RECEIVED
Apr 12 2022
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 REPLY BRIEF OF APPELLANT/RESPONDENT

April 12, 2022

Thomas R. Goldstein, S. C. Bar No. 2186
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554 4291; (843) 554 5566 (fax)
tgoldstein@cobblaw.net
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY TO STATEMENT OF FACTS

On pages 5-6 of the Respondent's brief, it inadvertently mischaracterizes the Appellant's request, the County's response, and the County Administrator, John Weaver's March 27, 2019, explanation furnished to Councilmember Mike Covert. As the record (R.O.A. Vol. 1, page 347 [Ex. 20, Weaver correspondence]) demonstrates, the explanation the County Administrator provided was not to the Plaintiff as set forth in the County's brief, but to a member of County Council who was concerned about the County's lack of transparency. (The Administrator did send her a cursory response on March 27, 2019, R.O.A. Vol. 1, page 341 [Exhibit 15], but it did nothing but amplify Ms. Spells' ignoring the Appellant's question about the exorbitant costs.) The Record further demonstrates the County's uniform hostility, and no amount of skillful advocacy can transform a suggestion that "the former County Administrator . . . promptly responded" to her into an accurate statement of fact. The record makes the County's animus clear; nowhere as unsettling, for example, as in the County Administrator's, Gary Cubic's, condescending response to Councilmember Covert's inquiry about the County overstepping its authority by inserting itself, including the County Judicial branch, into an alleged municipal infraction over which a jury acquitted Baracco. See R.O.A. Vol. 1, page 331 [Ex. 12]. Administrator Cubic's response reads like a declaration of war against Appellant.

The following paragraph (Respondent's Brief at page 6) also contains a misleading statement as fact. The Respondent is accurate in stating that the Appellant reduced her request for records, but she did so only because the County demanded that she $14,432.06 for the requested documents, requiring an initial deposit of $3,608.02. This putative statement of fact reappears on page 16 of Respondent's brief and will be addressed more fully below, but it is not a correct to say the Appellant reduced her request "upon receipt of this explanation," (Respondent's brief at page 6) because the Respondent is referring to the County Administrator's, John Weaver's, explanation to a County

Council member, not to Appellant. The County based its manufactured hurdle of prohibitive cost to producing the e-mails on its insistence that the legal department review the e-mails at $72.00 an hour, a patently illegal charge (R.O.A. Vol. 1, page 319 [Ex. 5]); however, only after the Appellant filed suit, did the allegation of attorney-client privilege arise. Along this same vein, the County never produced a "privilege log" identifying the basis for its attorney-client privilege until the Special Referee compelled it to provide one, and a review of the putative privilege logs in the Record on Appeal Vol. 1 at pages 87-96 demonstrates just how vague they are. As discussed more fully below, when the County produced the almost entirely redacted e-mails, it even blacked out the correspondents in the e-mail chain and would not provide even that information until the Special Referee compelled it to do so in July 2020. See correspondence from counsel dated August 10, 2020 and response from Special Referee July 29, 2020 at R.O.A. at Vol. 1, pages 101, 111 and 8. In short, the County's explanations for not providing documents evolved. First it was cost. Then it was attorney-client privilege that prohibited disclosing even the participants in the conversations. Finally, it became an amended privilege log, which the Court can see is unlawfully vague. See *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) for a discussion of vagueness related to the failure to announce specific reasons for executive session.

The Respondent makes a further misleading statement on page 6 when it writes that the Appellant sought e-mails from Alice Howard's personal e-mail address. The County's characterization incorrectly suggests that the Appellant was attempting to intrude on Councilmember Howard's personal affairs. As this record demonstrates, Appellant was becoming gradually more aware that Councilmembers were acting in unison on governmental matters, including becoming involved in what turned out to be an unlawful conspiracy to disadvantage the Appellant using the County's legal department and magistrate system to single her out, a stratagem that ultimately landed the County in court. The Appellant has no interest in Councilmember Howard's personal e-mails and

never sought them, except to the extent she was using her private e-mail account to conduct government business. As a practical matter, the County would have no access to her private e-mails except those sent to Beaufort County government addresses When a Councilmember uses her personal e-mail account to conduct government business, those communications are subject to a *Freedom of Information Act* disclosure, and those are the documents the Appellant sought.

Finally, the Respondent on page 7 suggests that the some of the issues before the Court are raised for the first time on appeal. This is a legal argument (addressed below), not a statement of fact, but Appellant controverts that statement to avoid being perceived as acquiescing to it.

