STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2021CP1002201
	)	
Joshua Hooser, Esq.,	)	
	)	
Plaintiff,	)	**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**
	)	
v.	)	
	)	
City of Isle of Palms,	)	
	)	
Defendant.	)	
	)	

Plaintiff Joshua Hooser submits this Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction filed on June 16, 2021. Plaintiff Hooser respectfully requests that this Honorable Court grant his Motion, and order as follows pursuant to S.C. Code Ann. § 30-4-60, § 30-4-70, § 30-4-80, § 30-4-100(A), and § 30-4-110(B):

- The mayor and city councilmembers for the Defendant City of Isle of Palms shall not convene on "private" electronic devices and must comply with S.C. Code Ann. § 30-4-10, *et. seq.*, regarding meetings; and

- Defendant City of Isle of Palms shall gather, transfer, and maintain all electronic messages by and between the mayor or city councilmembers currently stored on their "private" devices, using the City's current instructional technology contractor, VC3, located at 1301 Gervais St. Suite 1800, Columbia, SC 29201, at the City's sole expense.

Plaintiff Hooser requests this preliminary injunction pursuant to the South Carolina Freedom of Information Act ("FOIA"). *See, e.g., Brock v. Town of Mount Pleasant*, 411 S.C. 106, 122, 767 S.E.2d 203, 211 (Ct. App. 2014) (holding that injunctive relief is proper to prevent future violations of the FOIA and emphasizing that "the law in this area is ever developing"). A preliminary injunction is necessary to preserve the *status quo* pending adjudication on the merits. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010) (holding that "[a] preliminary injunction should issue only if necessary to preserve the status quo"); *Grosshuesch v. Cramer*, 367 S.C.

1, 4, 623 S.E.2d 833, 835 (2005) ("[T]he quintessential hallmark of an injunction [is the] preservation of the property at issue until the matter has been adjudicated").

South Carolina case law is consistent: "[T]he *essential* purpose of the FOIA is to protect the public from secret government activity." *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) (emphasis added). *See also Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 8, 760 S.E.2d 785, 789 (2014) (similar language); *Seago v. Horry Cnty.*, 378 S.C. 414, 422, 663 S.E.2d 38, 42 (2008) (similar language). The legislature explicitly gave the circuit court the ability to issue injunctive relief or other "equitable relief as it considers appropriate" to protect the public from secret government activity. S.C. Code Ann. § 30-4-100; *see also Campbell v. Marion Cnty. Hosp. Dist.,* 354 S.C. 274, 279, 580 S.E.2d 163, 166 (Ct. App. 2003) (emphasizing that because the "FOIA is remedial in nature [it] should be liberally construed to carry out the purpose mandated by the legislature"). Pursuant to S.C. Code Ann. § 30-4-100(A), a violation of the Freedom of Information Act "must be considered to be an irreparable injury for which no adequate remedy at law exists."

As described in more detail herein, Plaintiff Hooser has made the requisite showing that entitles him to a preliminary injunction: 1) that he is likely to succeed on the merits of the case; 2) that he is likely to suffer irreparable harm in the absence of preliminary relief; 3) that there is no adequate remedy at law should the injunction be denied; and 4) that the balance of equities tips in his favor as the injunction is in the public interest. *See, e.g.*, *Poynter Invs. Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010).

Nature of the Case and Pertinent Facts

On May 13, 2021, Plaintiff Joshua Hooser filed a Complaint against Defendant City of Isle of Palms, alleging multiple violations of the South Carolina Freedom of Information Act, including but not limited to, delayed, incomplete FOIA responses; excessive fees; and a quorum of its governing body meeting on "private" electronic devices. *See* Pl.'s Compl. Plaintiff Hooser attached to his Complaint two legitimate FOIA requests that were received by City Administrator Desiree Fragoso separately in September 2020 and November 2020. *See* Pl.'s Compl., Ex. A, Ex. B. The City's FOIA

responses remain incomplete, as sworn to by Plaintiff in his Affidavit in support of Plaintiff's Motion for a Preliminary Injunction.

