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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.

FINAL BRIEF OF APPELLANT/RESPONDENT

April 12, 2022

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STATEMENT OF THE CASE

This matter is before the Court under the *South Carolina Freedom of Information Act*, §§ 30-4-10, *et. seq*. On June 29, 2019, the Appellant filed an amended complaint, R.O.A. Vol. 1, page 30, alleging that she made four requests for government documents under § 30-4-40, S. C. Code, ann. The Appellant's amended complaint sets out how she requested to inspect County documents relating to the County's purchase of two parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River. In addition to the sales documents, the Appellant also asked for e-mail communications of County officials connected with these and other transactions. For the Court's convenience, the four requests—and the dates for each—are summarized as follows (R.O.A. Vol 1, page 37[Exhibit 1 to Amended Complaint]):

February 10, 2019	Case Number 2019-000231 (request for documents related to real estate purchases)	[Exhibit 2]
March 10, 2019	Case Number 2019-000385 (request for county officials' correspondence)	[Exhibit 3]
March 18, 2019	Case Number 2019-000459 (revised request for a county official's correspondence from four specified addresses)	[Exhibit 4]

March 31, 2019	Case Number 2019-00575 (request for emails from a private account) from Councilmember Alice Howard	[Exhibit 5] (R.O.A. Vol. 1 37)

The County acknowledged each of these requests and assigned each one the individual case number set forth in the preceding summary table on February 11th, March 11th , March 18th and April 1st (R.O.A. Vol. 1, pages313-322 [Exhibits 2, 3, 4, and 5 to amended complaint]) After acknowledging receipt of the requests, the County informed the plaintiff that it required a 25% deposit to cover the cost for supplying the documents. The County asserted the costs were approximately $14,432.06 and required a 25% deposit ($3,608.02) as a condition of fulfilling the request.

The appellant wrote checks to the County for $124.66 and 144.66. (R.O.A. Vol. 1, page 9 [Order page 3]); however, when the County furnished its responses, it redacted most of the documents it produced, including even the identity of the correspondents. (It also provided multiple copies of the same documents for which it charged the plaintiff.) When the plaintiff inquired as to the reason for the excessive charges, the reason for the extensive redactions and the absence of certain specified documents, the County refused to communicate with her in good faith. Instead, it responded in bad faith by avoiding her questions, directing her to contact the legal department, and provided non-answers as follows:

April 30, 2019

. . . The emails from [request] #2 and #3 were all redacted (it was about 76 pages). Also, I requested the emails between Gruber and Regecz, and they were not included.

/s/ Mare Baracco

[May 1, 2019]

Beaufort County has responded to your FOIA request in full and in accordance with South Carolina's Freedom of Information Act. If no documents were produced in response to a portion of your request, either no documents exist, or, if documents do exist and/or they were redacted, they are exempted form production pursuant to the act.

/s/ Bill Lisbon, FOIA Specialist

Not satisfied with the County's response, the appellant followed up with an e-mail on May 2, 2018 as follows:

. . . In an effort to amicably resolve my concern, what is the County claiming as their rationale under FOIA and the SC Records and retention act for the redactions?
/s/ Mare Baracco

May 2, 2019

Good afternoon. I just forwarded your correspondence to our Legal Department . . . for follow up. My office was not involved in the redactions.
/s/ Monica N. Spells, ICMA-CM

May 2, 2019

. . . Ms. Spells, are you the County's FOIA Officer? If not, please tell me who is—
/s/ Mare Baracco

May 3, 2019

Good morning. No, ma'am and we do not have an employee with that title.
/s/ Monica N. Spells, ICMA-CM[1]

After a month passed without further response, the appellant followed up on June 4, 2019:

June 4, 2019

Re your reply of May 2, I have still not heard from the legal department as to their reason for the redaction of FOIA 2019-000231. May I have a response please? Thank you.
/s/ Mare Baracco

June 4, 2019

I have submitted your follow up inquiry to the Legal Department. Generally speaking, my understanding is that the Legal Department redacts those portions of documents which contain information which the public records act exempts from production. . . . I recommend contacting either of those offices directly with any further inquiries about this item.
/s/ Monica Spells
R.O.A. Vol. 3, pages 623-627 [Exhibits 3 and 6]

When the appellant did not receive readable documents she requested and could not get anyone at the County to respond to her as demonstrated by the unsatisfactory explanations from the

[1] "ICMA-CM" is an acronym for "International City Managers Association—City Manager."

County quoted above, she filed her initial summons and complaint on April 10, 2019, and an amended summons and complaint on June 29, 2019, seeking a court order to enjoin the County from violating the *Freedom of Information Act*, for an Order compelling the County to make the records available and stop charging excessive fees as prohibited by the Act, for attorney's fees for the prosecution of the action and for such other and further relief as the Court found proper. The County timely answered on August 14, 2019, setting up four defenses: general denial, immunity, a motion to dismiss, and reserving all defenses (R.O.A. Vol. 1, page 38)

On May 28, 2020, the Chief administrative Judge for Beaufort County *sua sponte* assigned the case to the Honorable Perry Buckner to conduct a hearing in accordance with § 30-4-100, S. C. Code, Ann. (R.O.A. Vol 1, page 1 [Order])[2] Thereafter, the matter came before Judge Buckner on June 2, 2020, and the Court, again *sua sponte*, assigned the case to Erin Dean as Special Referee by Order filed that same day, June 2, 2020. (R.O.A. Vol. 1, page 4 [Order]) After Erin Dean set a briefing schedule, the parties appeared before her for the merits hearing of the case by video conference on September 25, 2020. After taking testimony, considering written briefing and arguments of counsel, the Special Referee issued an Order on November 13, 2020. (R.O.A. Vol. 1, page 7) On November 19, 2020, the appellant filed a motion for reconsideration (R.O.A. Vol. 1, page 152), and on November 23, 2020, the County filed its motion for reconsideration. (R.O.A. Vol. 1, page 162) By Order dated March 2, 2021, the Special Referee denied both motions (R.O.A. Vol. 1, page 23, and this appeal followed on March 22, 2021. The County filed its cross appeal on March 23, 2021. (R.O.A. Vol. 1, pages 199 and 201) On May 18, 2021, the Special Referee billed $7,280.00 for her service in the case, which required each party to pay the sum of $3,640.00 for the Special

[2] The reviewing Court will notice the delay from filing to resolution. This delay occurred because appellant's counsel suffered a heart attack on April 20, 2019, which led to open heart surgery on August 20, 2019, which required a lengthy rehabilitative period.

Referee's time, which each party paid.

STANDARD OF REVIEW

"The standard of review in a declaratory action is determined by the underlying issues." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012) (citing *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "The interpretation of a statute is a question of law." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citing *CFRE, L.L.C. v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). This Court may interpret statutes, and therefore resolve this case, "without any deference to the court below." *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)).

Moreover, "The essential purpose of FOIA is to protect the public from secret government activity." *Lambries*, 409 S.C. at 8–9, 760 S.E.2d at 789 (citing *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 535 n. 4, 500 S.E.2d 783, 785 n. 4 (1998)). In declaring FOIA's purpose, the General Assembly has found "that it is vital in a democratic society that public business be performed in an open and public manner so that [415 S.C. 629] 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." *Id*. at 9, 760 S.E.2d at 789 (quoting S. C. Code Ann. § 30–4–15 (2007)). " 'Toward this end, [FOIA's] provisions . . . must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.' " *Id*. at 9, 760 S.E.2d at 789 (alterations in original) (quoting S. C. Code, Ann. § 30–4–15).

Brock v. Town of Mount Pleasant, 415 S.C. 625, 785 S.E.2d 198 (S.C. 2016) (affirmed Court of Appeals' Opinion as modified where Court of Appeals ordered Mt. Pleasant to stop conducting executive sessions without proper notice and stop deleting e-mails instead of preserving them as

required by the *South Carolina Records Retention* Act. See Court of Appeals' Opinion at 411 S.C. 106, 767 S.E.2d 203 (S.C. App. 2014) The Court also remanded to the trial court for a redetermination of attorney's fees owed to the plaintiff.)

See also *Ballard v. Newberry County*, 432 S.C. 526, 854 S.E.2d 848 (S. C. App. 2021):

This case requires us to construe the Public Records Act and FOIA. "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law *de novo*." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston* , 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). (Court affirmed trial court that the Records Retention Act does not create a private cause of action and affirmed award of attorney's fees to plaintiff.)

STATEMENT OF FACTS

In February and March of 2019, the plaintiff sent the four requests for documents to Beaufort County summarized above on page 4. The four requests involved two subjects: the first was the County's acquisition of two parcels of real estate, and the second involved a request to review e-mail correspondence from three members of County Council who use their private e-mail accounts to conduct County business out of the public's view in violation of § 30-4-70, S. C. Code, ann. This section says: "No chance meeting, social meeting, **or electronic communication** may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." (emphasis added) The three members of the Council were:

Paul Sommerville, Chair

Alice Howard, Councilmember

Stu Rodman, Councilmember

In the hearing before the Special Referee on September 23, 2020, the appellant explained why she was interested in these communications, particularly her Council representative, Alice Howard:

Q. So what we've described as FOIA request number two and FOIA request number three and FOIA request number four in this action, those were all FOIA requests related to personal e-mails from a six-year period as to different things? . . .

A. That [Alice Howard e-mails] was a previous FOIA request for personal e-mails, correct [Exhibit 11]. If I might just speak to the Court about these Alice Howard ones. Alice Howard is my representative regarding Port Royal. And I couldn't get any help from Alice Howard, and I never understood why until I got some of these e-mails. And I didn't know about the e-mails from her to the town manager about doing intel. And again, one of the reasons I'm asking for the e-mails was I just was alarmed that there was like an active investigation of me by council members. I couldn't understand that.

