

conduct of a Merits Hearing after the review of the submitted records was complete. Prior to the Merits Hearing, the Court instructed counsel for the Defendant to remove the redactions relative to the "to/from" lines on the emails produced so that the distribution list would be available to Plaintiff. Thereafter, the Defendant produced revised redacted documents in response to FOIA No.1 (with bates labels County FOIA#1 000001-County FOIA #1 000306 as redacted/removed) and FOIA No. 3 (with bates labels County FOIA #3 000001-County FOIA #3 0006667 as redacted/removed) (Court's Exhibit 3). The Privilege Logs for each set remained the same (Court's Exhibits 1 and 2).

The Merits Hearing was conducted virtually via the Lifesize streaming program supplied by the Court Reporting service on September 25, 2020. Appearing at the hearing was Plaintiff, Mare Baracco, with her attorney, Thomas R. Goldstein, and E. Richardson LaBruce on behalf of the Defendant. The Court Reporter, Mackenzie R. Allen, also appeared remotely. The parties submitted a Joint Exhibit List which set forth twenty-three (23) exhibits that were entered into evidence by consent of the parties. The Court submitted six (6) Court's Exhibits into evidence to include the revised FOIA responses and the un-redacted versions of the responses. Based on the testimony of the Plaintiff, the arguments of counsel, the pleadings and exhibits filed to date, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves a dispute under the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. Sections 30-4-10, *et seq.* Prior to the initiation of the current law suit, Plaintiff Mare Baracco, a citizen and resident of Beaufort County, submitted four (4) FOIA requests to Beaufort County that are the subject of this litigation: February 10, 2019 (Bostick

Circle and 429 Broad River Road, October 8 2018 Community Services Meeting)(Joint Exhibit 1); March 10, 2019 (Emails 2013 through Present)(Joint Exhibit 4); March 18, 2019 (narrowing the March 10, 2019 FOIA request down to four email addresses)(Joint Exhibit 6); and March 31, 2019 (Alice Howard emails)(Joint Exhibit 8).

Defendant Beaufort County acknowledged each request and provided the estimated total of the fees for responding to each request (Joint Exhibits 2, 5, 7 and 9). As to the February 10, 2019 FOIA Request (FOIA Request No. 1, Beaufort County case #2019-000231), the Defendant requested a deposit of \$124.66 as a condition of fulfilling the request which was paid by the Plaintiff (Joint Exhibit 22, a portion of check number 4801 dated 2.21.19 in the amount of \$144.66). Defendant Beaufort County produced the documents responsive to FOIA No. 1 on March 21, 2019. At the same time, Defendant Beaufort County refunded \$53.66 back to the Plaintiff due to its overestimating the initial costs of production. Defendant Beaufort County requested a 25% deposit of the estimated \$12,079.00 cost for producing the response to the March 10 2019 FOIA request (FOIA Request No. 2, Beaufort County Case #2019-000385). The \$3,019.75 deposit was never paid by the Plaintiff. She did request an explanation of the charges and subsequently narrowed her request down to four email addresses and encompassed the request into the March 18, 2019 FOIA request (FOIA Request No. 3, Beaufort County Case #2019-000459). Defendant Beaufort County requested a 25% deposit of \$152.82 prior to producing the records. This deposit was not paid by Plaintiff. With regard to the final FOIA request under consideration in this case, Defendant Beaufort County requested a 25% deposit in the amount of \$1,617.14 in advance of responding to the March 31, 2019 FOIA request (FOIA request No. 4, Beaufort County Case #2019-000575). This deposit was not paid by the Plaintiff.

On April 10, 2019, Plaintiff filed the instant suit seeking a declaratory judgment, injunctive relief and an award of attorney's fees pursuant to the *South Carolina Freedom of Information Act* (hereinafter "the Act"), specifically S.C. Code Ann. Section 30-4-100. An Amended Complaint was filed on June 27, 2019. Plaintiff asserts that the Defendant Beaufort County redacted documents in violation of the Act and that the fees charged were done as a pretext designed to thwart Plaintiff's rights to public information. Defendant Beaufort County argues that the redactions were proper under the Act and that estimated fees were reasonable and determined pursuant to the statute.