Plaintiff Hooser attached to his Complaint a group discussion held on "private" electronic devices of the Defendant's governing body during the COVID-19 pandemic. *See* Pl.'s Compl., Ex. C. It is clear and obvious that further messages exist on these "private" electronic devices, particularly to and from Isle of Palms Mayor Jimmy Carroll, as sworn to by Plaintiff in his Affidavit. Plaintiff Hooser has no reason to believe any electronic messages were deleted or eliminated as of the date of the FOIA requests. In fact, Defendant City of Isle of Palms delivered new electronic messages to Plaintiff Hooser after being served with his Complaint.

Admittedly, the Isle of Palms mayor and councilmembers discussed City business on "private" devices in-part due to the COVID-19 pandemic, but there is no public health emergency exception to the South Carolina Freedom of Information Act. A slippery slope is created when an entire governing body uses "private" electronic devices during a public health emergency, especially since those records are not readily available for inspection by the public. For example, on March 24, 2020, Isle of Palms Councilmember Ryan Buckhannon expressed his opinions regarding the City's proposed COVID-19 restrictions in the group messages on the "private" electronic devices. *See* Pl.'s Compl., Ex. C, Pg. 6. But Councilmember Buckhannon then abstained from voting on the COVID-19 restrictions at the public meeting on March 25, 2020. The public was not able to gain access to this information until more than a year had passed. This is a slap in the face to the voters and constituents of the Isle of Palms.

On August 25, 2020, City of Isle of Palms Mayor Jimmy Carroll was involved in discussions occurring on "private" electronic devices simultaneously while the City of Isle of Palms city council was meeting in public on webcam. Mayor Carroll sent messages to all nine city council members, including one that said, "Shoot me please" - presumably during citizen comments. *See* Pl.'s Compl., Ex. C, Pg. 31. In a separate group message during the same city council meeting on August 25, 2020, City Administrator Desiree

Fragoso texted Mayor Carroll warning him, "Jimmy – fyi you are texting in the council text group."

In yet another "private" electronic message, Mayor Carroll also admitted he "shared [city business] with all of council including [City Administrator] Desiree [Fragoso]." *See* Pl.'s Compl., Ex. A, Pg. 2, Image #2. The public deserves to know when and how Mayor Carroll did in-fact "share" city business with the City's entire governing body on "private" electronic devices. Plaintiff has repeatedly asked for these electronic messages, and the City has thus far not disclosed the records. Isle of Palms Mayor Jimmy Carroll and the rest of the City's governing body discussed City business on their "private" devices, in-part due to the COVID-19 pandemic, and the public deserves access to these records.

Plaintiff Hooser respectfully requests that this Honorable Court issue a preliminary injunction and any other equitable relief it considers appropriate pursuant to the South Carolina Freedom of Information Act. The messages currently stored on "private" electronic devices need to be immediately disclosed to fulfill FOIA's essential purpose of protecting the public from secret government activity.

Legal Argument and Citation to Authority

The South Carolina legislature has explicitly granted this circuit court the power to issue a preliminary injunction or other "equitable relief as it considers appropriate" to enforce the South Carolina Freedom of Information Act. *See* S.C. Code Ann. § 30-4-100. Importantly, the South Carolina Court of Appeals has already upheld a circuit court's equitable power to enjoin a public body from "deleting, destroying or otherwise eliminating" electronic communications discussing city business. *See Brock v. Town of Mount Pleasant*, 411 S.C. 106, 122, 767 S.E.2d 203, 211 (Ct. App. 2014) (noting that "the law in this area is ever developing"). *See also Ballard v. Newberry Cnty.*, 432 S.C. 526, 533, 854 S.E.2d 848, 852 (Ct. App. 2021) (holding that the *Brock* court "did not err" by "enjoining [the] public body from deleting and eliminating records" in violation of the FOIA).

A citizen has the right to inspect or copy all non-exempt public records, which is defined as **"all books, papers, maps, photographs, cards, tapes, recordings, or other**

documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20(c) (emphasis added). The South Carolina Supreme Court has repeatedly stated that the "FOIA creates an *affirmative duty* on the part of public bodies to disclose information. The purpose of the Act is to protect the public by providing for disclosure of information." *Bellamy v. Brown,* 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) (emphasis added); *see also Campbell v. Marion Cnty. Hosp. Dist.* 354 S.C. 274, 280 580 S.E.2d 163 (2003) ("The essential purpose of FOIA is to protect the public from secret government activity."); *Burton v. York Cnty. Sheriffs Dep't*, 358 S.C. 339, 348, 594 S.E.2d 888, 893 (Ct. App. 2004). The South Carolina Supreme Court has instructed lower courts "to strictly construe the FOIA in favor of disclosure." *Perry v. Bullock*, 409 S.C. 137, 144, 761 S.E.2d 251, 254 (2014).