R.O.A. Vol. 1, page 274-275 [tr. page 59, line 19—page 60, line 13] (Councilmember Alice Howard actually uses the word "intel" when sending information about the appellant to the Town Manager of Port Royal, appellant's home. See e-mail from Alice Howard to Van Willis, dated March 12, 2015 at R.O.A. Vol.1, page 342 [Exhibit 16] "Van, you might find this interesting for your intel." /s/ Alice Howard)

In addition to seeking the communications of these three councilmembers' private account email exchanges, the plaintiff also wanted to review the correspondence of the two County Administrators, Josh Gruber and Tom Keaveny. Beaufort County provides each Councilmember and each staff member with an official Beaufort County e-mail address for use in conducting government business. There are many reasons for this, but one is to preserve such communications for archives as required by the State Records Retention Act § 30-1-10, *et. seq.* When the plaintiff discovered these three Council members using private addresses to conduct County business, she requested additionally the correspondence related to County business submitted from their private e-mail accounts.

As set forth above, the County acknowledged receipt of the four requests, giving each one a case number, and informed the plaintiff that the cost to retrieve the documents would be $14,432.06, including a charge for $72.00 an hour for the legal department to review the e-mails for "redaction." The County's charge for Request No. 1 was $124.66, which required a deposit of $124.66 as a condition of fulfilling the request. For request number 2, the County estimated the charges at $12,079.00 and demanded a deposit of $3,019.75. The County explained to the appellant that it

arrived at these charges by estimating 167 hours at $72.00 per hour, 3 hours to redact and compile at $16.00 an hour, and $7.00 for a flash drive. R.O.A. Vol. 1, page 319 [Exhibit 4]. After much back and forth, including the plaintiff's agreement to narrow the scope of her requests (the plaintiff limited her 2nd request, which then became her 3rd request), the County reduced the charges and demanded a deposit of $152.82 as a condition of fulfilling the request. Finally, on April 2, 2019, the County demanded a deposit of $1,617.14 as a condition of fulfilling the 4th request. (R.O.A. Vol. 1, page 327 and 9 [Exhibit 8, Nov. 13, 2020 Order, page 3]) When negotiations to resolve the impasse failed, the plaintiff filed suit on April 10, 2019, and later amended her complaint on June 27, 2019. Prior to filing suit, the County produced 276 pages of documents in response to F.O.I.A. request #1 on March 21, 2019, but it was a meaningless production because the documents were largely redacted, including blocking out the correspondents' identities and addresses so that the plaintiff could not tell who was included in each e-mail chain. When the appellant objected that she could not see who was included in the e-mail chains, the Special Referee responded by ordering the County to produce the redacted e-mails with the correspondents' identities disclosed: "Prior to the Merits Hearing, the Court instructed counsel for the Defendant to remove the redactions relative to the "to/from" lines on the e-mails produced so that the distribution list would be available to Plaintiff." (R.O.A. Vol. 1, page 8 [Nov. 13, 2020 Order page 2]) To this day, the County has never produced any e-mails relative to the F.O.I.A. request for e-mails from Stu Rodman and Alice Howard on their private e-mail address. To plant an exclamation mark upon the County's ferociousness in thwarting the plaintiff, the plaintiff discovered in the preparation of this brief for the Court, that the documents the Special Referee ordered County to turn over—the redacted e-mails revealing the names of the correspondents in the e-mail chains—were turned over in a digital time sensitive file that caused them to evaporate after a certain period, thereby forcing the plaintiff to request the County to resend the documents the Court previously ordered turned over.

Such subterfuge[3] is a pattern with the County and illuminates how Beaufort County repeatedly deployed a policy of bad faith toward the appellant, willing to circumvent court Orders to mistreat her. The reason this happens is because there is usually no consequence for government officials disobeying the law except to require a government to pay the opposing party's attorney's fees with taxpayer money, which is no deterrent at all. (The General Assembly removed criminal penalties when it amended the *F.O.I.A.* in 2017.)

After filing suit on April 10th, the disposition of the case stalled because, as set forth above, fewer than two weeks later, plaintiff's counsel suffered a heart attack, which required several hospitalizations, open heart surgery on August 20, 2019, and one post-surgical hospitalization. As a result, the case was not resolved quickly as required by § 30-4-100, S. C. Code, ann.: "Upon filing of the request for declaratory judgment or injunctive relief related to the provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties."

After the Chief Administrative Judge assigned the case to Judge Buckner on May 28, 2020 (R.O.A. Vol. 1, page 1 [order], the Clerk of Court called the case on June 2, 2020, and the parties appeared before Judge Buckner, who, *sua sponte*, ordered the case referred to Erin Dean to review the documents and make a ruling, appealable to this Court. As set forth above in the Statement of the Case, the Special Referee entered a final Order on November 13, 2020, and an Order denying reconsideration on March 2, 2021, and this appeal followed on March 23, 2021, and the County' cross appeal on March 24, 2021. (R.O.A. Vol. 1, pages 7, 23, 199 and 201 [Orders and Notices of Appeal]

[3] This subterfuge does not involve opposing counsel. Rather, it is a pattern of bad faith with the County to employ computer trickery to thwart appellant's access. See R.O.A. page 237 [Sept. 23, 2020 transcript page 22] regarding the County's response to discovery requests: "So all of the discovery was encrypted. It's interesting, in the same Citrix ShareFile that we all have . . . mine were all encrypted." Appellant testified she paid "almost $6,000.00" to get them unencrypted and printed. R.O.A. Vol. 1, page 237 [tr. page 22, line 24]

ARGUMENTS

1. DID THE SPECIAL REFEREE ERR IN FINDING GOVERNMENT OFFICIALS CONDUCTING GOVERNMENT BUSINESS ON PRIVATE E-MAIL ACCOUNTS, CAN CLAIM "PRIVILEGE" FROM DISCLOSURE UNDER THE *FREEDOM OF INFORMATION ACT*?

The appellant sets forth this broadly worded question before the Court, which appellant follows with a more detailed discussion breaking down the argument into four separate sub-sections below. Broadly stated, the Special Referee failed to apprehend that when Councilmembers resort to their private e-mail addresses in order to conduct County business, the Councilmembers surrender any expectation of privacy or "privilege" to shield their private e-mails about public business from an open records law. Likewise, the Councilmembers cannot invoke privilege by copying the County Administrator and the County Attorney in order to avoid disclosure. This is especially true here when from June 2018 until October 2018, the same person acted as County Attorney and County Administrator. As discussed more fully below, the County never identified attorney-client privilege as the reason for its redactions until after the appellant filed her action.

The County Attorney's duties do not include an obligation to render private legal advice to citizens who happen to be on Council. More importantly, using private e-mail communications to conduct County business is precisely the activity the General Assembly prohibited by enacting § 30-4-70(c). When the legal question is distilled down to the remaining solute, all that remains is an illogical proposition: we do not have to turn over private e-mails because they are private, but it is illegal to conduct business this way, and, as discussed in detail below, there is no attorney-client privilege in an unlawful act. There is not a lot of well-developed case law in South Carolina on government officials' reliance on private e-mail addresses to conduct government business, although this issue occupied America's attention in the run-up to the 2016 Presidential election when reporters disclosed a private server utilized to conduct government business. While our Supreme Court has not addressed this precise issue, it did address the opposite of the issue in 1988, when the Supreme Court

issued a public reprimand to a circuit court judge for, among other things, using official judicial stationary to advance a civil claim, or, as the Court put it: "[lending] the prestige of his office go advance the interests of another." See *In the Matter of Peeples*, 297 S.C. 36, 374 S.E.2d 674 (1988) (circuit court judge wrote letter on judicial stationary demanding payment of an alleged debt) Here, the County officials claim the opposite privilege; the right to lend the privacy of their personal communications to advance the political interests of the County. If judges cannot utilize their position of authority to advance private interests, neither can government officials hide behind their claims of privacy to advance public interests.

On July 19, 2018, the South Carolina Ethics Commission issued Advisory Opinion Number AO2018-004 on a related issue (Council member expressing personal opinion on referendum question as part of duties). R.O.A. page ____ There, the Commission noted that an elected official is never really off duty: ". . . the Governor does not stop being the Governor at 5:00 P.M. He is Governor twenty-four hours a day and must respond to the duties of his office whenever they arise." (quoting S. C. Attorney General Opinion Dec. 23, 2013). The State Ethics Commission held that while Councilmembers do not surrender their freedom to be private citizens, any time they utilize public resources or are expressing a public opinion in their capacity as government officials, then they are acting as officials of the government. See R.O.A. Vol. 1, pages 328-334 [Exhibits 9—13][4] in which four members of Council work together to script the outcome of an upcoming Council meeting. (This precise issue is discussed more fully below on page 23 because the Richland County Court of Common Pleas recently addressed this scripting phenomenon.) And when Councilmembers use their private e-mail addresses to communicate with one another about public matters, they are acting as government officials, and their communications are public. The same exemption requirements apply

[4] The County redacted these e-mails in response to the appellant's *F.O.I.A.* request but provided some of them to her without redaction earlier.

to these private account e-mails as those exchanged on the County's server whether using a government provided e-mail account or a private account, the requirement for open access is the same, and circumventing F.O.I.A.'s open meeting requirement by use of e-mail communications is either a willful effort to break the law or ignorance of how government works. Reaching consensus by e-mail among Councilmembers is akin is to holding an unannounced executive session, a clear violation of F.O.I.A. The whole purpose of § 30-4-70 is to prevent these secret Council meetings. This statute instructs office holders not to use e-mail or texts to circumvent their obligation to be transparent in government business, and the stratagem of including the County Attorney in the e-mail chain is a stratagem rejected by the Supreme Court as discussed more fully below. (As discussed below in detail in a separate analysis devoted to this one topic, the Supreme Court already declared that including the County Attorney in an e-mail chain does not invoke attorney/client privilege. See *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011))

At its core, the Beaufort County legal position is both circular and contradictory:

Private e-mails are private and do not have to be disclosed under the *F.O.I.A.*

↑ ↓

Private e-mails which copy the County Attorney in the chain are privileged and do not have to be disclosed because the County Attorney represents the County and dispenses legal advice to the Government.

