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!

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

July 10, 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/Form 4

So Ordered

s/DeAndrea Gist Benjamin, #2161