REPLY TO ARGUMENT 1

1(A). The use of private e-mail communication to the County Attorney and the inclusion of third parties in the communication waives the attorney-client privilege. The County Attorney represents the County, not the various members of County Council in their individual capacities, and when Council members choose to transact County Business on their private e-mail accounts, those communications become subject to the *S. C. Freedom of Information Act.*

As the Respondent correctly notes, the Special Referee based her decisions on an impossible requirement that the Appellant to prove a negative. In essence, the Special Referee says:

(1) Appellant cannot identify a law prohibiting the use of private e-mail.
(2) Therefore, such communications are exempted from disclosure.

There are two palpable legal errors in the Special Referee's conclusions, both of which are fully addressed in Appellant's initial brief. The Respondent ignores both.

The first is the Special Referee's overarching failure to adhere to and apply the General Assembly's statement of purpose of the *Freedom of Information Act* contained in § 30-4-15, "Findings and purpose," S. C. Code, ann., and the frequent statements by our Supreme Court defining the Court's duties in interpreting, applying, and enforcing the transparency of government conduct as required by the *Act*.

The second is the Respondent's incorrect assertion in its Statement of Facts requiring the Appellant to prove a negative to succeed. The impossibility of proving a negative is a given of logic, but the assertion to prove a negative in the attorney-client privilege arena is an area of law specifically addressed in Professor Maura I. Strassberg's encyclopedic discussion of this issue in the January 15, 2007, *Seton Hall Law Review* in her article entitled: "Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney-Client Privilege," *Seton Hall Law Review*, Vol. 37, 2007, pages 413 – 495:

> Much is made of the ethical duty to protect attorney-client privilege. Both the ethical duty of confidentiality and the ethical duty of zealous representation require attorneys to vigorously defend privileged information from attempts to compel its disclosure. The notion that there might be ethical limits to such a duty is hardly ever considered and certainly not emphasized. For most lawyers, this emphasis on the importance of protecting privilege and lack of attention to the ethical limits of such claims has produced a sense that there is an unlimited ethical duty to protect privileged information from compulsory disclosure. Indeed, many lawyers seem to think that they are ethically obligated to give privilege the same level of protection given to criminal defendants. Just as criminal defendants are presumed innocent until the government has proven their guilt, lawyers often treat confidential information as privileged until the party seeking compulsory disclosure proves that it is not.
>
> Strassberg at page 414

Compounding the impossibility of proving a negative, Appellant has never viewed the body of the e-mails as the Special Referee's examination of them occurred *in camera* without the Appellant's participation. The only people who know what material is redacted are the County Attorney and the Special Referee, so no one can expect the Appellant to address specific content, although the County provided some of the redacted e-mails to Appellant in response to other requests and in discovery in a separate suit (Exhibits 9, 10, 11, 12, and 13, R.O.A. Vol. 1, pages 328-333), and these disclosures shed light on what the County is redacting, much of what involves the County's illegal arrangement for payments to its former Administrator and four Councilmembers' efforts to engineer a rehiring of him out of the view of the public. Moreover, the same e-mail cannot be redacted in one F.O.I.A. request and not another, which waives the privilege if one exists. See *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984): "Any voluntary disclosure by a client to

a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject." One principle with which everyone agrees is that the exemption provisions of the *Freedom of Information Act* are not intended to shield unlawful conduct.

While no one can quarrel with the Special Referee's statement that the General Assembly has not enacted a statute specifically prohibiting the use of private e-mail for government business, the Special Referee overlooked the General Assembly's specific prohibition against "electronic communications" to circumvent the requirement that the Government business be conducted in the open: § 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 supervision, control, jurisdiction, or advisory power." (emphasis added)

It is frankly shocking that the County persists in protecting Councilmembers' use of private e-mail communications on government business for two reasons. The first is, as addressed in Appellant's initial brief, the County never furnished an explanation to Appellant as to why the e-mails—including the identity of the correspondents—were redacted despite the Appellant making an inquiry. See Ex. 3, Vol. 1, page 316 R.O.A. After the plaintiff filed suit, they then became "attorney-client" privilege but only **after** the Appellant filed suit, and even then, the County never produced a privilege log until the Special Referee compelled them to do so. The privilege logs are contained in the Record on Appeal at Vol. 1, pages 87-96, and the Court can see that the vague descriptions provided are mere conclusory assertions with none of specificity required by the Supreme Court in *Quality Towing*. This vagueness issue is similar to the line of cases involving executive session where the Supreme Court has repeatedly found vague explanations insufficient. See *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001). As Respondent concedes,