These two legal positions are contradictory. If the e-mails are private communications between private citizens and discuss private matters unrelated to public business, then appellant cannot and would not demand them. On the other and, if the Councilmembers are using private e-mails to conduct public business while circumventing governmental transparency, then they cannot be privileged because (1) they are related to the core function of government officials, (2) the County Attorney represents the County, not private citizens who happen to hold political office, and (3) there

is no privilege for an unlawful act. (See § 30-4-70(c): "No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has subversion control, jurisdiction, or advisory power.") E-mails exchanged between Councilmembers, the County Attorney, and third parties, cannot be "privileged," a legal position already determined by the Supreme Court in *Evening Post Publishing v. Berkeley County School District, op.cit.* Each of these issues is discussed in more detail below.

A. THE SPECIAL REFEREE ERRED IN FAILING TO APPLY THE GENERAL ASSEMBLY'S DECLARATION THAT THE COUNTY'S DEMAND FOR EXHORBITANT AND UNJUSTIFIED FEES AS A CONDITION OF RESPONDING TO A F.O.I.A. REQUEST IS AN "IRREPARABLE HARM" UNDER *F.O.I.A.* AND A VIOLATION THAT DOES NOT REQUIRE A CITIZEN TO PAY AND CLAIM "DAMAGES" AS A CONDITION TO SEEKING INJUNCTIVE AND DECLARATORY RELIEF UNDER THE *FREEDOM OF INFORMATION ACT*.

At the time the plaintiff made her application for public documents, the County maintained a published fee schedule on its home page, which identified the allowable charges as set by the General Assembly. However, in response to the plaintiff's request for documents, the County demanded over fourteen thousand dollars as a precondition to supplying electronic communications that can be gathered and transferred in seconds to a flash drive, which costs the requestor $7.00 according to the County's published charges. When the plaintiff questioned these charges, the County responded by informing her that the County Attorney's office was reviewing the documents prior to their release, a charge that is statutorily prohibited. See Record on Appeal Vol. 1, page 319 [Exhibit 4, County's March 18, 2019 correspondence] for its charges: "167 hours estimated for I.T. to search and compile emails @ $72.00/hour = $12,024.00." When the plaintiff questioned the County about its exorbitant fees (R.O.A. Vol. 1, page 323 [Ex. 6]), the then acting County Administrator, John Weaver, replied to her on March 27th, and offered the following explanation as to why the charges are so high:

Ms. Baracco—As you may/may not know, Beaufort County perhaps has the most sophisticated FOIA system of any count or municipality in South Carolina, including both manpower

and electronic capabilities. I have complete confidence in that department and in the management oversight provided by Ms. Spells. I provide you with a response as to your inquiry of last Monday and find it to be satisfactory. Certainly you are free to contact Council with your concern, which you have done; although I tell you that neither Council nor county staff nor I have any significant impact on what can and cannot be done with FOIA inasmuch as the requirements are dictated by South Carolina statutory law.

/s/ John Weaver R.O.A. Vol. 1, page 341 [Ex. 15]

It is revealing to compare the County's response to Ms. Baracco with the response provided to Councilmember Mike Covert:

As part of recommendations from SLED to tighten all controls over all of our information technology systems, especially those that tie to criminal justice information, the County has restricted the email search permission to only the IT Director and another senior manager in that department. A previous staff member no longer employed with the County previously searched emails at an hourly rate of $25. Staff did not update this information on their end. I have handled that botch from a managerial standpoint. The current hourly rate of the IT Director is $49.07 and the hourly rate of the other manager is $30.74. the primary email searcher is the senior manager and the IT Director is the secondary email searcher. Their availability coupled with FOIA response deadlines determines who conducts the search.

If requested emails involve elected and appointed officials, historically, the Legal Department/County Attorney review these emails prior to release to ensure that privileged information is not released inadvertently.

Staff currently uses an estimated minimum time of one minute per email for the County attorney to review these emails. The current hourly rate of the County Attorney is $72.

The Legal Department/County Attorney determines redactions and will have to address this question. **My understanding is that some elected officials use a combination of personal email accounts and an account provided by Beaufort County in the course of conducting business with other individuals using Beaufort County accounts.**

/s/ John Weaver
March 27, 2019 (R.O.A. Vol. 1, page 347 [correspondence to the plaintiff on the same subject, Exhibit 20]) (emphasis added)

The above explanation is entirely bogus and further highlights the County's animal for Ms. Baracco. First, the *South Carolina Freedom of Information Act* requires that the government's imposition of charges be at the lowest possible rate and cannot include assessing attorney's fees against a requestor. § 30-4-30, S. C. Code, ann. states: "The records must be furnished at the lowest possible cost to the person requesting the records." Furthermore, the County cannot charge for

"redactions." "Fees may not be charged for examination and review to determine if the documents are subject to disclosure." § 30-4-30(B) Here, the excessiveness of these charges, especially considering that they are specifically prohibited by statute and considering the County's demonstrated bad faith toward the appellant (discussed more fully below), is *res ipsa loquitur*. (The great South Carolina jurist, Professor Kemmerlin, quoted Shakespeare to legions of students and lawyers for the proposition that while South Carolina may not have *res ipsa loquitur* by name, it has the same principle by a different name, circumstantial evidence: "What's in a name? That which we call a rose/By any other word would smell as sweet." *Romeo and Juliet*, Act II, Sc. 2, lines 43-44) Moreover, the County further gives away the game in a June 11, 2014, e-mail circulated between the lawyers for the County, Allison Coppage, the City of Beaufort, William Harvey, and the Town of Bluffton, Terry Finger:

> I am writing in reference to the attached FOIA request from Mare Barraco. It is my understanding that each of your respective municipalities has received a similar request. We currently have our PIO looking at what is readily available online and what will take staff time & resources to gather. Based on the extensive nature of the request we are considering requiring a 50% deposit before processing the entire response. What I would like to know is whether the municipalities may be thinking about taking a similar approach. The County would like to respond similarly to the other parties so that there can be no issues later on about us not providing an adequate response.
>
> **For anyone that is not familiar with this matter or the requestor feel free to call me or send questions my direction.**
> /s/ Allison C. Coppage, Assistant County Attorney (R.O.A. page 343 [Exhibit 17] "PIO" = Public Information Officer) (emphasis added)

If this Court grants oral argument in this case, the Court may inquire of the County what difference the identity of a requestor makes to the County's obligation to adhere to the *Freedom of Information Act* or why the County believes it is important for different governmental bodies to coordinate their responses to a request from a specific requestor. The June 11, 2014 solicitation not only violates both the letter and the spirit of the public policy of the *Freedom of Information Act*, but also the County's invitation to assess unlawful charges, and the manufacture of pretexts to justify them should shock the conscience of the Court. One municipal attorney, William B. Harvey, initially

did not accept the County's offer to conspire against Baracco. Writing on behalf of the City of Beaufort at 10:59 a.m., Mr. Harvey's response was ideal: "I don't see anything in this letter directed to the City of Beaufort that would require a response." (R.O.A. Vol. 1, page 343 [Exhibit 17]) However, later that afternoon, after the County Attorney wrote back and advised the City that they were contemplating billing Ms. Baracco $35,000.00, Mr. Harvey reconsidered, writing back at 3:42 p.m.:

> You are correct. The city manager sent me the letter directed to the City. Generally, we charge $35 per hour for staff research time. I have no idea how much staff time it would take to compile the information requested, but we generally estimate the amount and ask of an advance check before responding to a request like this. **Let me know how the County is proceeding**. (emphasis added) R.O.A. Vol. 1, page 344 [Ex. 17]

In analyzing either the issue of the amount of fees or the attempted coordination, the Special Referee avoided the issue, concluding, erroneously, that because the appellant never paid the fees, she has no claim under the *F.O.I.A.* because she suffered no "damages." See Order under Review at pages 7-8 (R.O.A. Vol. 1, pages 13-14):

> 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.

The Special Referee's conclusions are palpable errors and gut the limited relief afforded by the *Freedom of Information Act*. The Special Referee violated her own reasoning, concluding on one hand, that the appellant proved the County was violating the Act, but concluding on the other that because the County did not collect the unlawful fees it proposed, the appellant is not entitled to relief. This action is not a suit for breach of contract or tort in which the plaintiff is required to prove "damages" as a condition of recovery. The *South Carolina Freedom of Information Act* is remedial legislation, and any violation is deemed to be an irreparable harm under § 30-4-100:

> (A) A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive

relief, or both, to enforce the provisions of this chapter in appropriate cases is the application is made no later than one year after the date of the alleged violation or one year after public vote in public session, which comes later. Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extent this time period upon a showing of good cause. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy of law exists.

