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 REPLY BRIEF OF RESPONDENT-APPELLANT BEAUFORT COUNTY

April 11, 2022

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REPLY TO APPELLANT-RESPONDENT'S STATEMENT OF FACTS

In her Response Brief, Baracco aptly recognized the "awkward reading" that comes from referring to the Parties as "Appellant-Respondent" and "Respondent-Appellant." As such, this Brief will similarly adopt the convention of referring to the Appellant-Respondent as "Baracco" and the Respondent-Appellant as "the County." As to the remainder of Baracco's reply to the Statement of Facts, the County believes that a review of the record supports its Statement of Facts.

REPLY TO APPELLANT-RESPONDENT'S STANDARD OF REVIEW

Although Baracco concurred with the County's summary of the applicable standard of review, the Response Brief challenged whether the issues were, in fact, "novel." (Resp. Brief, pp. 6-7). The Response Brief does not cite any controlling precedent that would eliminate the novelty of these questions of law. Rather, the Response Brief claims – without foundation or evidence - that "government secrecy is as inevitable as nature's decay" and "the issues here will be depressingly and frequently repetitive, but far from novel." (Resp. Brief, pp. 6-7). Baracco also evidently seeks to elicit sympathy from the Court by referring to her cause as a "worthy one" only taken up by those "few citizens who care enough." *Id.* Contrary to the arguments raised by Baracco, whether an appeal presents a novel legal issue is decided neither by speculation regarding whether a similar fact pattern could occur nor by the alleged nobility of a party's cause. At issue is whether a South Carolina court has previously interpreted the relevant portions of these statutes. Both the County and Baracco agree that they have not.

ARGUMENT IN REPLY TO BRIEF OF APPELLANT-RESPONDENT

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, in passing and without any supporting legal authority, concluded that "redaction" was limited to the physical act of blotting out exempt information. Her reasoning rested solely on the General Assembly's retention of the "examination and review" prohibition when it amended the Freedom of Information Act to permit the recovery of fees related to the redaction of records. Applying such a harsh and narrow interpretation to "redaction" in this context effectively guts the ability of a public body to recover the actual costs of responding to a Freedom of Information Act request. As set forth in the County's main brief and discussed herein, the Special Referee abused her discretion in reaching this conclusion.

In the section entitled "Reply to Argument 1" of her Response Brief, Baracco does not claim that the Special Referee correctly interpreted the law. In fact, she asserts "the Special Referee's entire Order under review is based upon a material error of law." (Resp. Brief, p. 9). While the County disagrees with much of this section of the Response Brief, the majority of it simply rehashes issues raised by Baracco in her own appeal. It does not meaningfully respond to the issues raised in the County's appeal. As such, any reply from the County to Baracco's assertions in this section would be unnecessarily repetitive and of seemingly little independent value to the Court.

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

At issue, as the County has repeatedly stressed throughout this action, is whether the South Carolina Freedom of Information Act's prohibition against charging fees for "examination and review to determine if the documents are subject to disclosure" can 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. S.C. Code Ann. § 30–4–30(B). Despite arguing that any such distinction is "phony" and "bogus" and the result of the County "grasping at slender reeds...to avoid fulfilling its statutory duty," the Response Brief actually highlights the natural conflict between these two provisions. (Resp. Brief, pp. 12, 15).

In her Response Brief, Baracco claims that the "County launches its spurious argument into an even higher altitude of nonsense when it claims 'redaction' means only removing 'personal identifying information.'" (Resp. Brief, p. 12). The County wholly agrees with Baracco that such a narrow interpretation of "redaction" is nonsensical and contrary to the express language of the Freedom of Information Act. It was for this reason that the County challenged such an interpretation when it was initially raised by Baracco. (R. pp. 618-620). The County has never taken this position during trial or on appeal. Mischaracterizing the County's arguments does not weaken them.

Similarly, Baracco rebukes the County for having "the temerity to argue that a requestor is responsible for the County's fees in redacting documents," concluding that "the statute says exactly the opposite." (Resp. Brief, p. 12). This argument is entirely incorrect. The South Carolina Freedom of Information Act is explicit in permitting local governments to charge the costs of redaction to a requestor: "The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, **and redaction** of records." S.C. Code Ann. § 30-4-30(B) (double emphasis added). In reaching the conclusion that "the statute says the opposite," Baracco

relies solely on the Act's prohibition against charging fees for "examination and review to determine if the documents are subject to disclosure." *Id.*; (Resp. Brief, pp. 11-12). As such, it is clear that even Baracco perceives "examination and review" as indistinguishable from the redaction process, thus, her misplaced insistence that any fees associated with redactions are non-compensable under the Act.

