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THE 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 Case No. 2021-00321

Mare Baracco…… Appellant-Respondent,

v.

Beaufort County…… Respondent-Appellant.

FINAL BRIEF OF RESPONDENT-APPELLANT BEAUFORT COUNTY

April 11, 2022

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STATEMENT OF ISSUES

I. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW IN DETERMINING THAT THE COUNTY'S INCLUSION OF THE ESTIMATED HOURLY CHARGE FOR THE COUNTY'S LEGAL DEPARTMENT TO REVIEW AND REDACT DOCUMENTS VIOLATED THE FREEDOM OF INFORMATION ACT.

II. THE SPECIAL REFEREE ERRED IN ORDERING DISCLOSURE OF CERTAIN PUBLIC RECORDS AFTER FINDING ANY PRIVILEGE WAS WAIVED.

STATEMENT OF THE CASE

Appellant-Respondent Mare Baracco ("*Baracco*") filed this lawsuit on April 10, 2019, against Respondent-Appellant Beaufort County ("*County*"). On June 29, 2019, before service of a responsive pleading by the County, Baracco served and filed an Amended Complaint seeking an injunction against the County and attorneys' fees for the County's alleged violation of the Freedom of Information Act ("*FOIA*"). (R. pp. 31-37). In particular, Baracco challenged the reasonableness of the County's estimated fee for the production of requested documents in response to a series of FOIA requests pertaining to years' worth of emails from/by/to various County Councilmembers and their personal email accounts, and the propriety of the redactions completed by the County in producing certain documents to Baracco pursuant to another FOIA request involving a real estate transaction. *Id.*

Although the relevant portion of the Freedom of Information Act does not require responsive pleadings, on August 14, 2019, the County answered the Amended Complaint and raised four defenses, including a general denial and Rule 12, SCRCP. (R. pp. 38-41). On February 3, 2020, Baracco served her memorandum of law in support of the Amended Complaint. (R. pp. 42-54).

On May 28, 2020, the Chief Administrative Judge *sua sponte* assigned the case to the Honorable Perry Buckner to conduct a hearing in accordance with S.C. Code Ann. § 30-4-100(A). (R. p. 1). On June 1, 2020, the County served its memorandum of law in opposition to the Amended Complaint and the memorandum of law served by Baracco. (R. pp. 57-75).

On June 2, 2020, the matter came before Judge Buckner via WebEx hearing. By written order dated June 3, 2020, Judge Buckner (i) ordered Baracco to identify which documents she was requesting under FOIA, which documents remained in dispute, and to provide a list of the same within fifteen days to the County; (ii) ordered the County, within thirty days of receipt of the document identification from Baracco, to provide the basis for any objections to the requested documents as well as the exact fee that County intended to charge for the production of the same; and, (iii) appointed Erin Dean as special referee to "determine the reasonableness of the fee, and whether or not any of the exceptions under the applicable FOIA statute apply." (R. p. 5).

On June 19, 2020, Baracco provided the County and the Special Referee with her list of requested documents. (R. p. 81). On June 29, 2020, the County responded. (R. pp. 84-86). On July 6, 2020, and July 7, 2020, the County produced (i) redacted versions of the requested documents along with a privilege log asserting the basis of the FOIA exemption to Baracco and the Special Referee, and (ii) "clean" versions of the documents to the Special Referee for in camera review. (R. pp. 87-96). Given the sheer volume of documents, the parties agreed to accept receipt of the same via electronic transfer over Citrix ShareFile, an encrypted document sharing software program.

On July 28, 2020, after reviewing the pleadings, the memoranda of law and a letter from counsel for Baracco, the Special Referee posed a series of nine questions to the Parties. (R. p. 101). On that same date, Baracco responded to the same. (R. pp. 102-103). On August 12, 2020, the

County responded with its answers to the July 28, 2020, letters from the Special Referee and Baracco. (R. pp. 113-115). On September 3, 2020, the County revised its redacted production to remove redactions that covered the names of the senders/recipients of emails in accordance with the Special Referee's instructions. (R. pp. 125-126).

The Parties appeared before the Special Referee on September 25, 2020, for a final hearing conducted via Lifesize streaming program supplied by the court reporter. After taking testimony and considering the briefing and arguments of counsel, the Special Referee issued an Order on November 13, 2020. (R. pp. 7-22).

