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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Erin D. Dean, Special Referee

CASE NO.: 2019-CP-07-00818
APPELLATE TRACKING NO.: 2021-00321

Mare Baracco,…….,,,,,,,,,,,,,Appellant,

v.

County of Beaufort,……Respondent.

INITIAL RESPONDENT'S BRIEF TO CROSS APPEAL

December 15, 2021

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The case should be remanded to the circuit court, not the Special Referee, to Order the release of the unredacted documents, to award the Appellant/Respondent a reasonable attorney's fee as a prevailing party, and to enjoin the County from future violations of the *South Carolina Freedom of Information Act*. 28

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REPLY TO RESPONDENT/APPELLANT'S STATEMENT OF FACTS

A cross appeal makes for awkward reading by referring to the Appellant as the Appellant/Respondent and the County as Respondent/Appellant, and therefore for convenience, this Brief adopts the convention of designating "Baracco" for "Appellant/Respondent" and "County" for "Respondent/Appellant."

The County mischaracterizes its limited production of the real estate documents it supplied in response to Baracco's F.O.I.A. Request No. 1: "Portions of the production were redacted by the County." (County's Brief at page 4) The County's redacted production is found in the Record on Appeal at pages ____-_____, and the Court can see for itself that nearly the entire production is blacked out. In other words, in order to be accurate, the County should say it released a few unimportant documents and redacted almost everything else.

On pages 6-7, the County asserts as a "statement of fact" that Baracco either waived most of her claims or is raising them for the first time on appeal. The Special Referee understood the issues and correctly summarized them on page 4 of her Order (R.O.A. page ___): "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." As the briefs filed with the Circuit Court and the Record on Appeal demonstrate *passim*, the County's statement is not correct, but it does highlight the inadequacy of the relief available to citizens under the *Freedom of Information Act*, which can be a toothless tiger because local governments utilize free money to stonewall citizens' access to public documents, and by doing so, drive away all but the most resolute litigants who are willing to put their time and limited economic resources against a force of inexhaustible resources to force governments to adhere to their obligation of transparency. Asserting that Baracco "waived" or is raising her claims for the first time on appeal

is stock-in-trade of governments' resistance to accountability. It may be a legal argument, but it is far from an established "fact."

Page 7 of the County's brief contains two additional erroneous statements of fact. The first is self-refuted by the County's Statement of the Case on page 3: "On September 3, 2020, the County revised its redacted production to remove redactions that covered the names of the senders/recipients of email in accordance with the Special Referee's instructions." (County's Brief, page 3; See also Order under review at Record on Appeal page ____.) By forcing the County to display the correspondents in the blacked out e-mails was a major success and vindicated in part her efforts, making her a "prevailing party." The reason the County's subsequent statement is misleading is because Baracco commenced her suit on April 10, 2019 (R.O.A. page ___[complaint]), and the County did not reveal the recipients in the e-mail chains until the Special Referee required it on August 19, 2020, during the pre-trial conference. (R.O.A. page ____[September 3, 2020 transmission of the revised redacted documents via Citrix] Not until the Special Referee compelled the County to reveal the identities of the correspondents did Baracco learn who was included in the communications. (Interestingly, the County sent the revised redacted documents via encrypted files, which Baracco's counsel could not open.) The fact that Beaufort County would not reveal who was included on the communications sheds a powerful light on the County's motives and lack of transparency.

The second erroneous statement on page 7 is the County's assertion that the real estate agent who sold a real estate parcel to the County is a "privileged person" under the law. The County further states as a "fact" that the question of the real estate agent's relationship to the County is a novel question in South Carolina law. Again, Ms. Regecz's status may be a County legal argument (refuted by the record), it is a **fact** that the *South Carolina Freedom of Information*

Act specifically requires records relating to the purchase and sale of real estate be open for public inspection. See § 30-4-40(5), S. C. Code, ann.

REPLY TO RESPONDENT/APPELLANT'S STANDARD OF REVIEW

The parties find common ground with the County in its summary of the standard of review, but the matters raised here are neither novel nor infrequent. The well-developed South Carolina caselaw on the *Freedom of Information Act*, along with the preamble to the Act contained in § 30-4-15, S. C. Code, ann. demonstrate the General Assembly's anticipation of such disputes and emphasize that both the General Assembly and the Supreme Court are equally consistent that local governments should be transparent: "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." Barraco's exposure of private e-mail communications to avoid this openness is a "Captain Renault" moment when she brings to light local governments using private electronic communications to thwart both the letter and the spirit of the *Freedom of Information Act*:

> Rick: How can you close me up? On what grounds?
> Captain Renault: I'm shocked, shocked to find that gambling is going on in here!
> [a croupier hands Renault a pile of money]
> Croupier: Your winnings, sir.
> Captain Renault: [sotto voice] Oh, thank you very much.
> *Casablanca* (1942)

The County is not correct in suggesting that this case raises anything close to a novel issue. The well-developed "sunshine" laws across South Carolina and the entire nation prove *passim* that government secrecy is as inevitable as nature's decay. The well-developed body of the *Freedom of Information Act* law in this State demonstrate two things: (1) Government always resists

openness, and (2) the well-developed case law in the appellate courts of this state have little deterrent effect on the conduct of local governments. Instead, the only thing standing between complete secrecy and governmental transparency is the resolve of a few citizens who care enough to take up the gauntlet and force local governments to adhere. It is an unfair fight, but a worthy one that will forever clog the Courts of this state for the simple reason that local governments have no skin in the game. As a result the Courts' repeated deterrent effects reach only as far as to a particular transgressor on a particular case and no further because there is no penalty when a government official violates the *F.O.I.A.* If a local government loses, they pay the citizen's attorney's fees with taxpayer's money, shrug, and continue unabated. Wherever the Court's decision ends up in this case, the issues raised here will be depressingly and frequently repetitive, but far from novel.