While the plaintiff was testifying, the Special Referee asked her this question:

Q. . . . If I understand your testimony, the only payment that's part of Exhibit 22 that is for documents received in this litigation is a portion of receipt number 27; is that correct?

A. Yes. That's the one I paid for, and they just charged me for the two at the same time.

R.O.A. Vol. 1, page 279 [tr. page 64, lines 10—20]

The Special Referee misapplied the *South Carolina Freedom of Information Act* to the County's demand for unlawful fees by holding that the *Act* provides no relief without "damages." The General Assembly makes clear that the *Act* is remedial and any violation is an "irreparable harm" for which the remedy of injunction lies: "The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists." § 30-4-100, S. C. Code, ann. "Injunctive relief; costs and attorney's fees" Moreover, the fact that the County withheld (redacted) some of the same e-mails from the appellant that it had previously provided in response to a similar inquiry demonstrates the County's shifting criteria and bad faith. Whether the appellant suffered "damages" or not is of no consequence in analyzing the County's duties under the *F.O.I.A.* or the appellant's right to relief, and the Special Referee erred in holding otherwise.

The County's responses to the appellant's when she questioned its excessive charges illuminates its general recalcitrance to the obligations placed upon it by the *F.O.I.A.* as well as the County's policy of bad faith toward the appellant. The County's tin ear on the cost issue is illustrated by its summing up before the Special Referee:

> They [appellant] didn't question the fact that the attorneys [County attorneys] would have the necessary skill and question [*sic*] to be able to review these documents to determine whether they were subject to disclosure and whether that $72 an hour fee was reasonable." (R.O.A. Vol. 1, page 284 [tr. page 69, lines 2-6])

That the County can so widely miss the point is astonishing in the face of the General Assembly's specific prohibition against these charges: "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. In the run-up to the merits hearing and during the merits hearing, the County stood its ground that it could impose these unlawful charges and that the appellant waived any right to challenge them because she refused to pay. Neither position is correct as numerous cases have held: because the *Freedom of Information Act* is remedial legislation, a plaintiff is not required to pay unlawful fees as a pre-condition of challenging a F.O.I.A. violation, which the law considers an "irreparable harm." See *Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004)

The essential purpose of the FOIA is to protect the public from secret government activity. *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); see also *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001) (FOIA was enacted to prevent the government from acting in secret.); *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 535 n.4, 500 S.E.2d 783, 785 n.4 (1998) (noting that [t]he purpose of the FOIA is to protect the public from secret government activity). The FOIA meets the demand for open government while preserving workable confidentiality in governmental decision-making. *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991); *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166.

South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government. *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). The FOIA creates an affirmative duty on the part of public bodies to disclose information. *Bellamy*, 305 S.C. at 295, 408 S.E.2d at 221; *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166. The purpose of the FOIA is to protect the public by providing for the disclosure of information. *Id*. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166.

The Court might be hard pressed to find a case with as much "secret government activity" as exposed so far in this case. Throughout, the County remains defiant about government officials using

their private (and government) e-mails to conduct what turns out to be a government intelligence gathering operation on the appellant. As quoted above on page 17, the tone-deaf County Administrator explained to a sitting County Councilman that government officials routinely use a combination of their public and private e-mail accounts as a matter of course to conduct government business. For a more detailed analysis of how government officials can use private e-mail communication to circumvent F.O.I.A., see the South Carolina Attorney General Opinion dated February 18, 2021, to Emily Farr, Director of South Carolina L.L.R. To be fair, the Attorney General addressed a slightly different question; to wit, use of electronic communication with a quorum of Council members. Here, the question is more focused on the plain meaning of § 30-4-70(c), which prohibits electronic communication being used "in circumvention of the spirit of requirements of this chapter." It is an implausible inference to suggest that government officials can violate the *F.O.I.A.* at will so long as they keep their misconduct below a quorum, which is exactly like saying robbing a bank is not unlawful so long as one does not take too much. In fact, this Court can draw its own inference from the fact that in response to the Appellant's initial *F.O.I.A.* request, the County never claimed that a requested e-mail is protected by "attorney-client" privilege until she filed suit and even though it provided some of the same e-mails it now claims are protected by attorney-client privilege to appellant as part of its discovery responses in an unrelated lawsuit. Without having seen the body of all the redacted e-mails, other than the ones provided to appellant in a separate case, it seems clear that the e-mails do not request the kind of legal advice that triggers attorney-client protection. As our Supreme Court said in 2019:

> Despite the importance of confidential communications between an attorney and his client, we, like other jurisdictions, must understand and examine the tension that is created by competing policy goals. See *Doster*, 276 S.C. at 651, 284 S.E.2d at 220 ("The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice."). Thus, while South Carolina bestows significant weight to the attorney-client privilege, the privilege is not absolute. See *Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 384, 453 S.E.2d 880, 884 (1994). For example, the attorney-client privilege does not extend to communications made in furtherance of criminal, tortious, or fraudulent conduct. *Doster*, 276 S.C. at 651, 284 S.E.2d at 220. Likewise, information—in and of itself—does not become privileged merely because it was communicated to an attorney. *Booker*, 260 S.C. at 256, 195 S.E.2d at 621.

In re: Mt. Hawley Insurance Company, 427 S.C. 159, 829 S.E.2d 707 (2019) (This issue is discussed in more detail in Argument 1-C below.)

Here, the County convinced the Special Referee to withhold many e-mails originating from Council members' private e-mails. Yet, almost simultaneously the County provided similar **unredacted** e-mails, from these same Councilmembers' private accounts, including one dated July 18, 2018, from Councilmember Stu Rodman (R.O.A. page 328 [Ex. 9]). This July 18th e-mail peels back the curtain from government misbehavior because it reveals that Stu Rodman, then Chair of County Council, scripted out an upcoming meeting to Council members Paul Sommerville, Jerry Stewart, Alice Howard, and then acting County Administrator Tom Keaveny who was also County Attorney. In this e-mail, Councilmember Rodman drafted a script for an upcoming County Council meeting to lay out the strategy, "parliamentary maneuvering," to re-hire Josh Gruber as County Administrator. This is precisely the activity condemned by Attorney General Wilson in his February 18, 2021 Opinion, and it is specifically prohibited by § 30-4-70(c), S. C. Code, ann. By coincidence, the Richland County Court of Common Pleas recently took up the identical issue in a case called *Poole v. S. C. Department of Disabilities and Special Needs*, 2021-CP-40-03103. There, Judge McIntosh entered an Order on August 18, 2021, describing the effort undertaken by a quorum of 4 of seven members "shared information . . . using personal email addresses." After analyzing the facts, Judge McIntosh ruled:

> FOIA prohibits any "chance" meeting stating, "No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." S.C. Code Ann. § 30-4-70(c) (2007).
>
> Based on the facts in this case and the law, I find that the attachment to the February 16, 2021, email from Rawlinson to the three other commissioners, was a chance meeting under the language of the statute as it constituted a quorum of the Commission over which the DDSN had supervision, control, etc., thereby requiring notice under the FOIA statute."

The question raised in *Poole* was a broader question than the question raised here. Here, the narrower question is whether the appellant is or is not entitled to see the written exchange of information by government officials related to government action. Leaving aside the obvious observation that attorney-client privilege is waived by the voluntary disclosure to appellant in a prior

request, there is a more important consideration to this case: whether the County can deploy alleged attorney-client privilege to cover *Freedom of Information Act* violations. The Rules governing the conduct of lawyers do not permit this. See *South Carolina Appellate Court Rules,* Rule 407, Rule 1.6, and the comments thereunder:

> [9] Paragraph (b)(3) does not limit the breadth of Paragraph (b)(1) but describes one specific example of a situation in which disclosure is permitted to prevent a criminal act by the client. Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

Engaging in a deliberate F.O.I.A. violation is not protected by attorney-client privilege, and, as demonstrated by the analysis of the Supreme Court in the *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011) case, communications with a government lawyer do not become protected attorney-client privileged material by the simple expedient of including an attorney in an e-mail chain. Moreover, the voluntary disclosure of some of the e-mails in the companion case demonstrates the County's claim of "attorney-client privilege" is spurious. Even though the fact that the government officials conducted secret Council meetings to script the outcome of public business in secret, this is not the gravamen of the plaintiff's complaint—as it was in the *Poole* case. Here, the appellant put forth evidence demonstrating the County's disobedience to the requirements of public disclosure and demonstrated how the County's efforts to prevent disclosure by imposing excessive fees and invoking attorney-client privilege to shield unlawful acts and how, when the appellant asked legitimate questions, the County doubled down on its animus for her and erected dilatory barriers and pretextual reasons. In short, the County deployed maximum bad faith, even labeling her "harassing" because she sought access to documents that

should be public. This is why an exhibit such as the plaintiff's Exhibit 9 (R.O.A. Vol. 1, page 328 [July 18, 2018 e-mail] from Stu Rodman to Paul Sommerville, Jerry Steward, Alice Howard, and Thomas Keaveny, who was acting County Administrator at the time, is shocking. There Councilmember Stu Rodman maps out the strategy for the upcoming Council meeting to lay the groundwork for the re-hiring of their preferred candidate for County Administrator, Josh Gruber, laying out a scheme which he terms "parliamentary maneuvering." The inclusion of this evidence, and other evidence like it, is not offered to demonstrate that the County imposed excessive fees on the appellant or improperly redacted public information. Rather, it is offered to demonstrate the County's pattern of willfulness and the depth of its contempt for the *F.O.I.A.* The entire purpose of the *South Carolina Freedom of Information Act* is to deter such conduct but unless citizens such as the appellant are willing to step up and challenge unlawful government conduct, the entire carefully calibrated system of checks and balances will dissolve into something different than a constitutional republic, and this is, precisely, the type of "irreparable harm," for which the General Assembly provided F.O.I.A. as a remedy.