On November 19, 2020, the Appellant-Respondent filed and served her Motion for Reconsideration. (R. pp. 152-161). On November 23, 2020, the Respondent-Appellant filed and served its Motion for Reconsideration. (R. pp.162-168). By Order dated March 2, 2021, the Special Referee denied both Motions for Reconsideration. (R. pp. 23-30).

On March 22, 2021, the Appellant-Respondent filed her Notice of Appeal. (R. p. 199). On March 23, 2021, the Respondent-Appellant filed its Notice of Appeal. (R. p. 201). On May 18, 2021, the Special Referee billed $7,280.00 for her services in this case. In accordance with the Order from Judge Buckner, each party paid one-half of those costs.

STATEMENT OF FACTS

On February 10, 2019, Mare Baracco, a resident of Port Royal, South Carolina, submitted a Freedom of Information Act ("*FOIA*") request to Beaufort County for communications related to the sale and purchase of two parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River Road ("*FOIA Request No. 1*"). (R. p. 313-15). On February 20, 2019, Beaufort County responded requesting an initial deposit of $124.66 as a condition of fulfilling the request.

After tendering the initial deposit, Ms. Baracco was provided with the responsive documents on March 21, 2019. At that time, the County refunded Ms. Baracco $53.66 due to the County's overestimating the initial costs of production. Portions of the production were redacted by the County prior to the delivery to Ms. Baracco.

On March 10, 2019, Ms. Baracco submitted an additional FOIA request to Beaufort County. In this request, Ms. Baracco requested all emails to/from/between two County Councilmembers with various County department heads, the County Administrator, the County Attorney, the County Sheriff, members of County Council, and/or other public and private individuals over an approximately six (6) years period ("*FOIA Request No. 2*"). (R. pp. 317-318). There was no limit as to subject matter. The request implicated thousands of documents.

On March 18, 2019, the County responded to FOIA Request No. 2 by requesting a deposit of $3,019.75, which represented approximately 25% of the reasonably anticipated costs to be incurred by the County in responding to FOIA Request No. 2. (R. pp. 319-20). The County estimated that searching and retrieving the hundreds of records requested by FOIA Request No. 2 would take approximately 167 hours, based on an estimated time of one minute per document. (*Id.*).

On that same day, the Plaintiff requested a thorough explanation from the former County Administrator, who promptly responded that (i) SLED, as the primary law enforcement agency for the state, has recommended stronger internal controls on access to the County network, presumably to limit outside interference/hacking; (ii) the IT charge was expected to range from $49.07/an hour to $30.74/an hour based upon which member of the County IT Department conducts the search; (iii) the County Attorney is required to review any disclosed emails from elected or appointed officials to ensure that the attorney-client privilege is not waived; and, (iv) that the County Attorney's rate for review is $72.00/an hour. (R. p. 347).

Upon receipt of this explanation on March 18, 2019, Ms. Baracco revised FOIA Request No. 2, by reducing its scope to all e-mails over a 6-year period between the County Council Chairman, the former County Administrator, the former County Attorney/former Deputy County Administrator, and the County Attorney ("*FOIA Request No. 3*"). (R. pp 321-322). On March 25, 2019, the County responded that an initial deposit of $152.82 – once again, 25% of the estimated cost of fulfillment - would be required prior to record compilation. (R. pp 323-325).

Thereafter, on March 31, 2019, Ms. Baracco submitted her fourth FOIA request to the County specifically requesting emails from County Council member Alice Howard's personal e-mail address from January 1, 2015, to the "present" to/from/between Ms. Howard and multiple individuals ("*FOIA Request No. 4*"). (R. p. 326). On April 2, 2019, the County responded that an initial deposit of $404.29 would be required prior to the County beginning the process of fulfilling this request. (R. p. 327). This deposit represented 25% of the reasonably anticipated costs of producing the records, which the County determined was $1,617.14. (R. p. 327).

The Appellant-Respondent commenced this lawsuit on April 10, 2019, amending her complaint once. Throughout the course of this litigation and into this appeal, the Appellant-Respondent has alleged that the County violated FOIA. In particular, the Appellant-Respondent has asserted the following claims, some of which are raised for the first time on appeal and others which have been abandoned:

1. Communications to and from an in-house governmental attorney are never afforded protections from FOIA disclosure as such communications can never be considered privileged.