REPLY TO ARGUMENT 1.

The *South Carolina Freedom of Information Act's* limitation on charges for producing documents is not ambiguous, and the County intentionally violated it to impede Baracco's efforts to examine public documents.

The County's first argument alleges Baracco fails to present a justiciable controversy because she never paid the County's demand of $12,079.00 as a condition of receiving the documents she requested. The County avoids the fact that to arrive at its "estimate" of $12,079.00, it unlawfully inflated the figure by requiring her to be responsible for charges specifically prohibited by statute (including an unlawful 50% deposit discussed more fully below). A justiciable controversy is one that is not hypothetical or abstract. See *Black's Law Dictionary*, 5th Ed. "justiciable controversy." There is nothing hypothetical or academic about Beaufort County demanding that Baracco pay an unlawful fee of $12,079.00 as a condition of obtaining public documents, especially when they turned out to be mostly blacked out and included demonstrably

unlawful charges in computing the required prepayment. (An unintended irony flows from the County's position that Councilmembers have an unmanagable "sheer volume" of personal e-mails when County business is supposed to be conducted in the open.) In 2013, the Supreme Court delineated "justiciable controversy" as follows:

> To fall within the intended purpose and scope of the Declaratory Judgments [742 S.E.2d 374] Act, the parties must seek adjudication of a justiciable controversy. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) ("Despite the [Declaratory Judgments] Act's broad language, it has its limits."); see also *Power*, 255 S.C. at 154–55, 177 S.E.2d at 553 (noting that where adjudication of a question "would settle no legal rights of the parties," it would be "only advisory and, therefore, beyond the intended purpose and scope of a declaratory judgment"). " 'Questions of statutory interpretation, by themselves, do not rise to the level of actual controversy.' " *Entergy Nuclear Generation Co. v. Dep't of Envtl. Prot.*, 459 Mass. 319, 944 N.E.2d 1027, 1034 (2011) (quoting *Woods Hole, Martha's Vineyard & Nantucket S.S. Auth. v. Martha's Vineyard Comm'n*, 380 Mass. 785, 405 N.E.2d 961, 966 (1980)).
>
> "The Uniform Declaratory Judgment[s] Act is not an independent grant of jurisdiction." *Brown v. Oregon State Bar*, 293 Or. 446, 648 P.2d 1289, 1292 (1982). Further, it is fundamental that the Declaratory Judgments Act does not eliminate the case-or-controversy requirement. See *Power*, 255 S.C. at 153–54, 177 S.E.2d at 552 (" 'The existence of an actual controversy is essential to jurisdiction to render a declaratory judgment.' " (quoting *S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Auth.*, 215 S.C. 193, 215, 54 S.E.2d 777, 787 (1949))); *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 ("The Uniform Declaratory Judgment[s] Act ... 'does not require the Court to give a purely advisory [403 S.C. 82]opinion which the parties might, so to speak, put on ice to be used if and when the occasion might arise,' or 'license litigants to fish in judicial ponds for legal advice.' " (citations omitted)).
>
> *Committee v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371 (S.C. 2013)

Baracco's demand to see public documents and the County's imposition of unlawful charges creates "the existence of an actual controversy requirement" because (1) the County withheld public documents from her unless she paid an unlawful amount, and (2) the statute itself confers standing upon her to bring the action. § 30-4-100, S. C. Code, ann. The whole purpose of § 30-4-100 is to empower citizens to bring actions for declaratory and injunctive release as guardrail to prevent secret government conduct. The Special Referee found that the County imposed illegal charges on Baracco but granted her no relief: "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." (R.O.A. page ___[Order under review at page 7]) The Special Referee then goes on to conclude that because Baracco did not pay the fees, she suffered no "damages," and this is the error of law addressed by Baracco's appeal. A citizen is not required to prove "damages" to bring a cognizable claim under the *Freedom of Information Act*. § 30-4-100(a), S. C. Code, ann. makes this clear: ". . . a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists." Thus the Special Referee's entire Order under review is based upon a material error of law. See also *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006): Additionally, this Court has held that standing under FOIA does not require the information seeker to have a "personal stake in the outcome. *Fowler v. Beasely*, 322 S.C. 463, 466, 472 S.E.2d 630, 632 (1996)."

In short, by interposing technical objections, the County seeks to profit from its own wrongdoing and shield its conduct from the openness requirements of the *Freedom of Information Act*. The *Act* does not allow the County to deny public records to a citizen by adopting the expedient of assessing unlawful charges to chill the effort. The County's violations are hardly a hypothetical or academic question. Baracco presents a real and ripe controversy, which if not addressed will be repeated without ever receiving judicial scrutiny because most citizens lack the ability to bring an action. As the Court of Appeals stated in another *F.O.I.A.* case involving a citizen's request for a copy of emergency call tapes:

A matter becomes moot "when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Curtis v. State*, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001) (alteration in original) (quoting *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)), cert. denied, 535 U.S. 926, 122 S.Ct. 1295, 152 L.Ed.2d 208 (2002). In civil cases, there are three exceptions to the mootness doctrine: (1) an appellate court can retain jurisdiction if the issue is capable of repetition yet evading review, (2) an appellate court can decide cases of urgency to establish a rule for future conduct in matters of important public interest, and

(3) if the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction. *Id.* at 568, 549 S.E.2d at 596.

In *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996), a student challenged the school district's order which suspended him for ten days for coming onto campus after consuming alcohol. The court chose to hear the case because school suspensions are very brief and are usually completed before judicial review can take place. *Id.* at 432, 468 S.E.2d at 864. Similarly, although we can grant no further relief in the current appeal, we choose to address The Post and Courier's argument because the facts presented here are capable of repetition yet evading review.