I. REASONABLENESS OF FEES CHARGED

S.C. Code Ann. Section 30-4-30(B) establishes the framework for the establishment and collection of reasonable fees "not to exceed the actual cost of the search, retrieval and redaction of the records." *Id.* The Act requires the public body to post the fee schedule online and that any such fees "for the search, retrieval, and redaction of records shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skills and training to perform the request." *Id.* The Act goes on to state that "[f]ees may not be charged for examination and review to determine if the documents are subject to disclosure." *Id.* Finally, the Act does provide that a "deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records may be required prior to the public body searching for or making copies of records." *Id.*

Plaintiff testified with regard to the FOIA requests and responses to the same and confirmed that she had paid a total of \$71.00 for the documents responsive to FOIA Request No.1 (She originally paid the \$124.66 deposit and was refunded \$53.66 by the Defendant) and

that no additional funds had been paid for deposits for any of the requests. In correspondence prior to the hearing, counsel for Plaintiff agreed that they were not contesting the reasonableness of the charges for FOIA No. 1 since the fee was *de minimus*-however, the Plaintiff contests the original fee schedules for each of the four FOIA requests as being in violation of the mandates of S.C. Code 30-4-30(b) of the Act. There was no breakdown of fees charged for FOIA No. 1 entered into the record.

With regard to the original fee estimate for responding to FOIA No. 2, the Defendant listed \$72.00 per hour for IT to search and compile emails with an estimated 167 hours to complete the task and an additional \$16.00 per hour for Records Management to compile and redact emails for an estimated 3hours for a total of \$12,079.00. As previously indicated, after receiving an explanation from the Defendant for the charges, the Plaintiff limited to the scope of the request and submitted FOIA No. 3 which encompassed the previous request, making FOIA No. 2 and its estimated charges moot.

With regard to FOIA No. 3, Plaintiff was advised by Defendant that the estimated cost was \$611.26 with a requested deposit of 25% in the amount of \$152.82. This included estimated fee of IT to search and compile emails at \$49.07 per hour, 8 hours estimated for Legal/Admin to sort emails at \$72.00 per hours and \$16.00 per hour for Records Management to redact and compile mails (Joint Exhibit 7). However, Plaintiff further narrowed her request after the hearing with Judge Buckner such that a new fee estimate was generated for a total of \$71.00 which was \$30.00 per hour for IT Department to conduct archival search of e-mails and \$14.00 per hour for Records Management to retrieve emails, convert to legible form and to compile documents. The revised cost breakdown also lists a fee of \$72.00 per hour for Legal Department of record with a

note that states Plaintiff is not being charged this fee since the production is a result of a Court Order. Again, Plaintiff has confirmed she is not disputing the total charged since it is *de minimus*, but is disputing the fee schedule as being in violation of the Act.

Finally, with regard to FOIA No. 4, the Defendant provided an estimate for that production which included an hourly rate for the IT Department to conduct an archival search of emails at \$30.74 per hour, \$72.00 per hour for Legal Department to sort emails and a charge of \$16.00 for Records Management to compile and redact emails for a total estimated fees of \$1617.14 with a 25% deposit due of \$404.29. After the litigation was filed and in response to the Special Referee's inquiry regarding the estimated cost for the production of documents responsive to FOIA No. 4, Defendant indicated that upon inquiry by the Special Referee as to the cost, Defendant provided estimated costs as follows: \$33.19 per hour for IT Department to conduct archival search of e-mails, \$16.48 per hour for Records Management to retrieve e-mails, convert to legible form and compile documents and \$72.00 per hour for Legal Department redaction of documents (but again lists the Legal Department's time and total as not applicable since the production is a result of a Court Order) for a total estimated cost of \$389.99. The Court cannot help but note that the Defendant Beaufort County website does not list the specific fee schedule by Department for Research/Labor but rather states "[b]ased on department; typically no less than an hourly rate of \$14.00 including time/labor to research, scan, compile and redact as necessary. The Court would also note that although the four (4) FOIA requests were made from February 10, 2019-March 31, 2019, the amounts of the fees per hour charged are not consistent for the IT department and the Record Management departments performing the work. For example, the hourly rate for the IT department in response to FOIA No. 3 was originally