B. THE SPECIAL REFEREE ERRED IN FAILING TO RECOGNIZE THAT CONDUCTING GOVERNMENT BUSINESS ON PRIVATE E-MAIL COMMUNICATIONS IS A VIOLATION OF THE PROHIBITION OF § 30-4-70, S. C. CODE, ANN., AND ARE NOT COMMUNICATIONS SHIELDED FROM PUBLIC INSPECTION.

During the trial on the merits and in its various court filings, the County advanced, as set forth above, a straw man argument that the plaintiff was attempting to bring an action under § 30-4-70(c), S. C. Code, ann. and failed to prove that the County was holding secret meetings. While discussed briefly in the preceding paragraph, § 30-4-70(c) prohibits officials from conducting government meetings in secret by resorting to e-mails, texts, *etc*. The County's mischaracterization of the plaintiff's claims is a red herring seeking to sow confusion where there is none. First, there is no doubt the plaintiff filed her action for essentially a single purpose; to wit, to gain access to public documents surrounding the Councilmembers' discussions about the acquisition of two parcels of real estate as well as their private communications with one another and with staff about government business. In short, a Councilmember cannot utilize private e-mail communications about government

business as a shield from the *F.O.I.A.*

In California, a taxpayer sought disclosure of government officials' private e-mail communications, and the trial court ordered that they be produced. The California Court of Appeal reversed for the same ground relied upon by the Special Referee here. The Supreme Court of California reversed the Court of Appeal and obliterated the artificial distinction the County is attempting to draw here:

> The City's interpretation would allow evasion of CPRA simply by the use of a personal account. We are aware of no California law requiring that public officials or employees use only government accounts to conduct public business. If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. The City's interpretation "would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private." (Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?* (2014) 19 Comm. L. & Pol'y 293, 322.)
>
> *City of San Jose v. Superior Court of Santa Clara County*, 214 Cal. Rpt.3d 274, 2 Cal. 5th 608, 389 P.3d 848 (2017)

The impetus for the plaintiff's interest in governmental activities arose out of her discovery of behind-the-scenes political interference in her municipal criminal charge of having a dog at large. After a jury in municipal court acquitted her of a municipal charge, she sought to understand why the County was continuing to prosecute her in a County court for the same municipal charge on which a jury acquitted her. Her investigation revealed political manipulations calling for multiple prosecutions for an allegation of violating a municipal ordinance for which she was tried and acquitted. She sought to understand why the County became involved and why the County required her to appear at multiple Court appearances before a Beaufort County Magistrate. What the appellant discovered was an astonishing political interference in local court process, that included both an associate Magistrate Judge and the Chief Magistrate Judge of the Beaufort County Summary Court. After the County Administrator e-mailed his assessment of the appellant in response to Councilmember Rick Caporale's questions about the multiple prosecutions, the Beaufort County

assistant magistrate, Rod Sproatt, wrote to the Chief Judge, Lawrence McElynn, questioning Caporale's concerns about multiple prosecutions for the same offense. The Chief Judge responded by mocking Councilmember Caporale's questions and agreed with his judicial colleague that Caporale was misinformed and should "check the credibility of his source," *i.e*. the appellant. See R.O.A. Vol. 1, pages 333 and 346 [Exhibits 13 and 19: "RC" [Rick Caporale] The appellant's investigation also revealed private County Council pre-meetings in which Councilmembers hashed out the issues out of public view so that the public meeting was nothing more than a *pro forma* implementation of the plan of action formed in private. Since councilmembers were using their private e-mail addresses to conduct "intel" on her, she naturally asked for disclosure, which led to further questions and demonstrates why the County has adopted a policy of bad faith toward her when she asked for public documents.

C. THE SPECIAL REFEREE ERRED IN FINDING THAT INCLUDING THE COUNTY ATTORNEY IN AN E-MAIL CHAIN DOES NOT SHIELD THE COMMUNICATIONS FROM PUBLIC INSPECTION AND THAT COMMUNICATIONS TO THIRD PARTIES WAIVES ANY CLAIM TO PRIVILEGE.

When the County originally provided appellant with the e-mails she requested, they were mostly blacked out. The County not only blacked out the information contained in the e-mails, but also obliterated the addresses so the plaintiff could not see who was participating in the e-mail chain. Prior to filing suit, the County never explained the reason for the redactions, but after the plaintiff filed her suit, the explanation became that the e-mails were protected by attorney-client privilege even though the County never provided a privilege log until the Special Referee required it. The County's shifting explanation from cost to privilege smacks of pretext, a stratagem made clear when the Special Referee ordered the County to provide both a privilege log and to remove the block of the County's correspondents on the address chains, and, for the first time, the appellant could see who was included in the communications. Once the list of correspondents were revealed, the plaintiff could see that a claim of attorney-client privilege is pretext because lawyers do not deliver legal advice in chain e-

mails to groups of correspondents. The appellant is, obviously, at some disadvantage because she cannot speak to the discussions in the e-mails, and the respondent will have to furnish them to this Court because the appellant has only blacked out copies (except for the unredacted ones provided in a separate suit). As set forth above, the County originally blacked out the entire e-mail to prevent the appellant from seeing who was included in the e-mail chain, but the Special Referee ordered the County to remove the redaction to reveal the addressees. Once the County did this, its disclosure obliterated is claim of attorney-client privilege because the e-mails reveal numerous correspondents who cannot be covered by such a privilege. Because the appellant has nothing but blacked out copies, she can do nothing further than list here a typical summary of correspondents from e-mails such as the County's correspondence. Here are typical e-mails from January through February 2018, which included the following correspondents:

Thomas A. Bendle, Closing Attorney
Gail Brown, Employee of Disabilities of Disabilities and Special Needs
Beth Cody, Employee of Disabilities of and Special Needs
Joshua Gruber, County Administrator
Alicia Holland, Director of Finance
Thomas Keaveny, County Attorney/County Administrator (July 2018—October 24, 2018)
William Love, Director of Disabilities and Special Needs
Wanda Myse, Employee Disabilities and Special Needs
Debra Regecz, local real estate agent
Mark Rosenau, Director of Facilities Management
Monica Spells County Assistant Administrator
Mark Sutton, Deputy Director Facility Management

(R.O.A. Vol. 3, pages 628-630 [County Bate Stamped production 221, 220, and 255])

These e-mails—despite being entirely blacked out—demonstrate that there are numerous correspondents who cannot possibly be construed as clients of the County Attorney. The inclusion of Debra Regecz deserves special mention. Ms. Regecz was the real estate agent who handled the sale of Bostick Drive and Broad River Road to the County to serve as sites for its Department of Disabilities and Special Needs. The County has cross-appealed the Special Referee's Order requiring the County to furnish the e-mail communications with her, so appellant will have to wait

to see what the County's argument is on her being protected by attorney-client privilege. It is noteworthy, however, that § 30-4-40(5)(a) and (b), S. C. Code, ann. specifically makes these communications public information.

The County takes a very broad view of attorney-client privilege, essentially asserting that anything going across a lawyer's desk is automatically protected by attorney-client privilege, and the Special Referee erred in adopting this expansive view of attorney-client privilege instead of applying the narrow construction required by the *Ac*t and by the caselaw construing the *Act*.

Attorney-client privilege is a narrow exception. There is no such thing as "privileged information" when government officials communicate with third parties or one another about government business. § 30-4-40, S. C. Code, ann. provides a specific list of matters exempt from disclosure, but none of these exemptions are either (1) mandatory or (2) implicated in this case. Despite dying a thousand deaths in a thousand cases, the non-lawyer's faith in the myth that the act of copying a lawyer on a communication makes it "privileged" persists as a zombie canard despite the Supreme Court's rejection of it every time it has risen from the dead. In *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011) the Supreme Court reversed a grant of summary judgement when the School District argued that a questionnaire developed by its lawyer for the School Superintendent was covered by the privilege:

> FOIA's basic premise is to give "any person has a right to inspect or copy any public record of a public body." Id. § 30-4-30(a). This right is not without some exceptions, enumerated under section 30-4-40, the following being the one at issue in this case: Correspondence or work products of a legal counsel for a public body and any other material that would violate attorney-client relationships." Id. § 30-4-40(a)(7). The determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and nonexempt material disclosed. *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996); see also *Beattie v. Aiken County Dep't. of Social Servs.*, 319 S.C. 449, 453, 462 S.E.2d 276, 279 (1995); *Newberry Publ'g Co., Inc. v. Newberry County Commn on Alcohol & Drug Abuse*, 308 S.C. 352, 354; 417 S.E.2d 870, 872 (1992). However, the exemptions should be narrowly construed to not provide a blanket prohibition of disclosure in order to "guarantee the public reasonable access to certain activities of the government." See *Fowler v. Beasley*, , 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996); see also S.C.Code Ann. § 30-4-15 (2007). 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).