government officials are never "off duty," but when they choose to communicate government business via their private e-mail accounts, the Councilmembers are intentionally acting as private citizens and not legislative authorities. This is especially salient here as this case demonstrates elected officials operating badly when left to operate in secret. See Exhibit 9 Vol. 1 at page 328, R.O.A. (one of the redacted e-mails disclosed to Appellant in a separate request) in which four members of Council and the County Administrator/Attorney script an upcoming meeting to rehire Josh Gruber, a former Administrator known for creating a controversy of providing himself a consulting agreement when he left Beaufort. (This stratagem of paying departing employees "consulting" fees recently ensnared a County Attorney appointed to the federal bench, another example of why transparency in government is so important.) This record demonstrates a pattern of improper communication between Councilmembers Howard, Somerville, and Rodman, involving both the County Administrator, the Sheriff's Department, and even the Magistrate Courts in continuing a bogus criminal prosecution against the Appellant for an alleged municipal violation over which the County has no jurisdiction. In responding to the Appellant in other *F.O.I.A.* requests and in her tort case, the Country provided some of the redacted communications in this case, and these e-mails reveal how four Councilmembers were scripting upcoming public meetings to control the outcome to rehire the departed County Administrator. See R.O.A. Vol. 1, pages 328-330 [Exhibits 9, 10, 11] The fact that the County previously provided some of the same documents to the Appellant they now claim are protected by attorney-client privilege demonstrates the redactions are not protecting privilege but rather to shield Councilmembers' unlawful conduct from becoming exposed. Moreover the disclosures waives the privilege:

> Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications [Page 47] between the same attorney and the same client on the same subject. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146 (D.S.C.1975); *U.S. v. Jones*, 696 F.2d 1069 (4th Cir.1982).
>
> *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (S.C. App. 1984)

See R.O.A. Vol. 1, page328 [Ex. 9 July 18, 2018 from Stu Rodman to Paul Somervealle, *et. al*, 10, July 2018 Stu Rodman to Paul Sommerville, 11, September 25, 2018 Stu Rodman to Paul Sommerville]

Finally, it is absurd to suggest that the County Attorney provides legal representation to Councilmembers in their individual capacities. A County Attorney represents the County as a legal entity, not the individual members who make up Council:

> In the absence of legislative restriction, a municipal corporation which is authorized to contract and to sue or be sued has the implied power to employ counsel to appear in the litigation in which it is involved, when in the exercise of its reasonable discretion the interest of the municipality so requires. Most municipal corporations employ an attorney to head a law department to attend to all the ordinary litigation to which the municipality is a party. He or she may be known as the corporation counsel, city solicitor or city or town attorney.
>
> *56 Am. Jur.2d Municipal Corporations, Counties, and Other Political Subdivisions*, § 198, Employment of Counsel

Thus, a County Attorney is no different than a Solicitor—his or her duties are to the governmental entity, not the individuals who comprise the government.

Moreover, as discussed fully in the Appellant's initial brief at pages 27-36, the Supreme Court has already disallowed invoking attorney-client privilege simply because the County Attorney is included in an e-mail chain, a principle of law the County concedes. See Respondent's Brief at page 12: "The South Carolina Supreme Court has already dismissed the notion that the status of the attorney can eliminate the protections provided by the attorney-client privilege. *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011)." The Appellant agrees, but the parties disagree what the County Attorney's "status" is here, especially in the months of June—October 2018 when the County Attorney was acting in a dual capacity as Administrator and lawyer. One thing is certain, the Appellant has never alleged that the County Attorney lacks the authority to act on behalf of the County, and when Councilmembers seek the advice of counsel on County business through government communications, the attorney-client privilege might apply. That is not

what happened here. What happened here is that the Councilmembers utilized their private e-mail addresses to circumvent the transparency required of government service for the purposes of concealment, not the receipt of legal advice. The County reconfigures Appellant's argument into a straw man in order to knock it down more easily. The Appellant never questioned the status of the County Attorney as the County Attorney, but instead demonstrated: (1) Tom Keaveny acted in a dual capacity as County Administrator and County Attorney from June 2018 until October 2018, (2) a private correspondent cannot invoke attorney-client privilege by adopting the simple expedient of including a County Attorney in an e-mail chain, which is the holding of *Evening Post Publ'g. Co*., and (3) members of Council cannot utilize their private e-mail accounts as a workaround of § 30-4-70(c), (4) attorney-client privilege cannot shield unlawful conduct, and finally, (5) having disclosed the communications in other productions, the privilege, if it existed, is waived.

