meeting was reconsidered at a properly noticed May meeting. As such, reconsideration of the Commission's decision at the properly held May meeting cured any prior FOIA violation. This Courts review of the case law cited by the Defendant illustrates that "mere technical error" are procedural errors. Such small errors differ greatly from failing to provide multiple pages of responsive documents to a FOIA requester, which is the main goal of the FOIA process. Therefore, the argument based on "mere technical error" does not require amendment.

IT IS SO ORDERED!

The Honorable DeAndrea Gist Benjamin
Presiding Circuit Court Judge
Fifth Judicial Circuit

July 10, 2020
Columbia, South Carolina

EXHIBIT D

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE MAGISTRATE'S COURT CIVIL CASE NO.: 2015-CP-40-01805
Wendy Brawley, Plaintiff, v. Richland County, South Carolina, DEFENDANT	**AFFIDAVIT AS TO ATTORNEY'S FEES AND COSTS**

PERSONALLY APPEARED BEFORE ME, the undersigned attorney Jenkins M. Mann, who, being first duly sworn, deposes and says as follows:

1. Rogers Lewis Jackson Mann & Quinn, LLC was retained by the Plaintiff in the above-captioned action to pursue an action under the authority of 15-53-10, et seq., Code of Laws, known as the Uniform Declaratory Judgment Act, and 30-4-10 et. Seq., Code of Laws of South Carolina, as amended, known as the Freedom of Information Act ("FOIA"). FOIA provides that the Plaintiff is entitled to the recovery of attorneys' fees and costs as the instant action was necessitated by Defendant's conduct.

2. My law partner Shaun Blake and I are the attorneys who have primarily handled the filing and pursuit of action on behalf of Plaintiff, and as such I am aware of the attorneys' fees and court costs incurred in this regard.

3. Since the inception of our representation of the Plaintiff in this case, my law firm has, without limitation, undertaken the following actions:

a) Meeting with Client on Multiple Occasions to Assess Possible FOIA Action;

b) Reviewing Document History and FOIA Requests filed with Richland County;

c) Conducting Legal Research Regarding FOIA Actions in South Carolina;

d) Assessing the Merits and Potential Success of FOIA Action;

e) Drafting and Filing of the Summons and Complaint;

f) Serving of the Summons and Complaint on Richland County, South Carolina;

g) Reviewing and Assessing Richland County, South Carolina's Responsive Pleading, Defenses Raised and its Motion to Dismiss;

h) Attend hearing on Defendant's Motion to Dismiss Complaint;

i) Handling All Correspondence Between Counsel for Defendant and Plaintiff for Duration of Case;

j) Conducting Written Discovery Between Parties, Including the Review o Thousands of Documents Made Available by Richland County in Response to Discovery Requests;

k) Preparing Motions to Compel Written Discovery;

l) Preparing Documents in Opposition to Defendant's Motion for Summary Judgment;

m) Preparing for and Appearing to Defend Defendant's Motion for Summary Judgment;

n) Preparing for and Attending Mediation of Case;

o) Preparing Extremely Lengthy Post-Mediation Proposed Settlement Documents;

p) Attending Numerous Status Conferences with Court;

q) Preparing All Trial Documents, Including Trial Brief, Witness Subpoenas and Trial Exhibits;

r) Meeting and Conferring with Trial Witness Prior to Trial;

s) Reviewing All Documents, Pleadings, Discovery and Motions in Preparation for Trial;

t) Conducting Legal Research Regarding All Matters Relevant to Trial

u) Conducting Trial of Case;

v) Preparing Lengthy Proposed Order on the Merits, Including Legal Research as to All Issues of Law Raised at Trial; and

w) Reviewing and Assessing Defendant's Proposed Order on the Merits, the Court's Order on the Merits, the Defendant's Post Judgment Motions, and the Court Subsequent Amended Order;

4. Under Dede v. Strickland, 414 S.E.2d. 134 (S.C. 1992), the Supreme Court of South Carolina has set forth the factors to be considered in an award of attorney's fees. These factors include nature, extent, and difficulty of the legal services rendered, the time and labor necessarily devoted to the case, the professional standing of counsel, the contingency of compensation, the customary fees charged in the locality for similar services, and the beneficial result obtained. These factors, as applied in this case, are as follows:

a. Nature, Extent, and Difficulty of the Legal Services Rendered. Paragraph 3, *supra*, outlines the nature and extent of the legal services rendered and the level of contest the Defendant presented in defending Plaintiff's claims against it.