Evening Post v. City of North Charleston, 357 S.C. 59, 591 S.E.2d 39 (S.C. App. 2003)

The discussion of mootness sheds light on the discussion of a justiciable controversy, because the concepts are twin sides of the same coin. In *Evening Post*, this Court held that the 9 1 1 tapes were not subject to release, but the Supreme Court granted *certiorari* to review this decision reversing it two years later, but took pains to point out that the Court of Appeals applied the correct standard of review to find that the newspaper presented a justiciable controversy:

After the tape was played in open court at the lynching trial, the Post published a transcript. We agree with the Court of Appeals that the case is not moot, because "the facts presented here are capable of repetition yet evading review." *Evening Post Pub. Co.*, 357 S.C. at 62, 591 S.E.2d at 41.

Evening Post v. City of North Charleston, 363 S.C. 452, 611 S.E.2d 496 (S.C. 2005)

Thus, Baracco was not required to pay the County $12,079.00 of illegal fees to receive blacked out documents as a condition precedent to challenging the County's conduct and availing herself of the relief available under the *Freedom of Information Act*. Once the County demanded unlawful fees, Baracco had the right to challenge that action. Otherwise, the County can stymie requests for any document into perpetuity by demanding unlawful, inflated estimates and never be called to account for its violation when a citizen cannot pay them.

The rest of the County's rationale in Argument 1 is clearly refuted by the plain language of the *Freedom of Information Act*. In the preamble to its first argument, the County takes pains to identify the rules of statutory construction but then ignores them by splitting this semantic hair on page 13: ". . . the Special Referee reiterated that there was no violation by the County relative

to the fees but also concluded that "(search, retrieval, and redaction) are administerial not analytical in nature" and only the physical act of redacting would be compensable." (Quoting Order under review at pages 5-6 in Record on Appeal at pages 5-6.) Although the Special Referee is correct that the County can assess fees for retrieval: "The records must be furnished at the lowest possible cost to the person requesting the records," both the Special Referee and the County are wrong about the County's charges for the same reason. The County cannot escape the reach of the *Act* by the semantic subterfuge of labeling prohibited fees "administrative" and charge $72.00 an hour for the County Attorney to examine them, a stratagem the Special Referee found "troubling," but granted Baracco no relief. (R.O.A. page ___[Order page ___] If re-labeling actions justified conduct, then human beings can absolve themselves from any act, no matter how horrible. Torture is not torture when it is "enhanced interrogation techniques." As trial lawyers frequently say (channeling six thousand years of religious traditiony): "we are judged by what we do, not by what we say." Currently, there is a growing movement in this Country in which citizens seek to escape the applicability of laws by rebranding themselves as "sovereign citizens." The County is attempting the same sleight-of-hand here, and the Special Referee erred in accepting it. The fact is the statute is clear, and the County disregarded it to intimidate Baracco from making her request:

> Fees may not be charged for examination and review to determine if the documents are subject to disclosure. § 30-4-30(B), S. C. Code, Ann.

There is no "administrative" exemption to this rule, and the County's recitation and application of the rules of statutory construction make this fact beyond dispute, and therefore both the Special Referee and the County err in arguing that the County can escape the requirements by adopting the expedient of simply relabeling the activity.

REPLY TO COUNTY'S ARGUMENT 1(A)

The *Freedom of Information Act* requires that documents "be furnished at the lowest possible cost to the person requesting the records."

The County stands the statute on its head. On page 14 of its brief, the County has the temerity to argue that a requestor is responsible for the County's fees in redacting documents. However, the statute says exactly the opposite, quoted above in the preceding paragraph. As the County say on page 15 of its Brief: "When the terms of a statute are plain and unambiguous and convey a plain and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." (County's Brief at page 15 citing *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994)) The County takes these undisputed principles and manufactures out of whole cloth a fictitious distinction between "gathering" the documents and "examining" the documents. This phony distinction is not to be found in any caselaw in South Carolina. The County launches its spurious argument into an even higher altitude of nonsense when it claims "redaction" means only removing "personal identifying information." Obviously, Baracco cannot see what is redacted, but when viewed in context and when compared with UN-redacted e-mails the County furnished in other F.O.I.A. requests, which waives any privilege if it existed, the County is obviously redacting much more than "personal identifying information." The County would not even reveal who was involved in the e-mail chains until the Special Referee compelled it to do so. R.O.A. page ____[Order at page 2] When Baracco compared these e-mails to the ones the County previously provided un-redacted, R.O.A. pages ___-____[Exhibits 9, 10, 11, 12, and 13], she could easily determine the County had gone to considerable editorial effort to redact embarrassing details. The County's bogus argument flies

in the face of the very rules of statutory construction the County carefully lays out in pages 10-12 of its Brief and the weakness of its legal argument requires no further response.

REPLY TO ARGUMENT 1(B)

There is no ambiguity in the *South Carolina Freedom of Information Act* and thus the Court need not resort to the rules of statutory construction to enforce the cost limitations required by the *Act.*

It is difficult to follow the County's opaque argument here. It is undisputed that the General Assembly amended the *South Carolina Freedom of Information Act* in 2017, but none of these amendments are germane to the dispute here. Here are the two sections side-by-side:

1998 Version

Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public. **Fees may not be charged for examination and review to determine if the documents are subject to disclosure.** Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records.