The e-mails in the present case include the plaintiff's effort to discover the "certain activities of the government" directed at her! Moreover, as demonstrated above, the redacted e-mails involve numerous members of the Beaufort County Council and staff, and even if the County could plausibly argue that such email chains invoke attorney/client privilege, the Councilmembers waive that argument when they seek legal advice (if that is really what they were doing) through their private e-mail accounts. The County Attorney does not exist to furnish legal services for anyone who happens to hold political office; the County Attorney represents the County, and the attorney-client privilege should be construed narrowly. Just because a putative privilege exists, does not mean the County is required to assert it, and as the Supreme Court has pointed out time and again, these questions must be settled on a "case by case basis." "That a record is exempt does not mean that the government has a duty of non-disclosure. Rather, an exemption provides the government with discretion to either withhold the record or release it." [internal citations omitted] *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005) (Supreme Court ordered North Charleston to release recorded conversation capturing North Charleston Police officers killing a crime victim inside a convenience store. The City argued the tape was exempt from disclosure because releasing it could result in a change of venue for a criminal trial.)

Government officials routinely communicate with one another and just as routinely automatically include the County Attorney in the chain of correspondence. This fact does not invoke the privilege of attorney-client. See *Marshall v. Marshall*, 282 S. C. 534, 320 S.E.2d 44 (Ct. App. 1984): "The attorney client privilege, though, does not protect communications with non-clients." Councilmembers communicating in their private capacities are not "clients."

An attorney may not represent both a governmental body and a private client in the same matter even when full disclosure is made and they consent to the representation, nor may a lawyer accept private employment in a matter in which he or she had personal and substantial responsibility

while a public employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

7 Am.Jur2d, Attorneys at Law § 194 Matters involving public interest, Rule 1.11(a)(2) ABA Model Rules, See also *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005)

As these and many other cases hold, attorney-client privilege only applies when a client is seeking legal advice based on the transmission of confidential information without third person being present. Nothing sought by the plaintiff in this case involves either seeking legal advice or confidential information; she sought only documents related to the County's purchase of two parcels of real estate, which are by statute public information, and communications from Councilmembers utilizing their private e-mail accounts who cannot possibly be clients of the County Attorney. Under the County's legal theory, every email copied to a lawyer makes it "privileged." When Berkeley County resisted turning over superintendent evaluation questionnaires on the ground that they were protected by attorney-client privilege for the same reason, the Supreme Court disagreed, holding: "The interest in confidentiality expressed through the attorney-client privilege should not trump the public's right to know at this juncture." *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011) (Court reversed grant of summary judgment to the School District.) Interestingly, the Order under review recites the correct standard at page 10 (R.O.A. Vol. 1, page 16) but never explains how non-County correspondents were seeking legal advice from the County Attorney. The Special Referee reaches an erroneous conclusion on page 11 of her Order (R.O.A. Vol. 1, page 17) without any evidentiary support: "I find the remaining redactions appropriate and subject to exemption pursuant to S. C. Code Ann. 30-4-40(a)(4)."

Third, the County's reliance on alleged SLED policies (quoted above on page 15) not only has nothing to do with the responsibilities of local goverments' creation, retention, and dissemination of public documents, but also demonstrates how far the County is willing to go to erect pretextual barriers. The County's duties to preserve and disclose public records arise under the *State Records*

Retention Act and the *South Carolina Freedom of Information Act*, and neither legislative authority grants to SLED any oversight, let alone veto, authority. The County's justification as expressed through the County's statment is made of whole cloth.

Finally, both the South Carolina General Assembly and the South Carolina Supreme Court have been clear that a citizen's right to public records is "vital" to keeping government honest and preventing dishonest conduct that would otherwise flourish in the dark. "The Freedom of Information Act (FOIA) serves the important governmental interests of providing transparency in governmental decision making, preventing fraud and corruption, and fostering trust in government." *Disabao v. South Carolina Ass'n. of School Adm's*., 404 S.C. 433, 746 S.E.2d 329 (2013) As the Supreme Court said in *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011): "It is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials **at a minimum cost or delay to the persons seeking access to public documents or meetings**. S. C. Code, Ann. § 30-4-15 (2007)." (emphasis added) Here, the e-mails and other documents disclosed so far reveal local government officials discussing ways to control the outcome of public meetings, to thwart the plaintiff, and to find a way around her acquittal in Municipal Court in order to persecute her. The only reason such conduct occurs is because it is done out of the public's view, which is why the Councilmembers selected their private e-mail communications to conduct government business. They mistakenly thought they could escape detection.

The assertion that the private email communications of government officials are "privileged" is nonsense, and such an assertion, when viewed alongside the evidence of the County's hostility to

the plaintiff is exactly why the General Assembly adopted the *Freedom of Information Act* as a bulwark against governmental secrecy and why the General Assembly originally made willful violations subject to criminal penalties. See § 30-4-110, "Penalties": Prior to May, 2017, the statute read: Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not more than one hundred dollars or imprisoned not more than thirty days for the first offense . . ." However, in May 2017, the General Assembly deleted the criminal penalties but broadened the potential for recovery to a prevailing plaintiff by including not only attorney's fees, but also "compensatory damages" as follows:

> (C) If a person or entity seeking relief under this section prevails, the court may order:
> (1) Equitable relief as he [*sic.*] considers appropriate;
> (2) Actual or compensatory damages; or
> (3) A reasonable attorney's fees and other costs of litigation specific to the request, unless there is a finding of good faith. The finding of good faith is a bar to the award of attorney's fees and costs.

After the County refused to provide the documents without the plaintiff paying prohibitive fees, the plaintiff sued on April 10, 2019, under the *Act*, alleging that the County was in violation of its duties to supply unredacted material and for imposing retaliatory fees instead of "fees not to exceed the actual cost of searching for or making copies of such records." § 30-3-30(b). The plaintiff also alleged that the County specifically and willfully directed these actions against the plaintiff.

In its Answer the County raised three defenses: a general denial, a motion to dismiss, and an assertion that the County is exempt from suit under the *State Tort Claims Act*. (See Answer filed August 14, 2019 at R.O.A. Vol. 1, page 38.) As discussed in more detail below, in May 2017, the General Assembly amended the *Freedom of Information Act* to provide the County the option to allege a "good faith" defense. The County adroitly avoided this defense because while lawyers are zealous advocates for clients, zealousness has a limit, and that limit is usually the front door to the Courthouse.

Before the Special Referee, the County asserted that the plaintiff failed to raise a colorable claim, but clearly, the plaintiff has alleged a proper cause of action because the General Assembly created the cause of action in § 30-4-100:

A) A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later. Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties.[5] If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

(B) If a person or entity seeking relief under this section prevails, he may be awarded reasonable 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 award him reasonable attorney's fees or an appropriate portion of those attorney's fees.

HISTORY: 1978 Act No. 593, Section 11; 1987 Act No. 118, Section 8; 2017 Act No. 67 (H.3352), Section 4, eff. May 19, 2017.

There is nothing in the *State Tort Claims Act* that abrogates the *Freedom of Information Act*, and the universal rule of statutory construction requires that the two Acts of the General Assembly be harmonized.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

. . .

[5] The Court could not hold a hearing within ten days because shortly after filing suit, plaintiff's counsel entered M.U.S.C. for what turned out to be an extended stay. During the extended recuperation period, both opposing counsel and the Clerk of Court's office were not only understanding but also generous beyond my capacity to repay.

The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. *Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 501 S.E.2d 725 (1998).

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)

It is a hard sell to convince this Court that the General Assembly did not mean what it said in the *Freedom of Information Act*, since the General Assembly took pains to declare violations to be an irreparable harm and to provide for expedited hearings and attorney's fees for citizens who bring such actions. § 30-4-100(a) says: "The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists." Second, the purpose of the *State Tort Claims Act* is to abolish sovereign immunity and set out the rules for suing the State, so the two Acts are harmonized and do not address the same subject. While the *State Tort Claims Act* provides limited immunity in specific instances, it does not relieve the County from adhering to its responsibilities under *the Freedom of Information Act,* and in reaching her decision, the Special Referee gave the County's assertion no weight. More importantly, in its Answer, the County does not dispute that it is subject to the *Act*, nor does it offer a reasonable explanation as to why it charges were originally in excess of fourteen thousand dollars when the requested information can be produced as electronically stored material that is easily retrievable and easily loaded on a flash drive or burned to a C.D. disc and which are materially at variance from its published fee schedule. See R.O.A. Vol. 1, page 341 [Exhibit No. 15, March 27, 2019, correspondence from Acting County Administrator, John Weaver]: "Ms. Baracco As you may not know, Beaufort County perhaps has the most sophisticated FOIA system of any county or municipality in South Carolina, including both manpower and electronic capabilities." The County's original attempt to saddle her with exorbitant fees is a clear example of bad faith deployed to try to scare her off her effort to obtain public documents.

D. THE SPECIAL REFEREE ERRED IN FAILING TO ACKNOWLEDGE THAT ONCE THE COUNTY CONSUMMATES A REAL ESTATE PURCHASE AND THE TRANSACTION IS COMPLETE, THERE IS NO LONGER A VALID EXEMPTION TO PUBLIC INSPECTION.

The final barrier erected by the County was the spurious claim that a completed real estate transaction is exempt from disclosure. The first F.O.I.A. request sent by the plaintiff on February 10, 2019, sought information about County's real estate acquisition of two parcels, a transaction previously completed, so the material is obviously public and just as obviously not subject to any exemption or redaction. While the *Act* provides defined statutory exemptions that allow the County to redact information, such as ongoing negotiations for a proposed sale, none of those exemptions apply to a real estate transaction that has closed. For the convenience of the Court, the statutory exemptions are: (1) trade secrets, (2) information of a personal nature, (3) confidential informants, *etc.*, (4) matters specifically exempted, (5) documents related to a **proposed** sale, (6) salaries less than $50,000.00, (7) lawyers' work product and confidential communications, (8) working papers of the General Assembly, (9) trade negotiations, (10) Department of Revenue audit criteria, (11) anonymous gifts, (12) investment information in the State Retirement System, (13) certain employment application information, (14) scientific and educational proprietary information, (15) identity of certain complainants, (16) investment decisions of endowed funds, (17) structural plans, (18) autopsy photos, and (19) financial data of the Venture Capital Authority. (emphasis added) If a governmental body asserts a right to redact, the burden is on the government asserting the exemption to prove it, and such exemptions are to be narrowly construed. *Evening Post Publ. Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005), § 30-4-40, "Matters exempt from disclosure" Here, despite that none of plaintiff's requests are subject to any exemption, the County furnished no explanation as to why it was redacting the information it did produce until the Special Referee compelled it.