b. Time and Labor Necessarily Devoted to the Case. Approximately three hundred five (305) billable hours by attorneys and paralegals. The time and labor devoted to this case were necessary to properly prepare and try this case.

c. Professional Standing of Counsel. Shaun Blake and I are a licensed member of the Bar of the State of South Carolina and United States District Court for the District of South Carolina and have "AV" Ratings from Martindale Hubell and have been recognized by Super Lawyers. Both Shaun Blake and I completed law school in 2006, and have practiced law in the area of civil litigation since that time. Accordingly, I submit that both Mr. Blake and I have a high professional standing in general and in this area of practice.

d. Contingency of Compensation. This matter was handled on a contingency basis, in that fees were to be paid to counsel based upon the court's awarding of the same.

e. Customary Fee Charged on the Locality for Similar Services. I am aware from discussions with clients, other attorneys in the Midlands region of South Carolina, and from my general familiarity with the legal profession that the fees charged by attorneys with equivalent experience is $300.00 per hour or more. We have applied that hourly rate to the services rendered in this case in formulating the reasonable attorney's fees herein.

f. Beneficial Results Obtained. We obtained beneficial results for the Plaintiff in this action by securing the production of the documents Richland County

failed to produce in response to the Plaintiff's FOIA request and by prevailing at trial.

6. After due consideration of the nature, extent, and difficulty of the legal services rendered, the time and labor necessarily devoted to the case, the professional standing of counsel, the contingency of compensation, the customary fee charged in the locality for similar services, and the beneficial result obtained, I respectfully submit that an award of attorney's fees to the full extent set forth in this Affidavit is appropriate; therefore, Plaintiffs are entitled to recover Seventy-Eight Thousand Four Hundred and 00/100 ($78,400.00) Dollars.

7. In conjunction with this Affidavit, Plaintiff's counsel submits the costs actually incurred to date are $2,864.96, comprised of filing fees, service of process fees, postage, and transcript costs.

8. Accordingly, the reasonable attorney's fees in this case total Eighty One Thousand Two Hundred Sixty Four and 96/100 ($81,264.96) Dollars.

Jenkins M. Mann, Esq

"I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt."

EXHIBIT E

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	)	
Wendy Brawley,	)	
	)	Civil Action No. 2015-CP-40-1805
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OPPOSING AWARD OF ATTORNEY'S FEES AND COSTS**
	)	
Richland County, South Carolina,	)	
	)	
Defendant.	)	
	)	

The Plaintiff Wendy Brawley brought this action pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq.*[1] The Plaintiff presented four separate FOIA requests to the Defendant Richland County at the meeting of Richland County Council held on the evening of September 9, 2014. The Plaintiff was sent correspondence regarding her FOIA requests on September 12, 2014 and October 1, 2014. Thereafter, by letter dated October 3, 2014, the Defendant provided a response to three of the four FOIA requests, and by letter dated October 8, 2014, the Defendant provided a response to the fourth FOIA request.

The remainder of the procedural history of the case -- which is critical to a proper examination of attorney's fees that may be properly claimed and awarded -- is discussed below. As also addressed below, there is not a proper or timely motion that has been filed. In fact, there is no motion before the Court. For all of the reasons discussed below, the Defendant Richland County opposes any award of attorney's fees and costs.

[1] A second Plaintiff -- Hopkins and Lower Richland Citizens United, Inc. -- was dismissed for lack of standing by Order filed October 24, 2016.

LEGAL ANALYSIS

I. This Court no longer has subject matter jurisdiction to consider the Plaintiff's attorney's fees affidavit filed on July 27, 2020, or to make any award of attorney's fees and costs.