2. Communications in which an attorney purportedly delivers inaccurate legal advice regarding whether the county's governing body must approve of the acquisition of real property is not subject to privilege per the crime-fraud exception (abandoned).

3. The consummation of a real estate transaction eliminates any ability to exempt privileged documents from FOIA disclosure (not raised below).

4. Upon being appointed as Interim County Administrator, the County Attorney was operating in a dual capacity and therefore no communications from the County Attorney during that time could be considered privileged, regardless of the content or context of the communications (abandoned).

5. The copying of the County's contractually retained third-party real estate agent on email communications between the County Attorney and County staff waives any claim of attorney-client privilege.

6. The County's inclusion of an estimated eight (8) hours billed at the rate of $72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 3 violates the Freedom of Information Act.

7. The County's inclusion of an estimated twenty-two (22) hours billed at the rate of $72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 4 violates the Freedom of Information Act.

Prior to the final hearing on the matter, the Special Referee received all of the documents pertaining to FOIA Request No. 1, both redacted and un-redacted, as well as all of the documents implicated by the Appellant-Respondent's revised FOIA Request No. 4, both redacted and un-redacted.

In regard to FOIA Request No. 1, the Special Referee determined that all of the redactions completed by the County fell within a recognized FOIA exemption except for those redactions on communication in which Debra Regecz, a third-party real estate agent retained by the County to assist with the location and acquisition of real property, was copied. (R. pp. 16-20). The Special Referee recognized that the question of whether a third party realtor was an "agent of the client" to qualify as a "privileged person" to avoid waiver was a novel question in South Carolina. The Special Referee further acknowledged that had the County not redacted this information, any privilege would have been waived upon disclosure; nevertheless, the Special Referee found that the County's RFP for brokerage services included an explicit disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. 19-20). For this reason, the Special Referee declined to extend "privileged persons" status to Ms. Regecz.

In regard to revised FOIA Request No. 3, "[a] thorough review by this Court of the 167 pages of documents produced … revealed that the majority of redactions did pertain to legal advice received from Keaveny." (R. p. 16). Three exceptions were found and the Special Referee ordered that those three documents be provided to the Appellant-Respondent. On December 15, 2020, those three documents were provided to Appellant-Respondent through her counsel.

As the Statement of the Case outlines, the Special Referee reviewed extensive pleadings on all of these issues, received the testimony of the Appellant-Respondent, and on November 13, 2020, issued her final Order. (R. pp. 7-22); *see* discussion *supra* in the Statement of the Case.

STANDARD OF REVIEW

Declaratory judgments in and of themselves are neither legal nor equitable. *See Felts v. Richland Cty.*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue. *Campbell*, 354 S.C. at 279, 580 S.E.2d at 165; *Travelers Indem. Co. v. Auto World*, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (suit for declaratory judgment is neither legal nor equitable, but is determined by nature of underlying issue). The underlying issues relevant to this appeal involve questions of novel statutory interpretation and the existence of privilege.

As to the existence of privilege, "[t]he determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010). "The trial judge's decision will not be overturned absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008), quoted in *Lambries v. Saluda County Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014).

As to the remaining two issues, the Special Referee's Orders turn on the statutory interpretation of two different sections of the Freedom of Information Act both of which raised novel issues of law. "Determining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In a case raising a novel issue of law

regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Lambries*, 409 S.C. at 7, 760 S.E.2d at 788, *citing Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006).

An order granting an injunction is reviewed for an abuse of discretion. *Id.* "An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support." *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 of 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); *Sloan v. Friends of The Hunley Inc.*, 393 S.C. 152, 711 S.E.2d 895 (S.C. 2011). "[T]he trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings." *Campbell*, 354 S.C. 274,280, 580 S.E.2d 163, 165-66 (citations omitted); *see also Harkins v. Greenville County*, 340 S.C. 606,533 S.E.2d 886 (2000).

PERTINENT PRINCIPLES OF STATUTORY INTERPRETATION

The cardinal rule in statutory construction is that a court must ascertain and effectuate legislative intent whenever possible. *Joint Legislative Committee v. Huff*, 320 S.C. 241, 245, 464 S.E.2d 324, 326 (1995). Legislative intent must prevail if it can reasonably be discovered in language used and construed in light of its intended purpose. *Glover by Cauthen v. Suitt Construction Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995). "The determination of legislative intent is a matter of law." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 148, 694 S.E.2d 525, 529 (2010) (citations omitted).