This record demonstrates that Beaufort County asserts an unlawfully broad interpretation of attorney-client privilege, a fact made clear when the County redacted the correspondents from its *Freedom of Information Act* disclosure. It took a lawsuit and a directive from the Special Referee to force the County to reveal the identities of the persons included in the communications! On this front alone, the Appellant is a "prevailing party" because without her filing suit and demanding access to the persons included in the communications, the County would have succeeded in redacting the identities of the persons included in the e-mail communications. Here, not only did Beaufort County redact everything in the requested e-mails, but also precluded the Appellant from seeing who was included in the communications. Only after the Special Referee directed the County to reveal the correspondents did Appellant learn for the first time the identities of the correspondents, which include third persons who are not County employees. See Record on Appeal Vol. 1, page 8 [Special Referee's directive to the County])

Thus, when the County stakes reliance on a case like *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005), the County is doing the Appellant's work for her. In *Ross,* a police officer sued the City of Memphis, and her supervisors, Walter Crews and Alfred Gray, for denying her a promotion from Patrol Officer to Sergeant and for demoting her from Patrol Officer II to Patrol Officer II Probationary because she received answers to a police exam in advance of the test. This demotion resulted in a loss of pay and seniority. During discovery, the defendant, Crews, testified that he conducted a City investigation about the allegations of improper test answers and as a result of the City investigation, he took actions against Ross based on his investigation and upon the advice from Corporation Counsel and thus asserted the advice of counsel as a basis for a qualified immunity defense to her claims. In other words, Crews sought specific advice from Corporation Counsel about how to conduct a City disciplinary action involving a city employee. The City claimed that Crews could not divulge the advice he received, and Crews, naturally, concluded that not being able to divulge what the legal advice provided impaired his defense of qualified immunity.

In other words, the *Ross* case is 180 degrees from this case. Crews was a City employee asking the City's attorney how to conduct a City investigation into a City cheating scandal. In such circumstances the privilege belonged to the City, and Crews **might not** be free to abrogate it because he was asking for help in how to conduct a proper investigation. (The *Ross* Court did not decide the issue—it remanded it to the trial court to take evidence on the issue.) In other words, the information potentially divulged in *Ross* is more like the Appellant sending a *Freedom of Information Act* request to an appellate court staff counsel to review the communications between the staff counsel and the Court. The *Ross* case makes this point clear:

> Though citation to outside authority is no substitute for our independent judgment, we find these authorities persuasive. As the Supreme Court has observed regarding the corporate privilege "[b]oth for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. **It thereby encourages observance of the law and aids in the administration of justice**." *Weintraub*, 471 U.S. at 348, 105

S.Ct. 1986. We see no reason that that function is no longer served simply because the corporation is a municipality, or more broadly, that the organization or agency is a government entity. Governments must not only follow the laws, but are under additional constitutional and ethical obligations to their citizens. The privilege helps insure that conversations between municipal officials and attorneys will be honest and complete. In so doing, it encourages and facilitates the fulfillment of those obligations. See *Grand Jury Investigation*, 399 F.3d at 534 ("Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.")

In *Commodity Futures Trading Comm. v. Weintraub, et. al.*, 471 U.S. 343, 105 S.Ct. 1986 (1985), the Supreme Court makes clear that attorney-client privilege cannot be asserted to cover up wrongdoing. After a bankrupt corporation tried to prevent the Bankruptcy Trustee from waiving attorney-client privilege, the U. S. Supreme Court said that the Directors' interest in keeping those conversations secret had to yield to the Trustee's duties to shareholders, a situation analogous to a citizen seeking access to public documents. The case before the Court is more like *Weintraub* than *Ross*. Unlike *Ross*, the authors of the public e-mails are government officials, not County employees, and as the unredacted versions of some of the e-mails demonstrate, they were mounting an unlawful scheme not only to control public meetings outside the public's view, but also to encourage an unlawful prosecution of Appellant. Here, the un-redacted e-mails provided to Appellant in separate requests opens a window on the subject of the communications flowing from the Councilmember's private e-mail accounts to the County Administrator/County Attorney and that the subject of the e-mails was as far removed from **observance of the law and . . . administration of justice** as can be imagined. As *Ross* makes clear, the privilege is not automatic or absolute and must be decided on the facts of each case. The *Ross* court evaluated whether the privilege must yield to the defense of qualified immunity, not whether the communications are protected from the *Freedom of Information Act*. Crew's attempt to waive privilege controlled his ability to mount a defense, and even there, the *Ross* court did not declare the privilege immutable; instead, it remanded the case to the district court

to conduct an evidentiary examination to determine if the advice being rendered to Crews was on behalf of the City or on behalf of Crews individually:

> We therefore hold both that municipalities can assert attorney-client privilege and the Crew's decision to claim qualified immunity based on advice he received from the city's counsel does not prevent the City from asserting attorney-client privilege. Having removed these obstacles from the city's attempt to assert attorney-client privilege, we note that the City still bears the burden of proving the existence of the privilege, *Dakota*, 197 F.3d at 825, about which there may be some question.
>
> *Ross v. City of Memphis* at page 606

In other words, in *Ross*, the City asserted it was the client, not Crews. The Sixth Circuit spoke clearly that the assertion of a privilege cannot be simultaneously employed as a sword and a shield: "This image is meant to convey that 'the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications.' *Ibid*. Crews certainly could not assert that he relied on privileged communications and then hide behind the privilege, if he ever had it." *Ross* at pages 604-605. This statement by the Sixth Circuit highlights the issue before the Court, which is: can Councilmembers utilize their private e-mail accounts to circumvent the prohibition of § 30-4-70(c) and then adopt the simple expedient of copying the County Attorney in order to further unlawful aims? This rhetorical question is already answered by § 30-4-70(c), and the Special Referee erred in providing cover to the County to continue to violate the law.