The Plaintiff's affidavit for attorney's fees and costs is untimely and procedurally improper. The Court currently lacks subject matter jurisdiction to award any such relief. By Order filed February 13, 2020, this Court entered a final judgment in favor of the Plaintiff. In that Order, the Court ruled that the Plaintiff "is entitled to reasonable attorney's fees incurred herein" and directed the Plaintiff "to submit a schedule of fees ***and a motion*** to support the amount of the fees and costs incurred herein." *See*, Order filed February 13, 2020, p. 12. (Emphasis added). The Plaintiff, by law, had ten days, or until February 24, 2020, in which to file a motion for attorney's fees and costs as directed by the Court. The Plaintiff has never filed a motion and did not even file the affidavit of her lawyer until July 27, 2020. By that date, this Court had lost subject matter jurisdiction, and therefore, now lacks the jurisdiction to make an award of any attorney's fees and costs.

The South Carolina Supreme Court has held that "[g]enerally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Russell v. Wachovia Bank*, N.A., 370 S.C. 5, 633 S.E.2d 722, 730 (2006). The appellate courts have consistently held that a motion for attorney's fees is a post-trial motion and must be filed within ten days of the entry of final judgment. *See e.g.*, *Holmes v. East Cooper Community Hospital, Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014); *Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002). As the Court of Appeals has made clear, "established case law" holds "that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Pitman*, 570 S.E.2d at 190.

Although this Court did not set a ten-day deadline in its Order for the Plaintiff to file a motion for attorney's fees, that deadline is set by rule and, like any other jurisdictional requirement, cannot be enlarged by the Court for any reason. The Plaintiff should have been aware of the foregoing case law as well as Rule 54(d), SCRCP, which includes a ten-day limit for filing a motion for costs.

In this case, the Court entered final judgment in favor of the Plaintiff on February 13, 2020. Thus, the Plaintiff had ten days, or until February 24, 2020, to file a motion for attorney's fees. The Defendant did file a timely Rule 52(b) motion which allowed this Court to continue to exercise jurisdiction until that post-trial motion was decided. However, that motion was decided by the Court on July 16, 2020, and it was on that date that this Court no longer had subject matter jurisdiction over this case. As the Court of Appeals has held, "a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Pitman*, 570 S.E.2d at 190. That occurred on July 16, 2020, and in fact, that is the date on which the thirty days for filing an appeal began to run. Here, the Plaintiff did not file an affidavit of her lawyer -- but not even a motion as required by the Court -- until July 27, 2020, but that was too late. This Court had lost jurisdiction by then. For this reason, the Court has no choice but to deny the request made for attorney's fees and costs.[2]

II. Even if the Court has jurisdiction to award attorney's fees and costs, the Plaintiff prevailed, at most, on only a fraction of the claims pled in her Complaint and received none of the relief that she actually sought in her Complaint.

In the event the Court determines that jurisdiction exists and the absence of a timely post-trial motion for attorney's fees is not fatal, the Defendant submits that the Plaintiff has failed to

---

[2] The Court may also deny the request for attorney's fees because the Plaintiff never even filed a motion as required by the Court's order or by Rule 54(d), SCRCP. The Plaintiff only filed an unsupported affidavit. In short, there was no post-trial motion even filed, let alone a timely one.

present sufficient evidence by which this Court could even make a fair determination of reasonable attorney's fees. Section 15-78-100(b) of the Freedom of Information Act governs a discretionary award of attorney's fees:

> If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. ***If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.***

S.C. Code Ann. § 30-4-100(b). As the highlighted language indicates, a court must initially determine whether the party seeking attorney's fees qualifies as a prevailing party, and if so, then the court must determine the extent to which the party prevailed.

That is critically important in this case as borne out by the procedural history of the case. The Plaintiffs brought this FOIA action in an attempt to enjoin the Lower Richland Sewer Project. In their Complaint, the Plaintiffs sought the following temporary and permanent injunctive relief:

> a. Enjoining Defendant from sending surveys to residents that make any representation that Richland County will provide all residents that reside within 200 feet of the proposed Phase I sewer line a full waiver of tap or connection fees;
>
> b. Enjoining Defendant from entering into negotiations with residents of Hopkins and Lower Richland for the acquisition of easements; and
>
> c. Enjoining Defendant from providing third reading to the Lower Richland Sewer Project.