In addition to the ordinary rules of statutory construction applicable when interpreting a state statute, the South Carolina Freedom of Information Act provides:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. 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. "South Carolina's FOIA was designed to guarantee the public **reasonable** access to certain activities of the government." *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004), citing *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996) (double emphasis added). The Act is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. *Id.*

Nevertheless, courts must apply the terms of a statute according to its literal meaning, without resort to subtle or forced construction in an attempt to limit or expand the scope of the statute. *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994). Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. *Timmons v. Tricentennial Commission*, 254 S.C. 378, 175 S.E.2d 805 (1970). When the terms and language of a statute are plain and unambiguous and convey a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994); *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996).

When a statute is ambiguous, the Court considers the terms of the statute and employs the rules of statutory interpretation. *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citing *Lester v. South Carolina Workers' Comp. Comm'n*, 334 S.C. 557, 514 S.E.2d 751 (1999)). Under South Carolina's rules of statutory construction, a reviewing court "must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (*citing TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998)). "In construing a statute, this Court will [nonetheless] reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." *Lancaster Cnty. Bar Ass'n v. S.C. Comrn'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008).

"Under the 'last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails." *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991). "In accordance with the principle that the last expression of the legislative will is the law, where conflicting provisions are found in the same statute, or in different statutes, the last in point of time or order of arrangement prevails." *Feldman v. S.C. Tax Comm'n*, 203 S.C. 49, 51, 26 S.E.2d 22, 24 (1943). "[L]ater legislation supersedes earlier laws addressing the identical issue." *Whiteside v. Cherokee Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993).

ARGUMENT

I. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW IN SUGGESTING THAT THE COUNTY'S INCLUSION OF THE ESTIMATED HOURLY CHARGE FOR THE COUNTY'S LEGAL DEPARTMENT TO REVIEW AND REDACT DOCUMENTS VIOLATED THE FREEDOM OF INFORMATION ACT.

The Special Referee correctly found that there was no violation of the Freedom of Information Act relative to the deposits estimated by the County because Ms. Baracco never paid the deposits. (R. pp. 13-14). Since no deposits were paid, Ms. Baracco's questions were merely academic. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474, 478 (2006)(finding that even in FOIA cases appellate courts will not decide academic questions). "Generally, this Court only considers cases presenting a justiciable controversy." *Id.* (citing *Byrd v. Irmo High School*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996)). "A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract." *Id.*

Despite finding there was no violation of the Freedom of Information Act by the County, the Special Referee noted in the Order that a public body's attempt to charge fees for "reviewing and redacting [ ] records" were both "problematic" and "inappropriate" as such fees would necessarily be for "the examination and review to determine if the documents are subject to disclosure." (R. p. 13). Given the substantial resources devoted by public bodies to ensure that legally privileged material (*e.g.,* social security numbers, victim and witness identifying information, work product, information regarding minors, etc.) is segregated from public material, the County moved the Special Referee to reconsider her position that the imposition of such fees would be problematic or inappropriate. (R. pp. 162-168). Upon reconsideration, the Special Referee reiterated that there was no violation by the County relative to the fees but also concluded

that "(search, retrieval, and redaction) are administerial not analytical in nature" and only the physical act of redaction would be compensable. (R. pp. 26-27).

The Special Referee's decision to interpret FOIA as limiting the recoverable costs associated with redactions to the time necessary to physically obscure the exempt material is without support in the Record. Further, it is an interpretation that strains logic and reason. The process of analyzing potentially sensitive documents for exempt material is a necessary and substantial component of redaction and requires extensive training. To separate the two would effectively nullify the General Assembly's decision to permit public bodies to recover the cost of redaction. Moreover, in reaching her conclusion, the Special Referee failed to consider an alternative interpretation that is consistent with the express language of the Freedom of Information Act.

A. The Freedom of Information Act Only Prohibits Charging Fees to Determine Whether Documents Constitute Public Records Subject to Disclosure.