One final reply is required to the County's Argument 1(A), and it is the rejection of the County's assertion that "privileged" communications related to the acquisition of real property continue after the transaction has closed. The *Freedom of Information Act* speaks to issue precisely and succinctly: "these documents are not exempt form disclosure once a contract is entered into or the property is sold or purchased except as otherwise provided in this section." § 30-4-40(5) S. C. Code, Ann. No greater potential for governmental mischief occurs than in the arena of local governments buying and selling real estate, and the citizens of South Carolina have few more important concerns than access to the local governments' expenditure of taxpayers' money in the area

of real estate acquisition. (The citizens of Charleston County had a front row seat to governmental mischief in this area in the sale of the Naval Base and the gigantic loss incurred by County taxpayers over the mishandling of the Naval Hospital.) Thus, this Court need look no further than the plain language of the statute to determine that documents related to real estate acquisition are not protected.

REPLY TO RESPONDENT'S ARGUMENT 1(B)

The reason the Appellant narrowed her request is because the County informed her she would be obligated to pay $14,432.06 for her initial request, including a pre-payment of $3,608.02 as a condition of fulfilling the request.

In its argument 1B, the County asserts that the Appellant fails to present a "justiciable controversy" because the County successfully intimidated the Appellant into a Hobson's choice of either altering her request or paying $14,432.06 for what should have been a routine disclosure. The County asserts that because the Appellant did not pay it, she cannot complain, which is like a defendant denying an armed robbery because she did not pull the trigger. The only way the County can make such an allegation is by ignoring the purpose and authority of the *South Carolina Freedom of Information Act* which allows citizens to sue for injunctive and declaratory relief. See § 30-4-100, S. C. Code, Ann. When the County demanded the exorbitant—and unauthorized—sum from the Appellant, its demand created a "justiciable controversy." The demand for unlawful costs chilled the Appellant's exercise of her right, and the demand for unlawful fees alone allows her to bring a suit under § 30-4-100, S. C. Code, Ann. Because she did not have $14,432.06 to pay to the County to put easily compiled e-mails on a thumb drive, the County forced her to amend her request, which is not "voluntarily" narrowing the scope of her request. Acting under government threat is never "voluntary." She narrowed the scope of her request in response to the County's demand for exorbitant fees and its refusal to explain them. It is a measure of the County's tin ear that it cannot comprehend how a citizen of modest means might not have over $14,000.00 to pay for e-mails on a thumb drive. The Special Referee agreed that the County's charges were unlawful, but she erred in concluding that

because the Appellant did not pay them, she did not suffer "damages" and therefore there was nothing for the Court to do. See R.O.A. Vol. 1, pages 13-14 [Order at pages7-8]: "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." This is an error of law because the remedy under the *Freedom of Information Act* is not for "damages," but rather for injunctive and declaratory relief and attorney's fees. In short, the Country cannot profit from its own wrongdoing by backing the Appellant down from paying an unlawful fee.

In support of its position, the County makes a surprising selection of authority. In *Sloan v. South Carolina Dept. of Revenue*, 409 S.C. 551, 762 S.E.2d 687 (2014), the Supreme Court upheld a finding that the case was moot because the Department of Revenue provided the requested documents almost immediately after Sloan filed his *F.O.I.A.* suit. The timeline of *Sloan* is:

November 19, 2012—Sloan made request for documents

December 20, 2012—The D.O.R. responded: "As soon as the information has been compiled, you will be contacted again and the requested information will be sent to you."

December 21, 2012—Sloan filed suit.

"Three weeks after Sloan filed suit, DOR provided Sloan with the documents he had requested. The trial court held a hearing at which Sloan conceded that his request for injunctive relief was mooted by DOR's production of documents, but Sloan maintained that his request for declaratory relief and attorney's fees and costs remained viable." *Sloan* at page 688 The Supreme Court agreed, holding that not only was Sloan the "prevailing party," but also: "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 the prevailing party status to the citizen by producing the documents after litigation is filed." *Sloan* at page 689 The same principle applies here in a different context. The County cannot assert a bogus inflated pre-payment demand to back the Appellant down and then profit from its own wrongdoing by claiming there is no "justiciable controversy" because she did not pay it. The County's assertion of the inflated fees included, by its own admission, the rate of $72.00 per hour for an attorney to review the materials for privilege, a charge that the *Freedom of Information Act* specifically prohibits: "Fees may not be charged for examination and review to determine if the documents are subject to disclosure." § 30-4-30(B) The County's assertion of inflated fees is a *Freedom of Information Act* violation, and the Appellant was not required to pay it to maintain her claim any more than a citizen subject to false arrest is required to resist the unlawful arrest to the death to preserve her right to challenge it. The Department of Revenue treated Sloan with more respect than the County provided to this Appellant, and the Supreme Court found that he presented a "justiciable controversy."