See, Complaint, ¶ 40. As Judge Clifton Newman agreed, the injunctive relief as sought by the Plaintiffs is not relief contemplated or allowed under FOIA. Judge Newman granted the Defendant's motion to dismiss *in toto* by Order entered August 14, 2015. *Noticeably absent in the Complaint is any claim for injunctive relief seeking the documents that the Plaintiffs contend have not been provided by the Defendant.* Initially, in its Order entered February 13, 2020, this Court granted such injunctive relief despite it never being sought in the Complaint, but that was

corrected in the Order entered on July 16, 2020, where this Court "remove[d] the injunctive relief requiring Richland County to provide the documents to the Plaintiff." *See*, Order filed July 16, 2020, p. 2.

S.C. Code Ann. § 30-4-100(a) allows a court to issue "a declaratory judgment and injunctive relief to enforce the provisions of this chapter."[3] Therefore, the available relief is limited to the enforcement of the provisions of FOIA. Based upon existing precedent, a court may presumably invalidate an ordinance that was enacted in violation of FOIA's open meeting requirements or order the disclosure of public records that are not exempt from disclosure and have been wrongfully withheld. However, in this case, the Plaintiffs sought injunctive relief that does not enforce the provisions of FOIA and which is much broader than the relief contemplated or allowed under S.C. Code Ann. § 30-4-100(a). Therefore, it is clear that the Plaintiff's claims for injunctive relief -- which was the heart of this litigation -- were denied in August 2015. The Defendant thus prevailed *in toto* on the injunctive relief claims.

That left *only* the declaratory relief claims for further adjudication. Those claims involved four separate and distinct FOIA requests. In those four requests, the Plaintiff sought documents as follows:

> (1) a copy of the minutes from the Richland County Council meeting when funds were approved by Council for waivers of tap on fees for the Lower Richland Sewer Project;
>
> (2) a copy of the minutes from Richland County Council's meeting when the Council gave Third Reading Approval for the Lower Richland Sewer Project;

---

[3] The Court is respectfully reminded that this case is controlled by the Freedom of Information Act as it was codified in 2014, which was prior to the significant amendments to FOIA as adopted as part of 2017 Act No. 67, which became effective on May 19, 2017. In its Order filed February 13, 2020, this Court correctly applied the pre-2017 version of FOIA, as noted in footnote #1 of that Order. However, in its Order filed July 16, 2020, the Court erroneously applied the 2017 version of the Act in unfairly criticizing the Defendant for failing to utilize the new provisions of S.C. Code Ann. § 30-4-110(a), which were not even in existence in 2014. *See*, Order filed July 16, 2020, p. 4.

(3) a copy of Richland County's USDA Rural Development Application for Loan and Grant Funding Lower Richland Sewer Project; and

(4) a copy of Richland County's MOU with City of Columbia regarding the sewer services agreement.

See, Complaint, Ex. 1. Those four FOIA claims were considered by Judge Clifton Newman on the Defendant's motion for summary judgment which was heard on August 23, 2016. As Judge Newman found:

> At the commencement of the hearing, counsel for the Plaintiffs conceded that the County fully responded to three of the four FOIA requests, specifically the request seeking a copy of the minutes from the Richland County Council meeting when funds were approved by Council for waivers of tap on fees for the Lower Richland Sewer Project, the request seeking a copy of the minutes from Richland County Council's meeting when the Council gave Third Reading Approval for the Lower Richland Sewer Project, and the request seeking a copy of Richland County's MOU with City of Columbia regarding the sewer services agreement. As a result, summary judgment is granted to the Defendant Richland County with respect to those three FOIA requests.

See, Order filed October 24, 2016, p. 2.

Thus, Judge Newman granted summary judgment on three of the four FOIA claims at issue. In fact, the Plaintiff conceded on those three claims after well over a year of litigation. Thus, the Plaintiff was not the prevailing party on the *entirety of her injunctive relief claim* and on 75% of her declaratory judgment claim. While that may qualify the Plaintiff as a prevailing party, that relief obtained -- particularly when compared to the relief actually sought when the Complaint was filed -- was ***extremely minimal***.[4]

---

[4] Recall also that the Defendant successfully obtained the dismissal of the Plaintiff Hopkins and Lower Richland Citizens United, Inc. Although not addressed in the Plaintiff's counsel's affidavit, there were obviously attorney's fees and costs expended in representing that Plaintiff as well through October 2016.