The South Carolina Freedom of Information Act grants public bodies the right to require a "deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records…prior to the public body searching for or making copies of records." *See* S.C. Code Ann. § 30-4-30(B). In determining the amount of a proposed deposit, a public body must first estimate the total permissible fee that could be levied under FOIA. FOIA permits public bodies to recover a reasonable fee for the cost of having an employee of the public body search, retrieve, **and redact** public records in response to a valid FOIA request. *See* S.C. Code Ann. § 30–4–30(B) (double emphasis added). The hourly fee for this service "shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request." *Id.*

For years, South Carolina limited local governments to recovering fees only for the cost of the "search and retrieval" of public records in response to a FOIA request, with such costs "not to exceed the actual cost of searching for or making copies of records." *See* S.C. Code Ann. § 30–4–30(B)(2016). In 2017, the Freedom of Information Act was amended to add the costs associated with "redaction" and to permit recovery based on the lowest hourly rate of the public body employee that has the necessary skill and training to perform the search, retrieval, and redaction of records. *Id.*; (R. pp. 62-67). Thus, operating under the revised FOIA, the time spent redacting public records in response to a FOIA request is expressly compensable on an hourly rate. *Id.*; (R. pp. 162-166).

While the Act permits public bodies to recoup costs incurred in the redaction of records, it also provides that "[f]ees may not be charged for examination and review to **determine if the documents are subject to disclosure**." S.C. Code Ann. § 30–4–30(B) (double emphasis added) (R. pp. 162-166). By its very nature, the process by which exempt material is separated from non-exempt material must be subsequent to the determination of whether the underlying public records are even subject to the disclosure requirement of Section 30-4-30(A)(1) of the Act. Upon receipt of a FOIA request, the public body has between ten and twenty days - depending on the age of the record(s) being requested – to make a "determination…as to the public availability of the requested public record." S.C. Code Ann. § 30–4–30(C).

In accordance with FOIA, many "public records" are not publically available and are not subject to disclosure. *See* S.C. Code Ann. § 30-4-20(c). In fact, the definition of "public record" in the Act identifies well over a dozen different subsects of public records (*e.g.,* "income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records," etc.) that the General Assembly determined should never be disclosed as part of a FOIA production. *Id.*

Only upon first reviewing the requested documents and determining that the FOIA request implicates public records subject to disclosure – a determination that must be relayed to the requestor – is the public body obligated to produce such records, "specific portions of [which] may be subject to redaction according to the exemptions provided for by Section 30-4-40 or other state or federal laws." S.C. Code Ann. § 30-4-30(C). Thus, in redacting material in accordance with S.C. Code Ann. § 30-4-40, the public body is not making a determination as to whether the documents are subject to disclosure; rather, it is analyzing whether portions of documents already determined to be subject to disclosure ***may be*** otherwise exempt per Section 30-4-40 of the Act.

This interpretation recognizes that FOIA places two distinct and separate review obligations upon public bodies and avoids an irreconcilable conflict. *See* S.C. Code Ann. § 30-4-30(C). When the terms and language of a statute are plain and unambiguous and convey a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994); *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996). Any other interpretation of these provisions would render the Act hopelessly contradictory as analyzing records for disclosure determinations is an essential part of the redaction process.

Under the County's interpretation, the prohibition on charging for "examination and review" applies *exclusively* to the review of the public records during the initial 10-day acknowledgement period required by FOIA. In other words, the public body could not charge for the time it takes to determine whether it will comply with a FOIA request and/or whether there are any responsive documents during the initial ten-day period; however, it could charge for the time spent reviewing and redacting responsive public records.

Moreover, eliminating fees for this initial review is consistent with public policy and the codified purpose of FOIA. *See* S.C. Code Ann. § 30-4-15. This interpretation clarifies that the public body has no right to charge a requestor in providing its initial response regarding the public availability of such documents and the public body's reasonably anticipated costs of production. *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). By removing the possibility of such an expense, the General Assembly reaffirmed the right of the public to inquire about publically available documents without risk of financial penalty, while simultaneously acknowledging the admirable goal of limiting taxpayer burden. Public money pays for the creation of the public records, the maintenance of them, the storage of them, and, ultimately, their production pursuant to a FOIA request. Requiring extensive retrieval, review and production of tens of thousands of documents annually in response to FOIA requests conflicts with this goal when local governments cannot recover ***the actual*** direct cost of numerous and expensive FOIA requests.

The Special Referee's conclusion that the term "redaction" is limited to the physical act of blotting out exempt information embraces a forced construction of FOIA, one that Ms. Baracco did not proffer throughout this matter. Ms. Baracco's position is that only those redactions <u>required</u> to remove "personal identifying information" are compensable, a position devoid of any support in the Act and relying solely on Rule 41.2, SCRCP. (R. p. 170). By adopting an interpretation of "redaction" that was without the benefit of legal authority and was in opposition to the positions espoused by both Ms. Baracco and the County, the Special Referee plainly erred.