As more thoroughly addressed in the County's main brief, there is a logical interpretation of the Act that would allow these two sections to coexist harmoniously. Charging fees for examination and review is only prohibited when the examination and review is to "determine if the documents are subject to disclosure." S.C. Code Ann. § 30-4-30(B). Whether a document is subject to disclosure is determined within the first ten to twenty days after receipt of a FOIA request. S.C. Code Ann. § 30-4-30(C). As the Act states:

> This determination must constitute the final opinion of the public body as to the public availability of the requested public record, however, the determination is not required to include a final decision or express an opinion as to whether specific portions of the documents or information may be subject to redaction according to exemptions provided for by Section 30-4-40 or other state or federal laws.

Id. Only upon first determining that the FOIA request implicates public records subject to disclosure – a determination that must be relayed to the requestor – is the public body then 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." *Id.*

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).

To avoid a conflict, the Special Referee created an exceedingly narrow definition of the term "redaction." A definition that is limited to only the physical act of obscuring information contained within a public record. (R. pp. 26-27). In doing so, the Special Referee essentially rendered the Act's newly created right to recover the costs of redaction as unnecessary and ineffective. The courts cannot construe a statute without regard to its plain and ordinary meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. *City of Hardeeville v. Jasper County*, 240 S.C. 29, 44, 530 S.E.2d 374, 376 (2000). Unlike the Special Referee's proposed interpretation of the Act, the County's interpretation allows the entirety of FOIA to remain effective and certain.

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

As discussed thoroughly in the County's main brief, in the event that the Court finds an irreconcilable conflict in the Freedom of Information Act, 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). The Special Referee did not address the last legislative expression rule as she found the statutes not in conflict.

The Response Brief does not contest that in the event the Court finds these two sections of the Act in conflict, the last legislative expression rule would hold that the time spent reviewing documents *as part of the redaction process* is compensable under FOIA. Instead, the Response Brief resorts to once again raising irrelevant allegations of past County misconduct. The irrelevancy of these emails and allegations is addressed in detail in the County's Response Brief and does not need to be addressed again. (County Resp. Brief, pp. 23-24).

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

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

In its main brief, the County asks the Court to review the scope of the attorney-communication statutory exemption in the Freedom of Information Act: "Correspondence 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). A literal reading of this statute does not require proof of attorney-client privilege. 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). 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).

In her Response Brief, Baracco does not offer any competing explanation for the vast scope of the attorney-communication exemption contained within FOIA. Instead, she provides multiple block quotes from cases upholding the virtues of the attorney-client privilege. (Resp. Brief, pp. 16-

19). The County has consistently recognized the importance of the attorney-client privilege and has defended it ***in this very case*** from claims that no communication to a government attorney could ever be deemed privileged. (Initial Brief, pp. 20-21). At issue in this section, however, is whether a privilege analysis is even necessary under the express language of FOIA. The County contends it is not. As far as the remaining issues raised in "Reply to Argument 2A" of her Response Brief, these were all the subject of extensive briefing in her appeal as well as the County's response to the same. For this reason, the County has not revisited these issues in this Reply.

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

The Response Brief raises two challenges to the County's argument that a third party real estate agent copied on certain communications was a privileged person for the purpose of the attorney-client privilege. The first challenge echoes the reasoning of the Special Referee. In refusing to award privileged person status to the County's realtor, the Special Referee relied heavily upon certain language included within the County's initial Request for Proposals ("*RFP*") for brokerage services. This language was a disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. 20). As set forth in the County's main brief, the law of privilege in this state has never been dependent upon the terms of a contract between the parties; rather, it depends of the nature of the communication and the client's expectation that it remain confidential. The second challenge reiterates a position that Baracco raised, for the first time, in her own appeal: that the consummation of a real estate transaction eliminates the attorney-client communication exemption. This question is addressed by the County in its Response Brief.

CONCLUSION

For the reasons stated in this reply brief and in its main brief, the County urges this Court to reverse the Special Referee's judgment as to the matters stated herein.

Respectfully submitted,

April 11, 2022

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