The Court should also factor in the fact that the Court, in issuing the February 13, 2020 Order, substantially altered the nature of the case and, in essence, decided a case that was never even brought. In essence, the Plaintiff is claiming to have won a claim that was never pled. In its February 13, 2020 Order, the Court made a declaration that the Defendant failed "to conduct a reasonable investigation to obtain and/or locate all relevant documents." *See*, Order filed February 13, 2020, p. 12. In its Rule 52(b) motion, the County pointed out that "[t]he Court overlooked that such a claim was not pled by the Plaintiff in her Complaint and thus was not an issue or claim for the Court to consider or adjudicate." In its Order entered July 16, 2020, the Court still disregarded what was actually pled and still did not comment on this point. However, for purposes of determining the extent that the Plaintiff prevailed, this point should not continue to be disregarded. This claim of an "unreasonable or inadequate investigation" was never pled and should never have been decided by the Court. It is contrary to the basic precepts of due process and the FOIA itself to award attorney's fee to a plaintiff on a claim that was never even brought.

Therefore, the Court is urged to closely examine the "relief" that was awarded in this case. The Plaintiff lost on three out of four FOIA claims at issue. She lost completely on her claims for injunctive relief -- which was the real purpose for bringing this action, i.e. to stop the Lower Richland Sewer Project. She prevailed only on a declaratory relief claim that, in fairness, was never even pled. This is not the type of case where the taxpayers should be required to pay attorney's fees -- and certainly not in excess of $80,000. The Court is respectfully requested to deny all attorney's fees and costs, which is well within its discretion per the language of S.C. Code Ann. § 30-4-100(b). However, in the alternative, the Court, if it awards attorney's fees, that award should be minimal and reflect that the Plaintiff lost on the *vast majority* of the case that she brought in her Complaint.

III. The Court should further find that the Plaintiff has failed to provide the necessary support for any award of reasonable attorney's fees and costs. The Plaintiff failed to file a motion as directed by the Court, but even the untimely affidavit that was filed provides the Court and the opposing litigant with no information from which a fair, just, and reasonable determination of attorney's fees and costs may even be made.

In addition, even if this Court is inclined to award attorney's fees, the Court has not been provided sufficient information to address the required factors or, more importantly, to make an assessment of the reasonableness of the attorney's fees sought in the affidavit filed by Plaintiff's counsel. In *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), which was a FOIA case, the Court of Appeals explained:

> There are six factors for the trial court to consider when determining an award of attorney's fees: (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. Upon request for attorneys fees that are authorized by contract or statute, the trial court should make specific findings of fact on the record for each of these factors.

594 S.E.2d at 898.

In addition, S.C. Code Ann. § 30-4-100(b) requires that a prevailing party may only be awarded "reasonable attorney's fees." This is also consistent with the Court's Order finding that the Plaintiff "is entitled to *reasonable attorney's fees* incurred herein." *See*, Order filed February 13, 2020, p. 12. (Emphasis added).

However, in order to make a determination of reasonableness of the attorney's fees, the Court needs to have contemporaneous billing records, which have not been submitted. Moreover, to determine what attorney's fees were expended on issues or claims on which the Plaintiff did not prevail, the Court needs contemporaneous billing records, which have not been submitted.

The Defendant submits that the attorney's fees opinions of the United States Supreme Court, while possible not controlling in state court, should provide this Court with compelling authority in

evaluating what a court should require to assess the reasonableness of attorney's fees being claimed by a prevailing party. Specifically, in the leading case of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the United States Supreme Court explained that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." 461 U.S. at 437. "Where documentation of hours is inadequate, the district court may reduce the award accordingly." 461 U.S. at 433. In addition, the Supreme Court instructs courts to exclude "hours that were not reasonably expended." 461 U.S. at 434. The *Hensley* Court further held that "[t]he applicant should exercise 'billing judgment' with respect to hours worked and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." 461 U.S. at 437. Elaborating on the concept of "billing judgment," the Supreme Court explained:

> Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.