B. The "Last Legislative Expression" Rule Requires Any Ambiguity Be Interpreted in Favor of Permitting the Recovery of the Direct Costs Associated with Redaction.

Arguably, FOIA's prohibition against charging fees for "examination and review to determine if the documents are subject to disclosure" cannot be reconciled with the public body's right to charge fees for redacting exempt information given the inherent obligation to analyze records as part of the redaction process.

Under the principles of statutory interpretation, if an irreconcilable conflict exists within a statute regarding whether fees may be charged for determining what portions of documents may be redacted, then the "last legislative expression" rule of statutory construction would require a court to presume that the legislature intended to confer upon public bodies this power. *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). "Under the 'last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails." *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991); *Whiteside v. Cherokee Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (finding that "later legislation supersedes earlier laws addressing the identical issue").

The General Assembly amended FOIA in 2017 to grant public bodies the right to recover the actual costs related to redacting public records prior to production. As such, the last legislative expression rule would hold that the time spent reviewing documents *as part of the redaction process* is compensable under FOIA.

II. THE SPECIAL REFEREE ERRED IN ORDERING DISCLOSURE OF CERTAIN PUBLIC RECORDS AFTER FINDING ANY PRIVILEGE WAS WAIVED.

FOIA's judicially enforceable right to access public records is subject to certain well-recognized exceptions, including the right of the public body to exempt from disclosure "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." *See* S.C. Code Ann. § 30–4–40(a)(7). The Special

Referee determined that a small portion of the public records redacted by the County did not qualify for this exemption as any claim of privilege was waived by the County's copying of a third-party real estate agent on the communications. (R. pp. 19-20). The Special Referee's conclusions were incorrect.

A. The Literal Interpretation of the Statute Exempts All Correspondence of Legal Counsel for a Public Body.

The Special Referee erred in finding that privilege had been waived by the County in copying a third party real estate agent on communications between legal counsel and County employees. Despite the statutory exemption at issue failing to include the word "privilege," the Special Referee analyzed all documents under such a standard. Applying this standard was improper under a plain reading of the statute.

The Freedom of Information Act grants public bodies the right to exempt from disclosure "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." *See* S.C. Code Ann. § 30–4–40(a)(7). Interpreting this exemption literally, the Act provides three separate exemptions: (1) correspondence of legal counsel for a public body, (2) work products of legal counsel for a public body, and (3) any material that would violate attorney-client relationships. *See* S.C. Code Ann. § 30–4–40(a)(7). "Unless there is something in the statute requiring a different interpretation, the words used in the statute must be given their ordinary meaning. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal terms." *Cothran v State Farm Mut. Auto. Ins. Co.*, 421 S.C. 562, 808 S.E.2d 824 (Ct. App. 2017). Applying the exemption in this manner would permit a public body to refuse to disclose

any correspondence from legal counsel for a public body to the public body and its representatives as part of a FOIA request.

While a South Carolina appellate court has not directly addressed whether such an interpretation is proper, the Supreme Court has implied that not all attorney-client communications are immune from discovery pursuant to FOIA. *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745 (2011). In this case, the Supreme Court did not address the literal interpretation of the exemption; rather, it determined that under certain circumstances, a court review may be necessary to determine whether the public body's interest in confidentiality should trump the public's right to know. *Id.* The Court, in reaching this conclusion, did not elaborate on the proposed balancing of interests. *Id.*

Nevertheless, in requiring that the County establish that the documents were "privileged," the Special Referee imposed a standard upon the County that is not within the text of the statute. *See In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (citation omitted)). When each word in the exemption is given is actual effect, the plain language of FOIA exempts "correspondence of legal counsel for a public body." *See* S.C. Code Ann. § 30-4-40(a)(7); *see also, Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 365, 798 S.E.2d 555, 558-559 (2017) (holding that "and" as used in the South Carolina Revenue Procedures Act should not be read to combine multiple provisions into a single limited category of disputes).