In summary, the Court must evaluate the County's conduct in total. In evaluating whether either the County's charges or the County's redactions are reasonable, *i.e.* authorized by a statutory exemption, the Court need only look at the redacted e-mails and the County's putative justification to see that they fit none of the exemptions. The Special Referee ignored the plaintiff's evidence of the County's expressed hostility for the plaintiff even though this evidence further demonstrates that the County's claim of privilege is pretext. See R.O.A. Vol. 1, page 343, [Exhibit 17] discussed in detail above on page 18. A selection of these Exhibits, collected in Exhibit 17, demonstrate that the County has gone to considerable pains to investigate her background, distribute information about her to both County and Municipal officials, even going so far as to collect a list of her public statements. The idea that Appellant's representative on county Council took it upon herself to disseminate what she thought was impeaching evidence to the Town Manager is shocking. The most disturbing evidence, discussed in more detail above, was the County Attorney's effort to coordinate with other municipal governments to stand united against her to erect financial barriers to her F.O.I.A. requests. (See Plaintiff's Exhibit No. 17 at R.O.A. Vol. 1, page 323.) **After** the plaintiff made routine *F.O.I.A.* requests, the County undertook to investigate her, and its efforts demonstrate the County's willfulness in harassing her only because she made lawful requests for documents. For example, in a June 10, 2014, email from the Town Manager of Bluffton to the Bluffton Police Chief and the Bluffton City Attorney, regarding an earlier F.O.I.A. request, the Town Manager wrote:

> Chief: This is the F.O.I.A. request I was speaking of. Anyone we may have arrested?[6]
> /s/ Anthony Barrett (R.O.A. Vol. 1, page 345 [Exhibit 18])

This is one example of numerous examples of animus and bad faith collected and attached as Exhibits 17-21 in R.O.A. Vol 1, pps. 343-349. The County may attempt to persuade this Court that

[6] Appellant concedes this remark is ambiguous. It could be a question as to whether the appellant has an arrest record, or it could be a query as to the propriety of arresting her. Neither is reassuring, and both are improper.

the Town's Manager's comment is innocuous, but if it does, the Court should be aware of the context of the statement. In 2012, the Town of Port Royal issued a 2012, municipal violation against the plaintiff for an alleged animal at large. After a jury acquitted her of the charge on November 8, 2012, Beaufort County inserted itself in a municipal event and issued to appellant an unlawful "Magistrate's Summons" for the same offense. In another example of animus, the County Attorney circulated an email among government officials, Exhibit 17, dated June 11, 2014 (R.O.A. Vol. 1, page 343), to urge other municipal governments to get on board with a "similar approach" with the County's decision to require a 50% deposit for plaintiff's requests. On June 23rd, the County Attorney estimates charging the plaintiff $35,000.00 for her requests even though the plaintiff's requests are electronically stored and can be recaptured in seconds. The County's imposition of excessive charges and efforts at redaction when the subject matter is not covered by any exception to disclosure is evidence of willfulness. This willfulness is conduct which the *Freedom of Information Act* addresses. In the pre-2017 version of the *Freedom of Information Act*, amended May 2017, the General Assembly labeled such conduct criminal. See § 30-4-110, S. C. Code, ann.: "Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or imprisoned not more than thirty days for the first offense . . ." The amendment to this section in 2017, quoted below, deleted the criminal penalties and substituted compensatory damages.

At no time, either before or after the plaintiff filed this action—until the Special Referee compelled it—has the County offered an explanation or justification as to (A) why the County Attorney must review e-mails generated by Councilmembers from their private e-mail accounts and (B) why the appellant has to pay for it. As further evidence of the County's bad faith, it never provided a privilege log until the Special Referee required it. Whether the private e-mails are protected by privilege or not, either way, the statute clearly prohibits these charges, and they are, therefore

excessive as a matter of law. Since plaintiff filed her suit, the County never offered any justification for expenses in excess of fourteen thousand dollars associated with the routine retrieval of information the County is required to archive under the state's *Records Retention Act*, and such unexplained charges are at variance with the Administrator's statement that "Beaufort County perhaps has the most sophisticated FOIA system of any county or municipality in South Carolina." (quoted above page 9) See §30-1-20, S. C. Code, ann.: "The chief administrative officer of any agency or any subdivision or any public body in charge of public records . . . is responsible for carrying out the duties and responsibilities of this chapter . . .". The responsibilities of Chapter 1 require the County to maintain, archive, and make available the public records of the County, and these include the electronic correspondence of the members of County Council and their agents. When government officials communicate with third parties or with one another, there is no attorney/client privilege implicated, and even communications to the County Attorney may not be covered by privilege if others are included in the communication. The plaintiff is confident that not one of the redacted e-mails represents a request for legal advice. The plaintiff reaches this conclusion on two grounds: First, the County previously provided the plaintiff with the some of the same e-mails that it now claims are covered by attorney-client privilege. Second, when the Special Referee required the County to un-redact the correspondents in the e-mail chains so the plaintiff could see who was included in them, the plaintiff discovered non-County personnel whose participation in such exchanges waives any alleged attorney-client privilege. Moreover, if the County is going to withhold information from the plaintiff, then it must at least provide her with a log of material it is refusing to turn over with an explanation. If the County chooses to pay its attorney to review every *F.O.I.A.* disclosure it makes, that is not a charge that passes through to the requestor. In essence, the County now argues that because the County has a lawyer, that every communication by a government official is subject to attorney/client privilege, a tacit assertion that is not supported by any case law, statute,

regulation, or policy governing the conduct of lawyers.

In conclusion, the evidence in this case is overwhelming that the County singled out appellant for special adverse treatment, denied her reasonable access to specific documents, redacted documents for no reason other than to thwart the plaintiff, and imposed excessive and unlawful charges for the collection of information and documents, which are easily retrieved, and forced her to file an application with the Court to address an irreparable harm by refusing to communicate with her. This is overwhelming evidence of bad faith. Appellant is entitled to a declaration that the County must turn over the documents in electronic form, unredacted, immediately and should be enjoined from further violations of the *Act*. In addition, the Court should require the County to reimburse the Plaintiff for the attorney's fees and for the compensatory damages she has incurred in compelling the County to conform to South Carolina law. Finally, the Court should impose the punishment it finds to be just and proper for a willful violation in order to deter the County from such unlawful conduct in the future. This last prayer for relief is not fanciful. The Courts of this state are clogged with *F.O.I.A.* cases because when local governments ignore their statutory duties to requestors, there is no personal penalty for disobedience. Government officials have no skin in the game and enjoy free representation by counsel paid for by taxpayers. Even their penalties are paid by taxpayers, and they never experience a consequence for breaking the law. If the Court could require a governmental official to report to jail for a weekend because of an intentional *F.O.I.A.* violation, only then would local governments pay attention to their statutory duties. However, in May 2017, the General Assembly amended § 110 to delete the criminal penalties. Instead, under the revised statute, the Court's power is limited to an award of attorney's fees, compensatory damages, and/or a "civil fine" of up to $500.00 per occurrence. As this case demonstrates, until a Court punishes local governments for disobedience of their statutory duty to be transparent, local governments will continue to violate *F.O.I.A.* with impunity because officials who are charged with a duty to provide documents are never

called upon to answer for their violations.

2. THE SPECIAL CIRCUIT COURT JUDGE ERRED IN FAILING TO REQUIRE THE COUNTY TO PAY THE PLAINTIFF/APPELLANT ATTORNEY'S FEES AS A PREVAILING PARTY.

The Special Referee erred in failing to award the plaintiff fees and costs as a "prevailing party" under the statute. First, it is indisputable that the only reason the plaintiff received access to the requested material ordered by this Court is because she filed suit, and that makes her a "prevailing party." After she filed suit, the County produced 276 documents she had not previously received although they were half redacted. R.O.A. Vol. 1, pages 242-245 [tr. page 27, line 4; page 30, line 12] Moreover, the only reason the County rethought its charges in this case is because: A) the plaintiff filed this action, and B) the parties appeared before Judge Buckner on June 2, 2020, during which hearing Judge Buckner telegraphed skepticism about both the fees proposed by the County and the reasons for nonproduction. The County never identified "attorney/client" privilege as the reason e-mails had to be redacted until matter was before the Court under the *South Carolina Freedom of Information Act*, §§ 30-4-10, *et. seq*. Prior to filing suit, the County made no mention of attorney/client privilege. Instead it sought to thwart the plaintiff's request by demanding she pay $12,000.00 to fulfill it. In her amended complaint, the plaintiff alleges that she made four straightforward requests under § 30-4-40, S. C. Code, ann. for County documents related to the sale and purchase of parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River Road and for e-mail communications of County officials—**from their private e-mail addresses**—connected with these and other transactions. See summary of requests, Exhibit 1 to the Amended Complaint. R.O.A. Vol. 1, page 37. The County's Answer made no mention of attorney/client privilege, alleging only that matters were "exempt." Even if the Court declines to amend or alter the Referee's findings for the reasons set forth above, it is indisputable that the plaintiff would have received nothing but for her filing this action, and the fact that she had to file an action to force the County to respond entitles her to fees and costs, and it is an abuse of discretion to deny such. The Supreme Court addressed this issue in *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011), including a discussion of the discretionary standard to be applied by courts:

> "The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. Sch. Dist. Of Greenville County*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (citing *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error or law or are based on unsupported factual conclusions." *Id.* 675 S.E.2d at 445 (quoting *Layman*, 376 S.C at 444, 658 S.E.2d at 325). The issue before the Court presents a series of legal questions in terms of determining (1) whether Sloan may be considered a prevailing party under the FOIA statute; (2) if Sloan is a prevailing party, whether his entitlement to fees may extend beyond the production of the requested documents; and (3) whether the law of the case from *Sloan I* affects the time period for the attorney fee award.