461 U.S. at 434. (Citation omitted). Thus, as *Hensley* teaches, "fee claimants must submit documentation that reflects 'reliable contemporaneous recordation of time spent on legal tasks that are described with reasonable particularity,' sufficient to permit the court to weigh the hours claimed and exclude hours that were not 'reasonably expended.'" *Guidry v. Clare*, 442 F.Supp.2d 282, 294 (E.D. Va. 2006), citing *Hensley*, 461 U.S. at 433. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433.

Here, the Plaintiff has not sustained her burden of proving to this Court that attorney's fees in the amount of $78,400 are reasonable. In fact, not only does the absence of billing records make it impossible for the Court to determine reasonableness, it also violates the Defendant's rights to due

process. Based on the affidavit of Plaintiff's counsel alone, which is naturally self-serving, the Defendant has been denied any ability to make an independent assessment of the attorney's fees claimed. Because the affidavit is purely conclusory in stating that "approximately 305 billable hours" was expended, the Defendant cannot assess and comment on whether the hours were reasonable, whether the work performed was reasonable and necessary, and most importantly, whether the hours were expended on claims on which the Plaintiff actually prevailed -- as opposed to all the claims on which the Plaintiff lost.[5] Thus, because the Plaintiff has failed to meet its burden of presenting sufficient evidence for the Court to make a fair, just, and reasonable award of attorney's fees, the Plaintiff's affidavit (recall there is no motion to grant or deny) should be rejected.

The same is true as to the Plaintiff's request for costs of $2,864.96. The Plaintiff made no attempt to comply with Rule 54(d), SCACR. There is no itemized list of costs, with accompanying receipts, to show this Court for what the $2,864.96 was spent. The affidavit simply says the expenses were for "filings fees, service of process fees, postage, and transcript costs." Not all of those items qualify as taxable costs under Rule 54(e), SCRCP. Again, the failure to provide the Court with the proper showing of costs claimed should result in a denial of that claim as well.

---

[5] The Plaintiff has also failed to provide the Court with a copy of the fee agreement that will show the hourly rate or other arrangement that was agreed upon with the Plaintiff.

CONCLUSION

Based on the foregoing, the Court is respectfully requested to reject the Plaintiff's request for attorney's fees and costs totaling $81,264.96. The Court lacks subject matter jurisdiction to award those attorney's fees and costs, and there has been no motion even filed seeking this relief. But even if the Court reaches the merits, the Plaintiff has simply not carried her burden of proving what a reasonable amount of attorney's fees and costs may be given the *very limited degree of success* that she actually achieved in this litigation.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldh-law.com

Counsel for Defendant Richland County

August 11, 2020

CERTIFICATE OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court's Amended Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), the undersigned counsel for the Respondent-Appellant Wendy Brawley, does hereby certify that service of the **Motion to Hold Appeal in Abeyance** in the above-captioned matter was made upon all counsel of record by email only this the 24th day of August 2020:

Andrew Lindemann, Esquire
Lindemann Davis & Hughes
Email: andrew@ldh-law.com

sl Jenkins Mann

ROGERS LEWIS
ATTORNEYS AT LAW

Jenkins M. Mann, Esq.
Direct: (803) 978-2831
jmann@rogerslewis.com

August 24, 2020

Via Email Only
The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

Re: Hopkins and Lower Richland Citizens United, Inc., and Wendy Brawley, vs. Richland County, South Carolina
C/A NO: 2015-CP-40-1805

Dear Ms. Kitchings,

Pursuant to Section (c)(6) of Supreme Court's Amended Order Re: Operation of the Appellate Courts During the Coronavirus Emergency, please find enclosed for filing Respondent-Appellant Wendy Brawley's Motion to Hold Appeal in Abeyance in the above referenced matter. In accordance with Section(g)(3) of the same Order, I am herewith serving copies on all counsel of record.

If you have any questions, please advise. Thank you for your assistance in this matter.

Sincerely,

s/ Jenkins M. Mann, Esq.

cc: Andrew F. Lindemann *(w/Enclosure, Via Email only)*
Lindemann, Davis & Hughes, P.A.
Email: andrew@ldh-law.com