listed as \$49.07 per hour, but this figure was reduced to \$30.00 per hour after the scope was revised following the hearing with Judge Buckner. The same department, IT, listed an hourly rate of \$30.74 with regard to the production of documents in response to FOIA No. 4 and then an increase to \$33.19 in response to the Court's inquiry in 2020 indicating that was the current rate for the IT department. Additionally, when comparing the charges for Record Management across the four requests, the fees fluctuated from \$16.00 per hour down to \$14.00 per hour and up again to \$16.48 per hour in 2020. The varying rates across the same Departments for responses requested within a month of the other are problematic in light of the mandate of the Act requiring the fees for such activities not to exceed the "prorated hourly salary of the lowest paid employee, who, in the reasonable discretion of the custodian of records, has the necessary skill and training to perform the task." S.C. Code Ann. Section 30-4-30(B) (as amended). Perhaps more problematic is the original attempt by the Defendant to charge the Plaintiff for work performed by its Legal Department in reviewing and redacting the records in response to FOIA No. 3 and 4 (and perhaps FOIA No. 2 since the rate listed, \$72.00, is the consistent rate charges for the Legal Department, not IT). The Act is clear that the public shall not be charged fees for the "examination and review to determine if the documents are subject to disclosure" *Id.* Therefore, any attempt to charge fees by the Defendant's Legal Department were inappropriate under the act.

Although it appears that the estimated fee schedules originally provided to the Plaintiff in response to her four FOIA requests may not have complied with the mandates of S.C. Code Ann. Section 30-4-30(B), because the Plaintiff did not pay the requested deposits for FOIA No. 2 (now moot), 3 or 4, nor is she contesting the reasonableness of the fee she paid relative to FOIA

No. 1, I find that the Plaintiff has suffered no damages as a result of the Defendant's estimated fee calculations. Further, since the Defendant has removed the charges for the Legal Department relative to FOIA No.'s 3 and 4 prior to the Plaintiff paying either the deposit or the estimated fees, I find there has been no violation of the Act relative to the fees.

II. WERE THE DEFENDANT'S REDACTIONS TO THE FOIA RESPONSES APPROPRIATE UNDER THE ACT?

It has been the long standing law of this State 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." S.C. Code Ann. Section 30-4-15. "The essential purpose of FOIA is to protect the public from secret government activity." *Lambries v. Saluda County. Council.* 409 S.C. 1, 8-9, 760 S.E. 2d 785, 789 (2014). S.C. Code Ann. Section 3-4-40 provides matters that may be exempt from disclosure at the discretion of the public body. "Whether a record is exempt from disclosure depends on the particular facts of the case." *Glassmeyer v. City of Columbia*, 414 S.C. 213, 219, 777 S.E.2d 835, 839 (Ct. App. 2015)(citations omitted). "Underlying each case, however, is the principle that the exemptions in Section 30-4-40 of the South Carolina Code (2007) are to be narrowly construed so as to fulfill the purpose of the FOIA." *Id.* "The burden of proving that an exemption exists lies with the government." *Evening Post Publ'g Co. v. City of North Charleston*, 363 S.C. 452, 457, 611 S.E. 2d 496, 499 (2005). In the instant case, every redaction, with the exception of one, was listed under the Defendant's Privilege logs as being exempt under S.C. Code Ann. 30-4-70(a)(7) as being "[c]orrespondence or work products of legal counsel for a public body" and "material that would violate attorney-client relationships" (Court's Exhibits 1 and 2). There was one document relative to FOIA request No. 3 that was also redacted based on

attorney-client privileged materials as well as S.C. Code Ann. Section 30-2-310(C) (social security number, driver's license number) and S.C. Code Ann. Section 30-4-40(a)(2)(items of a personal nature)(Court's Exhibit 2, document bearing bates labels 000139-000140). Plaintiff has raised the issue as to whether or not the redactions were appropriate for several reasons. First, whether the reactions made on the basis of attorney-client privilege involve legal advice or analysis as required under the Act; second, whether the redactions that took place from July 20, 2018 - October 15, 2018 when in house counsel also served at the Interim County Administrator were improperly made (i.e. did they involve legal analysis which would be a protected exemption or administrative functions which would not be a protected exemption); and third, whether or not the documents involved correspondence with "non-clients" such that the attorney-client exemption was waived. Each issue will be explored separately below.