2017 Version

The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is primarily benefiting the general public. **Fees may not be charged for examination and review to determine if the documents are subject to disclosure.** 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. (emphasis added)

When applying this law to the County's actions here such as attempting to charge Baracco for items specifically excluded by the Act or by the County Attorney writing to surrounding municipalities and urging them to coordinate with the County in breaking the law by requiring a 50% deposit instead of what is allowed by the Act (see R.O.A. page ____[Coppage July 11, 2014

e-mail, Exhibit 17], this Court should be shocked. (To be fair to the County, the General Assembly did not put a 25% cap on the maximum deposit required, but it is also fair to infer that the General Assembly was reacting to inflated deposits, such as 50%, when it amended the *Act* in 2017.) First, as the record demonstrates the County produced 167 documents (R.O.A. pages ___- ___), and of these, most were almost entirely blacked out, including the participants in the e-mail chains. Because the County refused to allow Baracco to see who was included in the e-mail chains, it remained free to assert entirely bogus claims of attorney-client privilege. See Record on Appeal pages ____-_____[redacted documents]. Second, the County Attorney actively recruited other local government attorneys to get on board with the County's plan to single Baracco out for a punitive 50% deposit instead of a "reasonable deposit," which became the statutory minimum of 25% as in the 2017 amendment to §30-4-30(B): "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.". See Record on Appeal page ____[Allison Coppage e-mail, June 11, 2014 Ex. 17]: "If you have any questions about this requestor, give me a call." Here, all of the costs passed on to Baracco involved the County's insistence to "examine and review [the documents] to determine if the documents are subject to disclosure," a charge the General Assembly specifically prohibited under the 1998 and the 2017 versions. Obviously, it takes minutes, if not seconds, to transfer electronic data from a central computer to a thumb drive for which the County charges $7.00. At every stage, the County gives away the game, which is to erect every barrier in its arsenal to dissuade Baracco from requesting public documents. When the County asserts "FOIA's prohibition against charging fees for 'examination and review to determine if the documents are subject to disclosure' cannot be reconciled with the public body's right to charge fees for redacting exempt information given the inherent obligation to analyze

records as part of the redaction process," it is being deliberately obtuse. The public body's right to charge fees is carefully delineated in the 1998 and the 2017 versions of the *Act*, and no amount of sophistic hair-splitting changes either this fact or the legal requirement that Courts do not resort to statutory interpretation when the General Assembly speaks clearly. The General Assembly spoke clearly in § 30-4-30(B), and the County's grasping at such slender reeds as a non-existent inconsistency in the *Act* further demonstrates commitment to avoid fulfilling its statutory duty.

REPLY TO COUNTY'S ARGUMENT 2

Any communications between a Councilmember and the County Attorney and a third party are not covered by attorney-client privilege by definition. The Special Referee acknowledged this principle of law but failed to apply it: "The emails found on FOIA No. 3_[Bate Stamped] 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 Beaufort County." (R.O.A. at page ___[Order under review at page 11] Obviously the Special Referee should have applied this correct statement of law across the board and not pick and choose to whom it should be applied. As discussed thoroughly in Baracco's opening and reply briefs as Appellant, the County cannot invoke attorney-client privilege by the simple expedient of including the County Attorney in an e-mail chain. This is the holding of *Evening Post Publ'g Co. v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 824 (Ct. App. 2017). Moreover, attorney-client privilege is waived when allegedly protected conversations either involve third parties or when such communications are elsewhere disclosed such as happened here when the County provided the same e-mails un-redacted to Baracco. The Special Referee acknowledged this legal conclusion on page 13 of her Order: "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)." (R.O.A. page ___[Order under review page 13]. See also *Floyd v. Floyd*, 615 S.E.2d 465, 365 S.C. 56 (S.C. 2005) The error is flows from the fact that the Special Referee identified the correct legal standard but failed to apply it to the facts of this case. These two issues are extensively briefed in the Baracco's Initial Appellant's Brief at pages 27 - 35 as well as in her Reply Brief at pages 6 - 15, citing *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 44) and other authorities, and it is an undue burden on the Court to repeat the identical arguments here. There is a full academic discussion of this issue, including an analysis of *Marshall v. Marshall*, *ibid.*, in the July 2012 edition of *South Carolina Lawyer*. See: Nathan Crystal, "Confidentiality, Privilege, and Work Product: Some Important Differences," *South Carolina Lawyer*, July 2012, pps. 9-10.) Therefore, in order to avoid a repetition of the same arguments made in her opening and reply briefs, the Appellant/Respondent incorporates those arguments here as if set forth fully *verbatim*.

REPLY TO COUNTY'S ARGUMENT 2 A.

Attorney client privilege is a narrow privilege and is specifically waived when such communications include third parties who are not clients and when otherwise disclosed.

The County expands the attorney-client privilege into an omnibus exemption that includes every document that passes through a County's Attorney's hands. This expansive reading of the exemption provides an exception that swallows up the entire *Freedom of Information Act*, which, in the County's view, can be abrogated at will by the simple expedient of copying the County Attorney on every correspondence. In the first place, the Court of Appeals previously disposed of this argument in *Evening Post Publ'g Co. v. Berkeley County School District* (*ibid*). Second, as argued extensively in Baracco's Initial Brief and Reply Brief, a member of Council who eschews his or her government supplied e-mail account and who chooses to communicate via private e-mail cannot expect to be covered by attorney-client privilege because the County Attorney is not

an elected official's private lawyer. Third, the County's expansive construction of the attorney client privilege is not supported by law:

> Even if the attorney-client privilege were to apply, it was waived when Laurens produced the letters in discovery. The attorney-client privilege excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established, waives the privilege. *Drayton v. Industrial Life & Health Ins. Co.*, 205 S.C. 98, 31 S.E.2d 148 (1944). *State v. Doster*, 276 S.C. 647, 284 S.E.2d 218 (1981), edifies:
>
> The attorney-client privilege has long been recognized in this State. The privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained. The privilege belongs to the client and, unless waived by him, survives even his death. *South Carolina State Highway Department v. Booker*, 260 S.C. 245, 195 S.E.2d 615 (1973). Generally, the party asserting the privilege must raise it. *State v. Love*, [275] S.C. [55], 271 S.E.2d 110 (1980).
>
> Many jurisdictions strictly construe the privilege. *81 Am.Jur.2d Witnesses* § 174, at 210. The reasoning behind the strict construction is that evidence excluded under the privilege is not necessarily incompetent. See generally, *McCormick, Handbook of the Law of Evidence*, §§ 87, et seq. (2d Ed.1972).
>
> We agree that the privilege must be tailored to protect only confidences disclosed within the relationship.
>
> *Doster* at 650-51, 284 S.E.2d at 219-20.
>
> The United States Supreme Court, in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), observed:
>
> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. . . . The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.
>
> *Upjohn* at 389, 101 S.Ct. 677 (internal quotation marks and citations omitted).
>
> In order to protect a communication on the ground of attorney-client privilege, it must appear that the attorney was acting, at the time, as a legal advisor. *Marshall v. Marshall*, 282 S.C. 534, 539, 320 Page 483 S.E.2d 44, 47 (Ct.App.1984) (citing *Branden & Nethers v. Gowing*, 7 Rich. 459 (S.C.App.1854)). Only confidential communications are protected by the attorney-client

privilege. *Cloniger v. Cloniger*, 261 S.C. 603, 193 S.E.2d 647 (1973). In *Ross v. Medical University of South Carolina*, 317 S.C. 377, 453 S.E.2d 880 (1994), the South Carolina Supreme Court stated:

Attorney-client privilege protects a client and any other person from disclosing confidential communications made to counsel relative to a legal matter. See generally *McCormick on Evidence* § 87 (E. Cleary, 3rd Ed.1984). However, this privilege is not absolute:

Not every communication within the attorney and client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice. This is exemplified by the widely recognized rule that the privilege does not extend to communications in furtherance of criminal tortious or fraudulent conduct.

State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (internal citations omitted).

Ross at 383-84, 453 S.E.2d at 884-85.

The privilege may extend to agents of the attorney. For example, in *State v. Hitopoulus*, 279 S.C. 549, 309 S.E.2d 747 (1983), our supreme court held the attorney-client privilege extended to communications between a client and a psychiatrist retained to aid in the preparation of the client's case. As articulated in *State v. Thompson*, 329 S.C. 72, 495 S.E.2d 437 (1998):

[I]n determining whether the attorney-client privilege extends to communications between a client and a non-lawyer, [a court] must balance two factors: (1) the need of the attorney for the assistance of the non-lawyer to effectively represent his client, and (2) the increased potential for inaccuracy in the search for truth as the trier of fact is deprived of valuable witnesses. However, before reaching this test, a court must ascertain whether the communication is confidential in nature.

Thompson, 329 S.C. at 75, 495 S.E.2d at 438-39.

The attorney-client privilege is owned by the client and, therefore, can be waived by the client. *South Carolina State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 620 (1973). "Any 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 communications between the same attorney and the same client on the same subject." *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 46-47 (Ct.App.1984) (citing *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146 (D.S.C.1975); *U.S. v. Jones*, 696 F.2d 1069 (4th Cir.1982)).

In *Marshall*, Mrs. Marshall inadvertently left a letter addressed to her from her attorney in Mr. Marshall's pickup truck. The parties were separated at the time. Mrs. Marshall's attorney had been sending copies of his correspondence with Mrs. Marshall to her father, who was the surety for payment of Mrs. Marshall's attorney's fees. On appeal, Mr. Marshall argued the letters from Mrs. Marshall's attorney were admissible because the attorney-client privilege had been waived. We held that Mrs. Marshall did not waive the privilege by mistakenly leaving one of the letters in

Mr. Marshall's truck. However, we found "[t]he copies of correspondence sent by Mrs. Marshall's attorney to her father" presented "a different question." *Marshall* at 538, 320 S.E.2d at 47.

In order to establish the attorney-client privilege, 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. *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980). 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. *SEC v. Kingsley*, 510 F.Supp. 561 (D.C.D.C.1981); *In Re Grand Jury Proceedings*, 517 F.2d 666 (5th Cir.1975). 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. *Brinton v. Department of State*, 636 F.2d 600 (C.A.D.C.1980). The attorney-client privilege, though, does not protect communications with non-clients. *State v. Love, supra*.

Marshall at 538-39, 320 S.E.2d at 47.

We found that Mrs. Marshall's father was not a client of her attorney. By sending copies of the letters to the father, Mrs. Marshall's attorney was informing a third party of the current state of his client's lawsuit. However, we found that the letter Mr. Marshall sought to admit was not relevant. Therefore, the trial court was affirmed.

The record indicates Laurens produced the letters he now asserts are protected by the attorney-client privilege. Thus, assuming these letters were subject to the attorney-client privilege, Laurens waived that privilege by producing the letters.

Floyd v. Floyd, 615 S.E.2d 465, 365 S.C. 56 (S.C. 2005)

An interesting footnote to the *Floyd* case is the General Assembly's 2008 adoption of § 62-1-110, S. C. Code, Ann. to delete the waiver of attorney client privilege in the Probate Court when lawyers communicate with fiduciaries. That exemption in Probate Court is tantamount to an exclamation mark on Baracco's legal position because members of Council and various third parties are not remotely equivalent to a fiduciary in a probate matter.

Here, the County thwarted Baracco's request for e-mails by interposing excessive fees and demanding an inflated deposit. When Baracco narrowed her request in an effort to overcome the County's obstruction, the County then struck back by providing nothing but blank documents. When Baracco then attacked the redactions and filed suit, then, and only then, did the County

unsheathe its ultimate excuse: attorney-client privilege. Baracco filed suit on April ___, 2019, and the County first produced, in response to an Order from the Special Referee, a putative privilege log on July 7, 2020, for the first time. This privilege log, contained in the Record on Appeal at pages ___-____ [Court's Exhibits 1, 2, and 3] reveals nothing but conclusory statements with nothing approaching the specificity required to assert attorney-client privilege. Instead it contains only boiler plate language: "mattes that would violate attorney-client relationship." Such deliberately vague language does not allow either the Court or Baracco to have a basis to evaluate, one way or the other, whether the claimed exemption is supported by evidence or whether it is pretext.