Absent the City demonstrating that the requested documents are exempt pursuant to S.C. Code Ann. § 30-4-40 or that their meetings on "private" devices were closed pursuant to S.C. Code Ann. § 30-4-70, these electronic records are public records that need to be disclosed to the public. *Evening Post Pub. Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011) (explaining that "the determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and the nonexempt material disclosed."). A public body who seeks to invoke any FOIA exemption bears the burden of establishing that the exemption applies. *See Evening Post Pub. Co.*. 392 S.C. at 83; *Seago v. Horry Cnty.*, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008).

The City of Isle of Palms has provided no justification to satisfy the South Carolina Freedom of Information Act's burdens and mandates for public disclosure.[1] Exemptions from the South Carolina Freedom of Information Act must be narrowly construed to "guarantee the public reasonable access to certain activities of the government." *Evening Post Pub. Co.*. 392 S.C. at 83; *see also Burton v. York Cnty. Sheriffs Dep't*, 358 S.C.339, 348, 594

[1] Pursuant to the South Carolina Freedom of Information Act: "No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of the requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." S.C. Code Ann. § 30-4-70.

S.E.2d 888, 893 (Ct. App. 2004) ("Indeed, consistent with FOIA's goal of broad disclosure, the exemptions from its mandates are to be narrowly construed.").

Plaintiff Hooser will likely succeed on the merits of his case, but a preliminary injunction is necessary to preserve the *status quo* and prevent any electronic records from being deleted, destroyed, or otherwise eliminated pending adjudication. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010).

1. Plaintiff is likely to succeed on the merits of the case.

The Freedom of Information Act "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." *See* S.C. Code Ann. § 30-4-15 (emphasis added). *See also Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 166 (Ct.App.2003) (emphasizing that because FOIA is remedial in nature, it should be "liberally construed" to carry out the purpose established by the legislature).[2]

This important law is the only practical tool the South Carolina legislature has explicitly given citizens to protect them from secret government activity. *See, e.g.*, *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) ("[T]he essential purpose of the FOIA is to protect the public from secret government activity."); see *also Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 8, 760 S.E.2d 785, 789 (2014) (similar language); *Seago v. Horry Cnty.*, 378 S.C. 414, 422, 663 S.E.2d 38, 42 (2008) (similar language). The South Carolina Supreme Court has repeatedly stated that the "FOIA creates an affirmative duty on the part of public bodies to disclose information. The purpose of the Act is to protect the public by providing for disclosure of information." *Bellamy v. Brown,* 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991); *see also Campbell v. Marion Cnty. Hosp. Dist.* 354 S.C. 274, 280, 580 S.E.2d 163, 166 (2003) ("The essential purpose of FOIA is to protect the public from

[2] *Cf. Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996) ("South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government."); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 237, 542 S.E.2d 752, 753–54 (Ct. App. 2001) ("The FOIA provisions must be construed to make it possible for the public to learn of and report on the activities of public officials.") (citation omitted).

secret government activity.") (citations omitted); *Burton v. York Cnty. Sheriffs Dep't*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004).

The South Carolina legislature has explicitly given circuit courts the ability to order declaratory relief, injunctive relief, costs, attorney fees, and other "equitable relief as it considers appropriate" to enforce the South Carolina Freedom of Information Act. *See* S.C. Code Ann. § 30-4-100. *See also Brock v. Town of Mount Pleasant*, 411 S.C. 106, 122, 767 S.E.2d 203, 211 (Ct. App. 2014) (holding that injunctive relief is proper to prevent future violations of the FOIA). *See also Ballard v. Newberry Cnty.*, 432 S.C. 526, 533, 854 S.E.2d 848, 852 (Ct. App. 2021) (holding that the *Brock* court "did not err" by "enjoining [the] public body from deleting and eliminating records" in violation of the FOIA).