This interpretation finds support in public policy and in practicality. In granting a blanket exemption for correspondence from legal counsel for a public body, the General Assembly appropriately balanced the competing public concerns of accountability through transparency and ensuring functionality at the local government level. A plain reading of the statute encourages

public officials and public bodies to face unpopular truths and ask difficult questions to legal counsel without concern of potential political ramifications. Such legal guidance can include the downsides, risks, and costs of pursuing a certain course of action; the existence of any potential alternatives; and, the possible collateral benefits and/or risks in terms of expense, politics, and/or public harm. Determining whether a particular communication is privileged, however, is a fact-intensive exercise and often requires the dedication of substantial legal and staff resources, as indicated in the case at hand. This broad exemption similarly furthers the state-recognized goal of limiting taxpayer burden by eliminating extensive review of tens of thousands of documents annually in response to FOIA requests.

The Special Referee's inclusion of a "privilege" standard is not supported by the text of the exemption, nor was this standard ever truly argued by Ms. Baracco. Rather, Ms. Baracco contended that no communication with in-house governmental counsel could ever be considered privileged: "The assertion that the email communications of government officials are 'privileged' is nonsense…." (R. p. 47). By requiring that the County establish privilege under the exemption, the Special Referee plainly erred. FOIA does not require proof of privilege, rather, it permits public bodies to exempt from disclosure correspondence of legal counsel for a public body.

B. Including a Third Party Real Estate Agent Retained by the Public Body on Communications with Legal Counsel Does Not Waive Privilege.

Assuming for the sake of argument that a public body must establish the existence of privilege or work product in order the exempt correspondence of legal counsel from disclosure, the Special Referee erred in finding that any such privilege had been waived by the County. In rendering her decision, the Special Referee recognized that the question of whether a third party

realtor was an "agent of the client" to qualify as a "privileged person" to avoid waiver was a novel question in South Carolina.

"The attorney-client privilege has long been recognized in this State and protects against disclosure of confidential communications by a client to his attorney regarding a legal matter." *In re Mt. Hawley Insurance Company*, 427 S.C. 159, 829 S.E.2d 707 (2019) (citing *Tobaccoville USA*, 387 S.C. at 293, 692 S.E.2d at 529; *State v. Doster*, 276 S.C. 647, 650, 284 S.E.2d 218, 219 (1981)). As discussed at length in a recent South Carolina Supreme Court opinion:

> The privilege is based upon a "wise public policy" that determines the best interest of society is served by "inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence shall not be abused by permitting disclosure of such communications." [*S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 619-20 (1973)]; *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009) ("By assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." (citation omitted)); *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 422 S.C. 643, 647 n.1, 813 S.E.2d 696, 699 n.1 (2018) (describing the privilege as "rooted in the imperative need for confidence and trust" (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996))).

In re Mt. Hawley Insurance Company, 427 S.C. at 167, 829 S.E.2d at 712. The Court further provided that the privilege is not absolute. *Id.* The attorney-client privilege belongs solely to the client and can only be waived by the client. *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980). "Although a client may waive his attorney-client privilege, the waiver must be distinct and unequivocal." *State v. Hitopoulus*, 279 S.C. 549, 551, 309 S.E.2d 747, 749 (1983).

Three categories of people are considered privileged persons: (1) the client or prospective clients; (2) the lawyer; and (3) ***the agents of the client*** and the lawyer. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000) (double emphasis added). South Carolina has a robust

"agency exception" to the waiver of the attorney-client privilege. *See State v. Thompson*, 329 S.C. 72, 75, 495 S.E.2d 437, 438-39 (1997).

At issue in this case is whether a realtor working with a governmental entity may be considered an "agent of the client" so as to retain the privileged nature of such communications. (R. pp. 18-20). Although there is no bright line rule for determining when a third party constitutes an "agent of the client," courts have looked at the context of the relationship and the necessity that such persons be included within protected communications. *Faloney v. Wachovia Bank, N.A.* 254 F.R.D. 204, 212-13 (E.D. Pa. 2008) (finding email between corporate attorney and two bank officials was protected). Some courts have similarly applied the "functional equivalent" test to determine whether a third party was acting as the functional equivalent of an employee. *See Alliance Constr. Solutions, Inc. v. Dep't of Corr.*, 54 P.3d 861, 867, 870-71 (Colo. 2002) (independent contractor of government agency was the functional equivalent of an employee for purposes of privilege).