Of course, in replying to the County's expansive interpretation of attorney-client privilege, Baracco is at a disadvantage because she has never seen the body of the redacted e-mails the County supplied, but she has seen the ones the County provided un-redacted, which are in the R.O.A. at pages ___-____[Exhibits 9, 10, 11, 12, and 13], and these not only obliterate the County's claim of attorney-client privilege, but also waive the claim because of the voluntary production of the documents now claimed to be protected. *Floyd v. Floyd*, 615 S.E.2d 465, 365 S.C. 56 (S.C. 2005) However, she can draw a reasonable inference about them based on the timing, the identity of the correspondents (which she did not obtain until after she filed this action and until after the Special Referee required they be disclosed), and the release of some of the same redacted e-mails the County released in UN-redacted form in response to other requests, an act which waives the privilege if it ever existed. The record demonstrates the County refused to disclose to Baracco the identity of the correspondents until the Special Referee compelled the County to reveal the correspondents' identities on July 29, 2020 at the parties' pretrial conference, which they finally did on September 20, 2020. (See Record on Appeal page ____[Order under

review at page 2]: "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." See also August 10, 2020, e-mail from Special Referee scheduling pretrial conference and page _____[County's production of the revised redacted documents on September 3, 2020]) Once the Special Referee compelled the County to disclose the identities of the correspondents, the County complied on September 3, 2020 by sending the redacted e-mails with the addressees disclosed in an encrypted Citrix file. R.O.A. page ___[Order under Review at page 2] Once the identity of the correspondents was revealed in September 2020, it became even more obvious that the communications are not remotely related to attorney client privilege because the revised documents include third parties and the context is clear that many of them involved members of County Council utilizing their private e-mail addresses to script upcoming Council meetings out of the public's eye, something specifically prohibited by the Act, § 30-40-70(c). The following e-mails received after the Special Referree compelled disclosure show that non-employee third parties are included:

Keaveny e-mail March 11, 2016, County Bate Stamp 33 includes Jim Hicks, who is not a County employee (R.O.A. page ___)

Rodman e-mail March 18, 2019 is from his private e-mail address, and includes persons not employed by the County. County Bate Stamp 50 (R.O.A. page ___)

Rodman e-mail January 8, 2016 from private e-mail accounts conducting government business. County Bate Stamp 56 (R.O.A. page ___)

Kenny Zentner e-mail dated June 6, 2018, and insurance company to councilmember's private e-mail addresses. County Bate Stamp 65 (R.O.A. page ____)

July 1, 2018 e-mail Paul Sommerville from private e-mail address County Bate Stamp 67 (R.O.A. page ___)

July 3, 2018 e-mail from Paul Sommerville from private e-mail address to a County employee (County Bate Stamp No. 93) (R.O.A. page ___) (By statute, Council members are prohibited from directing employees. See § 4-9-660, S. C. Code, ann.: "Except for the purposes of inquiries and investigations, the council shall del with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator, and neither the council nor its members shall give orders or instructions to any such officers or employees." This is a fascinating legal question beyond the scope of this appeal.)

July 6, 2018 e-mail from Paul Sommerville from private e-mail address (County Bate Stamp No. 95) (R.O.A. page ___)

July 9, 2018 Keaveny e-mail to Council members' private e-mail addresses and including third parties who are not county employees. County Bate Stamp 139 (R.O.A. page ___)

July 10, 2018 Keaveny e-mail to Council members' private e-mail addresses and including third parties who are not county employees. County Bate Stamp 141, 142 (R.O.A. pages ___)

July 16, 2018 Keaveny e-mail to Council members' private e-mail addresses County Bate Stamps 144, (R.O.A. page ___)

July 16, 2018 e-mails to Keaveny from third parties. County Bate Stamp 152 (R.O.A. pages ___)

October 25, 2018 e-mail to Elizabeth Ryan, a third party. County Bate Stamp 175, 176, 178 (R.O.A. pages ___)

March 11, 2016 e-mail to and from third party. County Bate Stamp 249, 175, 176, 178 (R.O.A. pages ___)

In these redacted e-mails, there are two important points to recall. The first is that from June to October 2018, Thomas Keaveny was acting County Administrator. The second is that some of these same e-mails the County provided to Baracco in other disclosures are in the Record on Appeal at pages ___-___[Exhibits 9, 10, 11, 12 and 13] and these exhibits demonstrate two irrefutable points: The first is the revealed e-mails contain no discussion supporting a claim of attorney-client privilege unless County Attorneys duties include advising political officers on breaking the law. Second, when the County released them in response to other inquiries, it not only waived the attorney-client privilege—even if one existed—but also demonstrated no attorney-client privilege could attach because each one involves members of Beaufort County Council unlawfully scripting upcoming public meetings to control the outcome. Thus, these e-mails are merely a lazy effort to avoid the application of § 30-4-70(c) and an even clumsier effort to script a public meeting outside the view of the public. Throughout its brief, the County asserts these communications are proper because they do not involve a "quorum" of members. § 30-4-70(c) says nothing about a quorum. More importantly, the County ignores the elephant in the room, which is the illegality of such acts. Even more glaring is the County Attorney's office coordinating with other local governments to conspire against Baracco to coordinate with one another to increase the fees "we are considering requiring a 50% deposit before processing the entire response," and inhibit her access to public documents: "For anyone that [*sic*.] is not familiar with this matter or the requestor feel free call me or send questions my direction." Exhibit 17, R.O.A. page ____.