REPLY TO RESPONDENT'S ARGUMENT 1(C)

The use of private e-mail is a violation of § 30-4-70(c) as well as a waiver of attorney-client privilege.

The County argues that the Appellant is raising this issue for the first time on appeal. The Record on Appeal refutes this. At the hearing before the Special Referee, the Appellant explained in detail why she zeroed in on the Councilmembers' private e-mail:

A. And subsequently, I began requesting FOIA because I believe that I was involved in some kind of Kafkaesque nightmare where there were other forces behind the scenes that were creating something unlawful. I made numerous FOIA requests, and they were all denied or I was given excessive charges. I did get some e-mails—private e-mails from the Town of Port Royal which led me to believe that all of what I just said to you is correct.

R.O.A. Vol. 1, page 237 [tr. page 22, lines 6—15]

Q. And as a result of that [receiving information], did you revise your second FOIA request narrow it?

A. Yes.

Q. Is that Exhibit 5?

. . .

Q. that's where you requested any and all e-mails to/from/between psommerville@hargray.com and the following e-mail?

A. Correct.

Q. Why were you zeroed in on Paul Sommerville—psommerville@hargray.com? Why were you interested in that particular address?

A. The same private e-mail address for council people were coming up in some other e-mails that I had gotten, some other FOIAs. In one of the exhibits, when we get to it, I can enlarge upon that a little bit further.

R.O.A. Vol. 1, page 246 [tr. page 31, lines 8—24]

Q. And how many documents have you already received as a result of bringing this action that you did not previously get in response to your FOIA requests?

A. How many additional ones did I get?

Q. Yeah.

A. Well, if you count the 167 redacted, Paul Sommerville's private e-mails, and then there was just last week, Mr. Richardson, I know that you sent a – it was the closing document for 429 Broad River Boulevard. I think there was 10 pages.

. . .

A. Otherwise, I didn't get any of the other documents that went with the closing documents.

R.O.A. Vol. 1, page 266 [tr. page 51, lines 10 – 24]

. . .

A. I'm not trying to vex the County in any way. I simply asked for things that I believe I have a right as a citizen to see and that our community has a right to see. I didn't ask specifically for anything that was under or in litigation or the subject of any litigation. I asked for documents about an administrator that involved an administrator search that already closed, a real estate transaction that was determined by the defendant to be unauthorized to begin with, and just people's personal e-mail accounts to government accounts, which I believe given that Mr. Weaver acknowledged they're using the private e-mails that would be something that we have a right to see, because I think that's the intent of the transparent, open government that we all expect and that we're all paying for.

R.O.A. Vol. 1, page 268 [tr. page 53, lines 8 –25]

A. No. I didn't receive this one through the discovery. This was through a FOIA that I had received when I asked for personal e-mails because there were personal e-mails that were in my discovery. So I just asked for separate FOIA's because the personal e-mails—because as I was referencing earlier when I said that there was—there were e-mails that they were doing intel on me and then there were private e-mails. And I was just – you know, I was alarmed by that. I had no idea that I was going to be getting these e-mails when I asked for that.

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 form a six-year period as to different things. Which FOIA request did you receive this particular document, Number 11, and was that a separate FOIA request for personal e-mails?

A. That was a previous FOIA request for personal e-mails, correct. 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. page 274-275 [tr. page 59, line 7 – page 60, line 13]

The first sentence of Appellant's November 19, 2020 motion for reconsideration filed with the Special Referee begins:

> **1. The use of private e-mail communications is a waiver of attorney/client privilege.**
> 1. In holding that certain e-mail communications between government officials, which included the County attorney as part of the address chain, the Court overlooks that the bulk of these e-mails originate form Council members **private** e-mail addresses. (R.O.A. Vol. 1, page 152 [November 19, 2020 Motion for Reconsideration]) (The boldface appears in the original.)