In this particular case, Ms. Debra Regecz was retained by the County to represent the County's interests in potential real property acquisitions and sales. Her role was unique at the County and, as such, she worked directly with various department heads and counsel to ensure that her actions on behalf of the County were consistent with South Carolina law. The acquisition and disposition of real property by a local government is heavily regulated and requires a comprehensive understanding of various legal issues and responsibilities for governmental actors. To withhold privilege in such a context would be contrary to the very "wise public policy" for which privilege exists: Open communication with legal counsel regarding the potential acquisition of real property and the construction of a Department of Special Needs home in a private

subdivision is not only proper but should be encouraged. *In re Mt. Hawley Insurance Company*, 427 S.C. at 167, 829 S.E.2d at 712.

In holding that Beaufort County waived privilege by communicating with Ms. Regecz, the Special Referee relied upon the County's Request for Proposals ("*RFP*") for brokerage services including an explicit disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. 20). Whether a communication is privileged does not hinge on the terms of any contract between them; rather, it depends of the nature of the communication and the client's expectation that it remain confidential. *Love*, 275 S.C. at 59, 271 S.E.2d at 112; *see also United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (finding that an accountant's presence while the client communicated with legal counsel did not destroy the privilege because the accountant's presence was useful "for the effective consultation between the client and the lawyer"); *AVX Corp. v. Horry Land Co.*, No. 4:07-CV-3299-TLW-TER, 2010 WL 4884903, at 7-8 (D.S.C. Nov. 24, 2010) (acknowledging the *Kovel* doctrine).

The South Carolina Code imposes upon real estate brokerage firms a duty of confidentiality similar to that imposed upon attorneys.

> Designated agents may not disclose, except to the designated agent's broker-in-charge or appointed representative, information made confidential by written request or instruction of the client whom the designated agent is representing, except information allowed to be disclosed by this section or required to be disclosed by this section. Unless required to be disclosed by law, the broker-in-charge of a designated agent may not reveal confidential information received from either the designated agent or the client with whom the designated agent is working. For the purposes of this section, confidential information is information the disclosure of which has not been consented to by the client and that could harm the negotiating position of the client.

See S.C. Code Ann. § 40-57-350(J)(9). As noted by the South Carolina Supreme Court, multiple aspects of a real estate transaction are considered the practice of law in this state and regulated as

such. *See Matrix Financial Services Corporation v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011). As the representative of one of the parties to the transaction, a realtor must have the freedom to communicate directly with legal counsel to ensure that any such actions taken on behalf of the respective party complies with the law.

The Record illustrates that any waiver of privilege was neither distinct nor unequivocal. Both the realtor and the client have similar interests in obtaining legal advice necessary to ensure the closing takes place as intended. The Order's reliance on the nonexistence of a contractual principal-agent relationship disregards the common interests of the Defendant and its realtor. In allowing the absence of clear contractual language establishing a principal-agent relationship to eradicate the attorney-client privilege, the Special Referee abused her discretion and erred.

The Court should reverse the Special Referee's finding of a waiver of privilege.

CONCLUSION

The County recognizes the crucial role that both accountability and transparency play in local government. Transparent governance fosters trust through collective oversight. While it is indisputable that the South Carolina Freedom of Information Act serves as one of the strongest guarantors of public transparency, it does not guarantee the public unfettered access to any and all public records. The General Assembly crafted limitations to FOIA to ensure that the delicate balance between efficient governance and disclosure could be maintained. One of those limitations is the broad exemption granted to public bodies to redact communications from legal counsel.

The General Assembly also recognized the excessive costs and constraints that open disclosure requirements can impose on municipalities and counties. Public money pays for the creation of the public records, the maintenance of them, the storage of them, and, ultimately, their

production pursuant to a FOIA request. Each step in the process is a cost to the taxpayer. Requiring extensive retrieval, review and production of tens of thousands of documents annually in response to FOIA requests conflicts with this goal if local governments cannot recover the actual direct and indirect cost of numerous and expensive FOIA requests. By amending the South Carolina Freedom of Information Act to grant public bodies the right to recover the actual costs of redaction, the General Assembly reasonably reduced the fiscal demands on taxpayers. Moreover, the byproduct of not allowing the full costs of redaction to be recovered by the public body is the financial incentive to delegate the review of potentially sensitive material to those not in a position of trust and/or expertise.

For all of the foregoing reasons, this honorable Court should reverse the Special Referee's decisions as to the matters stated herein.

Respectfully submitted,

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