Thus, this evidence demonstrates that: (1) there is no attorney-client privilege for unlawful acts, (2) attorney client privilege only attaches when clients seek legal advice based on confidential disclosures, (3) attorney-client is waived when involving third parties or releasing documents later

claimed to be covered by the privilege, and (4) the attorney-client privilege does not exist as a work-around the *Freedom of Information Act*. Baracco's evidence demonstrates that the County Councilmembers, utilizing their private e-mail addresses, were not seeking legal advice, but instead were doing the very thing the *Freedom of Information Act* is designed to prevent; to wit, scripting upcoming meetings. The County's answer to this is outrageous—it says that because the scripting did not include a quorum, the Council's conduct is therefore proper! The prohibition of § 30-4-70, S. C. Code, Section C does not mention a quorum and it is a preposterous assertion to claim that keeping the number of conspirators below a quorum gives them free reign to ignore the law. § 30-4-70 is clear that public officials shall not use electronic communications to subvert the transparency requirements of serving in government. The County tries to escape this trap by asserting that Baracco never filed suit for illegal meetings, which precludes appellate review of the Special Referee's Order. Such misdirection again demonstrates the County's refusal to meet the legal issue head on: Baracco's right to inspect public documents. Finally, as set forth above, Tom Keaveny was acting County Administrator from June through October of 2018, and it is astonishing that political figures are wrangling the County Administrator—who is specifically not supposed to be a political figure—see § 14-9-660, S. C. Code, quoted above on page 20—into political machinations. Councilmembers cannot intentionally violate the limitations of § 30-4-70(C) and disguise their efforts to control unlawfully the outcome of public meetings outside the public view and simultaneously claim that their unlawful acts are protected by attorney-client privilege. This issue is fully discussed in Baracco's opening brief at pages 13 – 16 and 22 – 44 and Beaufort County's assertion it can violate § 30-4-70(C) with impunity so long as it stays below a quorum elevates its chutzpah to superlative.

Only after the Special Referee compelled the County to reveal the correspondents' identities in the e-mail chains, did Baracco discover e-mails including persons who are not either County employees or agents, and the inclusion of third parties in private communications eviscerates the County's legal position on attorney-client privilege and its assertion of proper government conduct.

The County gives away the game on page 20: "Determining whether a particular communication is privileged, however, is a fact-intensive exercise and often requires the dedication of substantial legal and staff resources, as indicated in the case at hand." County's Brief at page 20. First, this is simply not true. As discussed in Baracco's opening brief and as explained above, an attorney-client privilege means a client is confiding confidential information in confidence, outside the presence of third parties, to receive legal advice. The un-redacted e-mails provided to Baracco in other disclosures, Exhibits 9, 10, 11, 12, and 13 (R.O.A. pages ___-____ reveal that no one is asking for legal advice about anything. The County either intentionally misses the point or fails to apprehend it. Claiming that the *Freedom of Information Act* is ambiguous and that citizens, such as Baracco, must be satisfied with reliance on the County's honesty and good faith in deciding which documents are public and which are withheld under "attorney-client privilege" is illogical. The County grasps its dilemma when it writes: "This broad exemption similarly furthers the state-recognized goal of limiting taxpayer burden by eliminating extensive review of tens of thousands of documents annually in response to FOIA requests." (Brief at page 20) The assertion that the County Attorney is charged with responding to "tens of thousands" of requests for legal advice simultaneously demonstrates both the absurdity of the County's position and its contempt for the law. Attorney-client privilege is a narrow exemption that must be intentionally invoked, but the County's broad interpretation allows the exemption of the *Freedom*

of Information Act to swallow the whole. The County expands its exemption to cover every government lawyer's utterance, something the Supreme Court rejected in *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011). The indiscriminate deployment of attorney-client privilege as a sword rather than a shield is a textbook example of the manner in which a well-recognized privilege can be employed to conceal and obstruct. See Marva Strassburg's exhaustive treatment of this issue quoted on pages 6-7 of Baracco's Appellant's Reply Brief. The same topic is covered by Nathan Crystal in his article, "Confidentiality, Privilege, and Work Product: Some Important Differences." *ibid*.

REPLY TO ARGUMENT 2 B

The *Freedom of Information Act* is clear and does not convey attorney-client privilege to third parties and specifically requires documents related to the sale or purchase of real estate be made public after the transaction has closed.

The redacted emails not only included a real estate agent who is not an employee of the County but also several other individuals who are not employees of the County. See the list of non-employee correspondents list above on pages 15-16. Moreover, the County's assertion that a real estate agent who listed a parcel of real estate for sale became a "functional employee" of the County is absurd. First, she is paid based on a commission earned from the sales price—the seller pays her, not the County. Second, she is not obligated to the County in any way—she could have sold the parcel to anyone. Third, the Special Referee noted in her Order that Debra Recgez's contract with the County specifically exempted her from being considered as the agent of the County. See Order under review at page ___(R.O.A. page 14 of November 13, 2020 Order): "The language of the Contract arising out of the RFP specifically states that the Contractor [Regecz] is not an agent or employee." There is nothing ambiguous about that, and the County's attempt to transform Regecz into a "functional employee" to thwart the disclosure of public documents is confounding.