A. Was the information redacted from the FOIA responses, and as explained on the respective Privilege Logs, related to legal advice and therefore protected by the attorney-client privilege?

The South Carolina Supreme Court has long held that in order for a communication to be protected under the attorney-client privilege, the information exchanged must involve a request for legal advice. *Branden & Nether v. Gowing*, 7 Rich. 459 (S.C. 1854). Our Supreme Court has also stated that the attorney-client privilege exists

- 1) [w]here legal advice of any kind is sought (2) from a professional legal adviser In his capacity as such, (3) the communications relating to that purpose (4) Made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection is waived.

Tobacoville USA, Inc. v. McMaster, 692 S.E.2d 526, 529-530 (2010).

In order to establish the attorney-client relationship, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature. The communication involved must relate to a fact of which the Attorney was informed by his client without the presence of Strangers for the purpose of securing primarily either an opinion On law or legal services or assistance in some legal proceeding. The Attorney-client privilege also applies to communications originating From the lawyer rather than from the client. When the attorney communicates To the client, the privilege applies only if communication is based on confidential Information provided by the client. The attorney-client privilege, though, does not protect communications with non-clients.

Marshall v. Marshall, 282 S.C. 534, 538-539, 320 S.E. 2d 44,46-47 (Ct. App. 1984)(citations omitted). Additionally, "[a]ny voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communication between the same attorney and the same client on the same subject." *Id. at 538*.

The *in camera* review of the un-redacted documents revealed that the documents contained email exchanges between Beaufort County officials/staff and County Attorney, Thomas J. Keaveny, II (hereinafter "Keaveny") or, with regard to the items relative to FOIA request No. 1, Thomas A. Bendle, Jr. Beaufort County's outside counsel employed with the Law Firm of Howell, Gibson, and Hughes, P.A. However, as the parties are aware, the inquiry does not stop there. In order to maintain its status as a privileged document, the exchange must be in regards to legal advice in order for the exemption under FOIA to apply.

A thorough review by this Court of the 167 pages of documents produced in response to FOIA No. 3 revealed that the majority of the redactions did pertain to legal advice received from Keaveny. A few exceptions were found, namely, bates label County FOIA #3_000140 (which was an attachment to FOIA #3_000139 from a third party). This is also the document that was

claimed as exempt pursuant to S.C. Code 30-2-310 (C), social security number and drivers license number, and 30-4-40(a)(2), items of a personal nature in addition to the attorney-client/work product exemption. During the hearing, in response to inquiry from the Court, Beaufort County confirmed the individual was one of the three final candidates pursuant to S.C. Code Ann. 30-4-40(a)(13), and therefore, hold that the complete redaction of 000140 was in error. Accordingly, the Court directs Beaufort County to provide 000140 with the redaction only for the content included below the signature line and date of the document. The email found on County FOIA No. 3_149 was from Sarah McKee of GovHRUSA to Keaveny and Sue Rainey. Since GovHRUSA is a non-client of Beaufort County, the email should not have been redacted. It is noted that there was no attachment to the email in the un-redacted materials. In that other emails from Ms. McKee were produced to Plaintiff in un-redacted form, it is inferred that this particular redaction was an oversight by the Defendant in that it landed in the middle of appropriately redacted attorney-client privileged correspondence. The emails found on FOIA No. 3_00175-179 that include Elizabeth Ryan of South Carolina Emergency Management Department should be produced to Plaintiff in un-redacted form as well since she is employed by an agency outside of Beaufort County.