The issue of public officials using private communications to conduct County business has been a salient issue in this case from the beginning, and there is no support in the record to suggest that the Appellant raises this issue for the first time on appeal. The County attempts to insert confusion where there is none, and this stems from the County's mis-characterization of Appellant's case as being an attack on County Council for conducting unlawful meetings under § 30-4-70(c). See Respondent's Brief at page 17 where it continues the canard that Appellant is bringing this action because the County was conducting improper meetings and argues that because the e-mail chains fell just below a quorum, the County committed no violation. Harkening back to the armed robbery metaphor above, it is not a defense to armed robbery to say the gun was not loaded. This effort to sow confusion results from the County's creation of the straw man assertion that Appellant is grounding her case on this section prohibiting unlawful meetings when the Appellant is relies upon § 30-4-70(c) for exactly what it says and to offer it to explain the **why** of Councilmembers' utilizing their private e-mail accounts, not to create the **what** of the case. § 30-4-70(c) does not discuss "quorum"; it specifically prohibits government officials from utilizing "electronic communication" to avoid the required transparency of the *Freedom of Information Act*. The issue of a quorum is a red herring, and Councilmembers are not free to violate the *Freedom of Information Act* because they do

it with fewer members than constitute a quorum. This is the age-old *de minimus* rationalization of bad conduct similar to: "it is not really stealing if I take only a little from a lot of people." Of course Councilmembers are free to use their private e-mail to do whatever they like, but they cannot use their private e-mail accounts either to conceal government business or to conduct government business out of the public's eye, and when they resort to their private citizen status, they cannot invoke governmental attorney-client privilege as a private citizen to shield their violations of the *Freedom of Information Act*. By analogy, if this were a tort claim instead of a statutory equitable claim for injunctive and declaratory relief, a Councilmember for whom the County provides a County vehicle to conduct County business could not claim the protection of the State Tort Claims Act for a wreck in her private vehicle by claiming she was on her way to the grocery store to bring lunch to the office. The County Attorney represents the County, not the individual Councilmembers, and should they desire to bring themselves under the protection of the County Attorney's privilege, they must do so operating on their Government Issue e-mail account, and any privilege applies only to proper conduct during the course and scope of the government activities. The County's Brief reinforces the Appellant's argument that County Councilmembers improperly utilize their private e-mail accounts to script public meetings. On page 4 of its Brief, the County concedes that Appellant's F.O.I.A. request "implicated thousands of documents." The County helpfully explains that the $14,000.00 estimate for e-mails resulted from the "sheer volume of documents," an assertion that reveals too much about what Councilmembers are up to. As the Queen of Denmark remarked in another context, "The lady doth protest too much, methinks." If the County were conducting its business in the open as it should, there would not be "thousands of documents," *i.e.* thousands of personal e-mails conducting government business.

REPLY TO RESPONDENT'S ARGUMENT 1(D)

Matters related to a real estate purchase are not privileged once the transaction has closed.

In its argument 1(D), the County argues that communications related to the acquisition of real estate retain their privilege even after the transaction has closed. As discussed above on pages 11-12, the *South Carolina Freedom of Information Act* specifically makes these documents public. § 30-4-40(5) S. C. Code, Ann. The reply to the County's spurious assertion is fully addressed above and does not require repetition here. The Appellant will not pounce on the County's unintended irony on this point. On pages 13-14 of Respondent's Brief, the County informs the Court that "*the County's attorneys were brought into these communications due to their legal knowledge . . . ,"* which is simultaneously humorous and revealing because the County's own investigation into the acquisition of 1 Bostwick Circle concluded that it was an unlawful transaction. See R.O.A. Vol. 1, page 338 [Exhibit 14] for Chris Inglese's report to the County Administrator, John Weaver, concluding that the County improperly acquired the parcel, but could take no corrective action because the person responsible resigned.

REPLY TO RESPONDENT'S ARGUMENT 2
The Special Referee erred in not awarding the plaintiff attorney's fees and costs.

The County's final argument is that the plaintiff was not a prevailing party and thus not entitled to fees or costs. This legal issue and the facts of the case are fully discussed in the Appellant's Initial Brief at pages 41 - 44 and do not require repetition here. Since the issue is fully addressed in the Initial Brief, the Appellant limits herself to the correction of factual errors contained in the County's Brief.

First the County asserts that the issue of the listing agent's relationship to the County raised "extremely difficult and unique challenges posed by the interplay between the *Freedom of Information Act* and the attorney client privilege." (Respondent's Brief at page 20) As set forth above, the least private communications in the conduct of government business are those related to the sale and purchase or real property, and these records, once the transaction is completed, are

specifically disqualified from exemption. The County's vigorous defense of the privacy of its communications with a real estate agent in the face of a specific statutory requirement of openness is emblematic of its resolve to thwart the plaintiff at every turn.

Second, the County asserts the Appellant did not address this issue as the main issue in the case. She did. The County attempted to hide the correspondents' identity in the redacted e-mails. The Special Referee ordered the County to disclose these. The County sought to shield its communications with a real estate agent, and the Special Referee required those communications be disclosed. The Special Referee found that some documents were improperly redacted and ordered those be produced. The receipt of any of these documents over the County's refusal to produce them makes her a prevailing party.