The Supreme Court analyzed Sloan's request under the same principle adopted by this Court in that the trial court found plaintiff prevailed in part but not in total and based on that finding, declined to award the plaintiff any fees or costs. The Supreme Court reversed, and under *Sloan II*, the refusal to award fees was an abuse of discretion because the Supreme Court found that in order to be a prevailing party, a plaintiff does not have to win 100 to 0 but is a prevailing party if she "successfully prosecutes an action . . . prevailing on the main issue, even though not to the extent of the contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Sloan* at page 897, quoting *Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990). Moreover, the Court is required to construe the *Act* liberally in favor of the plaintiff as the citizen taking upon herself the responsibility for making government officials act in accordance with the law. "The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166." *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) (Trial Court's Order requiring disclosure of records affirmed and case remanded for determination of attorney's fees under the six factors listed by the Court.) (An interesting footnote to the *Burton* case is that two of the three Court of Appeals' authors are now on the Supreme Court.)

In *Sloan II*, the public body argued that Sloan was not a "prevailing party" because it handed over the documents before the Court ordered them to, a position rejected by the Supreme Court, and this holding demonstrates that the Court's refusal to award fees and costs is an abuse of discretion:

> Friends argues that Sloan was not a prevailing party under this definition "because

> Sloan did not receive any of the relief he requested in his complaint. . . ." We reject Friends' position and agree with the trial court that Sloan was a prevailing party for purposes of the FOIA attorney's fees provision. We find persuasive the decision of the Montana Supreme Court in *Havre Daily News, LLC v. City of Havre*, 333 Mont. 331, 142 P.3d 864 (2006). The *Havre* court addressed whether the post-complaint voluntary production of disputed documents precludes prevailing party status to a plaintiff.
>
> . . .
>
> When a public body frustrates a citizens FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed. See *Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994) (Toal, J., concurring in part, dissenting in part) ("A government agency should not be allowed to stonewall an FOIA request without some penalty for its actions."); see also *Wildlands CPR v. U.S. Forest Serv.*, 558 F.Supp.2d 1096, 1098 (D.Mont. 2008) (finding that if a complainant receives relief "via unilateral change in position by the agency," he is entitled to fees under the federal FOIA statute); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wash.2d 89, 1117, 1125 (2005) (*en banc*) ("[P]ermitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit . . . would undercut the policy behind the act." (alteration in original) (quoting *Coal. On Gov't Spying v. King County Dep't. of Publ. Safety*, 59 Wash.App. 856, 801 P.2d 1009, 1013 (1990))).

The Supreme Court went on to hold that "by awarding attorney's fees in these circumstances may serve as an impetus for public bodies to comply with a FOIA request and thus avoid the imposition of an attorney's fee award. See *Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) (finding attorney's fees may be awarded to encourage agencies to comply with FOIA requests.)" *Sloan v. Friends of the Hunley* at page 898. Here it is unmistakable that the plaintiff would have achieved nothing, not even the putative privilege log, but for filing her suit. It was Beaufort County who dictated the litigation path; at any time, either before or after litigation commenced, Beaufort County was free to cooperate with the plaintiff to assist her in getting public documents. Instead it chose the path of maximum resistance even going so far as to label the plaintiff's search for public documents "harassment," a spurious allegation reinforced by Councilmember Caparole's March 29, 2015 e-mail to Senator Davis asking for help locating legal authority that might justify the "persecution" of the appellant and characterizing the County's treatment of appellant as "abuse of power." R.O.A. Vol. 1, page 346 [Ex. 19]) Thus the plaintiff is much more of a "prevailing party" as was Sloan in his suit for documents against Friends of the Hunley. Unlike *Sloan*, the public body here gave the plaintiff nothing until the Court required it to

do so. As the preamble to the *South Carolina Freedom of Information Act* makes clear, the purpose of the Act is to facilitate a citizen's access to documents, and the Court's refusal to award the plaintiff fees and costs not only represents an abuse of discretion under the *Act*, but also promotes Beaufort County's unlawfulness and provides a shield for illegal acts. It also acts as a chill on any other citizen who may think twice before attempting to hold the government accountable for its violations of F.O.I.A.

Before the plaintiff got counsel involved, the County wanted to charge her over $12,000.00 for public records in violation of the *Freedom of Information Act* and its own ordinances. It wanted to charge her $72.00 an hour for its legal department to review all the e-mails—and remember, these are e-mails from Councilmembers from their private e-mail accounts—to determine if they were subject to release, a charge specifically prohibited by statute: "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. This record demonstrates that Beaufort County employed every dilatory and obstructionist tactic at hand, which when combined with the evidence of open hostility for the plaintiff, demonstrates she was a substantially prevailing party. As the Supreme Court said in *Sloan v. Friends of the Hunley (Hunley II*), 393 S.C. 152, 711 S.E.2d 895 (2011):

When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed. See *Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist*., 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994) (Toal, J., concurring in part, dissenting in part) ("A governmental agency should not be allowed to stonewall an FOIA request without some penalty for its actions."); see also *Wildlands CPR v. U.S. Forest Serv.*, 558 F. Supp. 2d 1096, 1098 (D. Mont. 2008) (finding that if a complainant receives relief "via . . . unilateral change in position by the agency," he is entitled to fees under the federal FOIA statute); *Spokane Research & Def. Fund v. City of Spokane*, 117 P.3d 1117, 1125 (Wash. 2005) (*en banc*) ("[P]ermitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit . . . would undercut the policy behind the act." (alteration in original) (quoting *Coal. on Gov't Spying v. King County Dep't of Pub. Safety*, 801 P.2d 1009, 1013 (Wash. Ct. App. 1990))).

Once again, the importance of plaintiff's animus evidence comes into play because it demonstrates why the County adopted its harsh posture with her. Therefore, for the reasons set forth in her original motion for reconsideration, the plaintiff submits that the Court abused its discretion in

refusing to award fees.

CONCLUSION

As the length of appellant's brief demonstrates, it is an easy thing to get lost in the weeds of any legal issue, and the *S. C. Freedom of Information Act* is no exception. No fair minded person can examine the procedural history of this case and fail to apprehend two important points: 1) How important it is for ordinary citizens to keep their eyes on local governments, and 2) how easy it is for local government officials to thwart both the spirit and letter of the *Freedom of Information Act*. Local governments resist operating in daylight, and as the editorial board of the *Post & Courier* opined as recently as 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.

Here, the appellant became interested in her local government after it forced her to endure multiple court appearances following a jury acquittal on a municipal court offense, and it was that spark of interest that: (1) caused her to ask more questions about the operation of Beaufort County , and (2) made her known to local government officials across all three levels of government. H. L. Mencken reportedly said that every citizen lives in fear of being noticed by the government, and this case proves the point *passim*. The fact that the County demonstrated bad faith by adopting shifting explanations for preventing appellant's access to public documents and forcing her to incur the expenses she has incurred, including, but not limited to, compelling her to pay for a Special Referee to adjudicate a *Freedom of Information Act* dispute is both unjust and contravenes the express purpose of the *Freedom of Information Act* and the numerous cases construing it. (Interestingly, on June 3, 2021, our Supreme Court addressed the hemorrhaging of legal expenses incurred by citizens seeking

access to the courts in Administrative Order No. 2021-06-03-02, in which it prohibited circuit courts subcontracting discovery disputes to special referees. Even though this Order came too late and ameliorates a different problem, it serves to highlight the crises now occurring across this State in which law firms are now billing over $50,000.00 in routine Magistrate Court cases.) Beaufort County's mistreatment of the appellant is further exacerbated by the County's admission that its purchase of 1 Bostick Circle was, in fact, improper! See R.O.A. Vol. 1, page 338 [Exhibit 14] The County's shifting criteria for impeding her requests for documents combined with its efforts to not only block her access to public documents but also to get the adjoining municipalities to get on board is shocking and demonstrates the County's coordinated effort to obstruct and impede the appellant at every turn, even involving the local judicial officers. The appellant is clearly a "prevailing party," and the fact that the Special Referee places an *imprimatur* upon the County's unlawful acts only emboldens them to continue mistreating the appellant and others like her even though she is investing her time, her money, and her energy in providing a valuable service in checking the activities of her local government. The Special Referee's Order is controlled by palpable errors of law and fails to adhere to the requirements of the *South Carolina Freedom of Information Act's* procedural and substantive provisions. The appellant respectfully requests that the Order be reversed and the County be compelled to turn over public documents for inspection and for a remand to the circuit court for redetermination of the amount of attorney's fees to be awarded to the appellant as prevailing party.

Respectfully submitted,

April 12, 2022

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CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b), *South Carolina Appellate Court Rules*.

April 12, 2022

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