After a careful review of the un-redacted documents produced to the Court with regard to FOIA No. 1, with the exception of the documents that include Debra Regecz as further discussed below, I find the remaining redactions appropriate and subject to exemption pursuant to S.C. Code. Ann. 30-4-40(a)(7).

- B. Is the email correspondence dated July 20, 2018-October 15, 2018, properly redacted pursuant to SC Code Ann. 30-4-40(a)(7) in that Keaveny was both the County Attorney and the Interim County Administrator during this time period.**

The parties stipulated that Keaveny was employed by Beaufort County as both County Attorney and Interim County Administrator from July 20, 2018-October 15, 2018. Plaintiff correctly argued that if Keaveny was serving in his capacity as Interim County Administrator in any of the emails that were subject to the FOIA production during the roughly three month period identified above, those documents would not be exempt from disclosure pursuant to the attorney-client privilege protection under the Act. The only documents subject to production in FOIA No. 1 and FOIA No. 3 that fell in the time frame where Keaveny was acting in a dual capacity were CountyFOIA#1_000273 and CountyFOIA#3_000155-CountyFOIA#3_000168. Beaufort County produced CountyFOIA#3_000155-CountyFOIA#3_000168 without redaction. Therefore, the only document which need be reviewed for exemption purposes is CountyFOIA#1_000273. As discussed above, if the communication's primary purpose is to provide legal advice, then the redaction was appropriate under the Act. As indicated in the Privilege log provided by Beaufort County pursuant to Judge Buckner's instructions, this communication was between the retained agent and a County employee which included an email in the chain from Keaveny with regard to legal advice surrounding a potential contract. Keaveny was clearly acting in his role as County Attorney as the email in the chain which included Keaveny was dated December 21, 2107, prior to his undertaking both roles with the County. However, the inquiry with regard to this particular document does not stop there since it involves the status of the retained real estate agent as discussed in detail in Section C below.

- C. Does the inclusion of the County's retained real estate agent, Debra Regecz of Ballenger Realty Company, waive the asserted attorney-client protection as found under the Act.**

As referenced herein, correspondence which includes third parties waives the attorney-client privilege. See *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984). Therefore in order to determine whether or not the inclusion of Debra Regecz in certain email correspondence waives the asserted attorney-client privilege, a determination of her status as a "privileged person" must be made. There are generally three categories of people who are considered privileged persons: (1) the client or prospective client, (2) the lawyer; and (3) the agents of the client and lawyer. Restatement (Third) of the Law Governing Lawyers Section 70 (2000). In the instant case, the only consideration is whether or not Ms. Regecz is an agent of the client and lawyer. Neither party could produce any South Carolina law directly on point with regard to this issue (although Beaufort County did cite a Colorado case, *Alliance Constr. Solutions, Inc. v. Dep't of Corr.*, 54 P.3d 861, 867, 870-71(Colo. 2002), which held that an independent contractor of a government agency was the functional equivalent of an employee for purposes of privilege).

S.C. Code Ann. 40-57-370 (E) states in pertinent part:

For all real estate transactions, no agency relationship between a buyer, seller, landlord or tenant and a real estate brokerage firm and its associated licensees exists unless the buyer, seller, landlord, or tenant and the brokerage company and its associated licenses agree, **in writing**, to the agency relationship. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant or licensee or created orally or by implication (emphasis added).. . .

Therefore, in order for Ballanger Realty and its licensee Debra Regecz, to be an agent of Beaufort County, there must be an agreement in writing setting forth the agency relationship. Court's Exhibit No. 5, documents submitted by Beaufort County on September 25, 2020 relative to the agency issue with Ballenger Realty, did contain a Contract for Services for Beaufort County between Beaufort County and Ballenger Realty with regard to RFP No. 030217.

Ballenger Realty is referred to as the "Contractor" in the document. Article 13 of the Contract, page 6 of 8, titled "Independent Contractor" states:

The Contractor shall be fully independent in performing the services and shall not act as an agent or employee of the County. As such the Contractor shall be solely responsible for its employees, subcontractors, and agents for their compensation, benefits, contributions and taxes, if any.