The second erroneous assertion contained in the County's final argument is that the Appellant "voluntarily" abandoned her claim under her first *F.O.I.A.* request. As discussed above on pages 15 - 16 and as demonstrated by the testimony presented at the hearing, there was nothing "voluntary" about the Appellant's decision not to pay $14,432.06 to get what turned out to be blacked out documents. (See Record on Appeal Vol. 2, pages 448-614 for the blacked out documents the County produced.) Even the Respondent concedes that it was improper to charge the Appellant $72.00 an hour for a County Attorney to examine the records to determine if they are public. Doing an act under compulsion does not fit the definition of "voluntary," and very few citizens of South Carolina have the wherewithal to hand over $14,000.00 to examine e-mails that the County blacked out. (At the minimum wage of $7.25 per hour, the County's fee amounted to 1,991 hours or 50 weeks of work. That is a considerable sum to expect a citizen to pay to examine public documents.)

The final argument in the County's brief is to make light of the County's animus for the Appellant. It is, no doubt, a trivial matter to the County as Exhibit 12, Gary Cubic's resolve to see

to it that the County prosecuted Baracco for an alleged incident over which it had no jurisdiction (R.O.A. Vol. 1, page 331), and the Appellant is neither the first nor the last citizen to receive rough treatment at the hands of government officials, and the Court does not need a lesson in the function of the judicial branch as a check on executive and legislative action. The Appellant did not introduce the element of animus as an element of her *Freedom of Information Act* claim except to demonstrate the County's motivation and lack of good faith in thwarting her access to public documents. The issue of the County's mistreatment of Appellant was the subject of a separate lawsuit, which the Appellant resolved on terms favorable to her. However, as H. L. Mencken allegedly remarked: "A citizen's greatest fear is being noticed by the government," and Beaufort County noticed the Appellant. While the County puts forward a well-written and zealously argued brief, the facts are clear: the County erected every roadblock it could find to thwart the Appellant's access to public records, and the Appellant's failure to present the case without the evidence of animus would leave this Court perplexed as to the source of the County's hostility for Ms. Baracco. The animus is not the reason for the lawsuit—the lawsuit is the reason for the animus. Beaufort County is preventing public access to public records, and the Appellant is one of the few citizens sufficiently courageous to take up the gauntlet to challenge the County's conduct.

CONCLUSION

This case demonstrates the fragility of the *Freedom of Information Act* as a remedy to support citizens' efforts to be informed about government conduct. Not only was the Appellant required to battle the County for access to public records, but also she was required to retain counsel, file a suit, pay a Special Referee's fee—all for privilege of fighting for her right to be informed about what her local government is doing. There are few citizens who are willing to run this gauntlet, and the economics of this case paint a daunting portrait of what a citizen can expect when challenging government misconduct—the Col. Vindman effect. As pointed out by more

than one commentator on the *Freedom of Information Act*, the reason government officials continuously operate in secret is because they have no skin in the game when a citizen takes the time and invests the money to question improper conduct. The relief promised under the *Freedom of Information Act* failed the Appellant in this case, and the Respondent's brief, though expertly written and cogently argued, defends the same governmental hubris that led to this litigation. Even if this Court were not to reverse the Special Referee on the redacted e-mails, the Appellant still successfully compelled the County to disclose the identities of the persons communicating on the redacted correspondence, forced the County to disgorge obviously public documents, and demonstrated that the County's demand for exorbitant fees was unlawful. On these issues alone, the Plaintiff is a prevailing party, and the Special Referee erred in both providing cover for the County to keep public records out of public view and in failing to award attorney's fees and costs to the Appellant who bravely stepped forward to insist the County obey the law. In an astonishing exhibition of chutzpah, Beaufort County, in response to this action, has now adopted a written policy of refusing to turn over any public official's e-mail originating from a private address. This new policy is a powerful indictment of Beaufort County's contempt for its responsibilities to be open. As set forth in the Appellant's Initial Brief, this Court should examine the redacted e-mails, order them produced to the Appellant and remand this case back to the Special Referee or, more importantly, to the circuit court since the circuit court referred the case *sua sponte*, to award the Appellant attorney's fees and costs as a prevailing party under the *Freedom of Information Act*.

Respectfully submitted,

April 12, 2022

/s/Thomas R. Goldstein
Thomas R. Goldstein, S. C. Bar No. 2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554 4291; (843) 554 5566 (fax)
tgoldstein@cobblaw.net
Attorneys for Appellant/Respondent

CERTIFICATE OF COUNSEL

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

April 12, 2022

/s/ Thomas R. Goldstein
Thomas R. Goldstein, S. C. Bar No. 2186