Most importantly, and this is a point that the County ignores—the *Freedom of Information Act* specifically requires that contractual documents related to the sale or real estate be made public once the transaction is closed. See § 30-4-40(a)(5)(b), S. C. Code Ann.: "a contract for the sale or purchase of real estate shall remain exempt from disclosure until the deed is executed, but this exemption applies only to those contracts of sale or purchase where the execution of the deed occurs within twelve months from the date of sale or purchase." The County grasps at straws and stands the burden of proof on its head when it asserts, in the face of overwhelming evidence to the contrary, "that any waiver of privilege was neither distinct nor equivocal." (County's Brief at page 24) Of course there is no evidence of a "distinct" waiver because: (1) all the documents in the record demonstrate that the agent, Regecz, went out of her way to make sure she was not considered the County's employee, and (2) as the Special Referee noted in her Order, even the County's Request for Proposals made clear that the County's choice of sales agent would not be considered an employee. It is not up to Baracco to prove a distinct waiver; rather, the burden is on the County to show that a privilege exists! "Communications are protected by the attorney-client privilege only if an attorney-client relationship is first proven and the communications were intended to be confidential: 'In order to establish the privilege, 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. In general, the burden of establishing the privilege rests upon the party asserting it.' *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 44 (Ct. Ap. 1984). At the time of the communication, the lawyer must be acting as a legal advisor. *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984)." Crystal at pages 9-10.

The factors necessary to create an attorney-client privilege are set forth above at pages 15 - 17, citing the *Floyd* case and as identified by Prof. Crystal in his article discussing *Marshall*.

This record lacks a *scintilla* of evidence that either Regecz considered herself an agent or employee of the County or that the County considered her an employee who could impart confidential information to the County Attorney and expect him to render legal advice to her. Under the County's construction of attorney-client privilege, every vendor selling a product or service to the County becomes a client of the County Attorney.

CONCLUSION

The case should be remanded to the circuit court, not the Special Referee, to Order the release of the unredacted documents, to award the Appellant/Respondent a reasonable attorney's fee as a prevailing party, and to enjoin the County from future violations of the *South Carolina Freedom of Information Act*.

As set forth in Baracco's Appellant's brief, the County goes to extraordinary lengths and asserts creative arguments to justify its unconscionable conduct flouting the *S. C. Freedom of Information Act*. The record shows how far Beaufort County will contort South Carolina law and normal conventions to thwart Baracco's access to public records. As the County Attorney said in her communication to Corporation Counsel for the municipalities: "For anyone that is not familiar with this matter or the requester feel free call me or send questions my direction." R.O.A. page ____ [Allisson Coppage June 11, 2014 e-mail, Exhibit 17]) As set forth in her Appellant's Opening Brief, it is more important than ever than citizens remain well informed of their representatives' conduct, and the reason the General Assembly adopted a *Freedom of Information Act* is to provide the tools for ordinary citizens to gain access to the activities of government. As set forth her opening brief, the *Post & Courier* editorialized on this subject on Sunday, September 5, 2021:

> Our changing media landscape—specifically the continuation and even disappearance of local newspapers in South Carolina's smaller communities—has led some elected official to operate with less public oversight than ever, with often predictable and discouraging results.
>
> This vacuum has been filled partly by public-minded citizens who invest their time to learn about what's going on—and then spread the news through their social circles and social media.

This record demonstrates that Beaufort County has gone to extraordinary lengths to thwart Baracco's access. It knowingly assessed unlawful fees to impede her access in the hope she would discontinue her search. Its lawyer even solicited neighboring local governments to get on board to charge her more than allowed by statute. The Councilmembers wrote to the local judiciary about her and encouraged other officials to get involved in a criminal prosecution against her. R.O.A. page ____[Gary Kubic's, County Administrator's, March 6, 2015 e-mail to various officials and County Attorney, Exhibit 12] They make spurious claims of attorney-client privilege to hide unlawful conduct, and assess outrageous fees for the simple task of capturing e-mails and transferring them to a thumb drive and continue to claim a privilege when the County waived it by releasing un-redacted some of the same e-mails it now contends are protected. The County's subterfuge is neither subtle nor well executed. It provides documents in one *F.O.I.A.* response and redacts the same documents in another based on contrived attorney-client privilege. It asserts a ridiculous claim that a real estate agent is the "functional equivalent" of a County employee whose communications are then protected by attorney-client privilege—even though her contract with the County precisely states she is not the County's agent! See Court's Exhibit 5, ¶ 13, page 6 of 8, R.O.A. page ____: "The Contractor shall be fully independent in performing the services and shall not act as an agent or employee of the County." Quoted in November 13, 2020 Order at page 14, R.O.A. page ____. In short, he County's conduct makes a mockery of the *S. C. Freedom of Information Act.* It even sought to shield access to documents about the acquisition of a parcel of real estate that the County itself found to be improperly acquired by "the unauthorized purchase by the former Interim County Administrator." (R.O.A. Ex. 14 [Weaver memorandum December 12, 2018]) It is impossible to reconcile Baracco's recognition of this impropriety, something the County acknowledges, with its open hostility for her and

extraordinary effort to thwart her access to public documents. The only errors the Special Referee made was in not compelling the County to provide unredacted documents and her failure to recognize Baracco as the prevailing party and award fees and costs as such. On this point, the Appellant/Respondent, Baracco, acknowledges what a difficult position Judge Buckner placed the Special Referee in when he drafted her as an involuntary Special Referee. Judge Buckner placed the Special Referee in an untenable situation, forcing her to evaluate the conduct of the County in which she practices law. It was not fair of the circuit court to thrust this task upon a local lawyer, and the Special Referee discharged her duties with alacrity and impressive diligence, but in the end, it was not fair to her or to the parties for her to be forced into playing that role. As this case demonstrates, it is vital in a democratic society that citizens have access to public records in order to be informed about Government's conduct, and the evidence produced in this case demonstrated a strong governmental animus for Baracco's probing into government activity. The case should be reversed to the extent that the County's redactions are clearly improper, and the County should immediately turn over the material sought by the Appellant/Respondent. Moreover, the case should be remanded to the circuit court, not a Special Referee, to allow the circuit court to calculate the fees and costs to be awarded to Baracco as a prevailing party.

Respectfully submitted,

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