The language of the Contract arising out of the RFP specifically states that the Contractor is not an agent or employee of Beaufort County. Interestingly, the Contract provided is only signed by Gary Kubic, County Administrator for Beaufort County. Regardless, unless there is a signed contract which indicates the agency relationship between Ballenger/Regecz, then under S.C. Code Ann. 40-37-370 (E), no such relationship exists. To date, Beaufort County has been unable to provide the Court with a fully executed written contract between it and Ballenger/Regecz that establishes an agency relationship. Accordingly, I find that Ballenger/Regecz is not an "agent of the client" under South Carolina law and therefore, any email that included Ms. Regecz is not subject to the attorney-client exemption under the Act.

III. ALLEGED IMPROPER MOTIVES OF BOTH PARTIES

Additionally, through the Plaintiff's testimony and the introduction of Joint Exhibits 13, 16, 17, 18, and 19, the Plaintiff presented evidence that she contends shows a history and pattern of conduct by the Defendant (and others) which drove the decisions made by the Defendant in both the redaction of the documents produced in this case as well as the fees charged. In response to those allegations, the Defendant denied the same and pointed out through cross examination of the Plaintiff that the allegations and exhibits were from 2014 and 2015 and primarily involved employees who no longer work for the Beaufort County. Likewise the Defendant asserts that the Plaintiff has a long standing practice of using FOIA requests as a retaliatory tool to harass public

officials and to search through the public records to find anything potentially harmful for political opponents and third parties (see Plaintiff's Memorandum of Law, Defendant's Memorandum of Law, Plaintiff's Reply to County's Memorandum of Law, and the testimony of the Plaintiff on direct and cross-examination). While each party contends the other's motivations were improper, I find both positions without merit with regard to the FOIA requests before the Court for consideration (Specifically FOIA Requests No. 1, No. 3 and No. 4) as well as the Defendant's responses to the same.

IV. ATTORNEY FEES

Plaintiff has made a claim for attorney's fees under both S.C. Code Ann. Section 30-4-100 and S.C. Code Ann. 30-4-110. Plaintiff is misplaced in her assertions with regard to S.C. Code Ann. 30-4-110. That is the provision under the Act which allows the Public Body to seek relief for "unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests or where it has received a request but is unable to make a good faith determination as to whether the information is exempt from disclosure." *Id.* Beaufort County asserts it was prohibited from filing a request for such a hearing when the Plaintiff modified her request from FOIA No. 2 to FOIA No. 3. Regardless, S.C. Code Ann. Section 30-4-110 is not pertinent to the relief requested by the Plaintiff. However, S.C. Code Ann. 30-4-100 does provide:

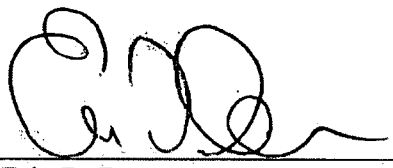
[i]f a person or entity seeking relief under this section prevails, he may be awarded attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court may **in its discretion** (emphasis added) award him reasonable attorney's fees or an appropriate portion of those attorney's fees.

Here, Plaintiff has prevailed in part, however, the issue on which she prevailed (the documents that included Regez in the correspondence) appears to be one of first impression in South Carolina. It is very clear that the redaction of the documents that included Regez as a recipient

under the attorney-client privilege exemption was done with a good faith belief that she was, in fact, the agent of the County and subject to protection. Accordingly, the Plaintiff's request for attorney's fees and other litigation costs is denied.

IT IS THEREFORE, ordered that the Defendant shall produce un-redacted copies of any email that includes third-part recipients to specifically include any email that includes Debra Regecz in the to/from distribution list to Plaintiff within thirty days (30) of the date of this Order. Additionally, any Post-Trial Motions shall be filed on or before December 4, 2020, unless special circumstances warrant an extension.

AND IT IS SO ORDERED.



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Special Referee Pursuant to The Order signed by Judge Buckner dated June 2, 2020

November 13, 2020
Beaufort, South Carolina