The South Carolina Court of Appeals has stated a circuit court may enjoin a public body from deleting, destroying, and otherwise eliminating electronic messages. *See Brock v. Town of Mount Pleasant*, 411 S.C. 106, 114, 767 S.E.2d 203, 207 (Ct. App. 2014). *See also Ballard v. Newberry Cnty.*, 432 S.C. 526, 533, 854 S.E.2d 848, 852 (Ct. App. 2021) (holding that the *Brock* court "did not err" by "enjoining [the] public body from deleting and eliminating records" in violation of the FOIA).

A. Plaintiff Hooser has standing to seek a preliminary injunction to enforce the South Carolina Freedom of Information Act.

The South Carolina legislature's intent is clear from FOIA's plain statutory text, which states: "***A citizen of the State may apply to the circuit court* for a declaratory judgment, injunctive relief, or both, to enforce [FOIA].**" *See* S.C. Code Ann. § 30-4-100(A) (emphasis added). The legislature anticipated lawsuits from private citizens like Plaintiff Hooser.

Defendant City of Isle of Palms argues a private citizen lacks standing to enforce the Public Records Act citing to *Ballard v. Newberry Cnty. See* 432 S.C. 526, 534, 854 S.E.2d 848, 852 (Ct. App. 2021) ("[C]oncerns about increased sunlight in government, while undeniably legitimate, cannot overcome the statutory limitation that a private right of action under FOIA must be tied to enforcing FOIA."). However, reliance on this single case is misplaced. The *Ballard* case involved standing to contest public records that were

inadvertently destroyed in the past and prior to any FOIA request or litigation activity. *See id.* The *Ballard* court emphasized that the documents "did not exist and were not in the County's possession" *at the time of the FOIA request*. *See id*. at 534. As the *Ballard* court specifically noted: "[The d]estruction of pertinent documents covered by a ***then-pending FOIA request*** could very well present a different question." *Id.* (emphasis added).

Indeed, the South Carolina Court of Appeals made a narrow ruling in *Ballard*: to have standing a private citizen must allege an underlying Freedom of Information Act violation outside of and apart from the Public Records Act. *Id.* Plaintiff Hooser filed his motion for a preliminary injunction pursuant to the Freedom of Information Act. He certainly has standing to seek to access and preserve these records.

A preliminary injunction may also reveal whether any public records have been deleted or eliminated unlawfully, but that matter would likely need to be referred to law enforcement agencies for potential criminal charges. *Cf. Ballard v. Newberry Cnty.*, 432 S.C. 526, 854 S.E.2d 848 (Ct. App. 2021) *(*"We highly doubt our holding will in any way encourage public bodies to violate the Public Records Act. For one, doing so would expose the participating individuals to criminal liability.") (citing §§ 30-1-20, -50). Plaintiff Hooser's claims are separate and apart from any potential criminal charges pursuant to the Public Records Act.

B. The court will likely find that the Defendant City of Isle of Palms violated the South Carolina Freedom of Information Act.

The City of Isle of Palms mayor, each councilmember, and the city administrator all used "private" electronic devices to meet and discuss city business without fully disclosing their electronic communications. The South Carolina Freedom of Information Act states: "No chance meeting, social meeting, or *electronic communication* may be used in circumvention of the ***spirit*** of the requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." *See* S.C. Code Ann. § 30-4-70 (emphasis added). A preliminary injunction is necessary to ensure these electronic communications are not deleted, destroyed, or otherwise eliminated pending adjudication on the merits.

The inevitable result and slippery slope of public officials using "private" electronic devices is that they discuss city business differently in "private" than they do at the public meetings. Isle of Palms Councilmember Buckhannon abstained from voting at the public meeting on March 25, 2020 when he had already let the rest of council know his thoughts on their private devices on March 24, 2020. Buckhannon was running for state representative at the time, but he lost that race and is now running to become mayor of Isle of Palms. Because Buckhannon abstained from voting, the public may never truly know Buckhannon's true opinions about the City's response to the COVID-19 pandemic.

In addition, Defendant City of Isle of Palms has not disclosed the electronic messages sent by Mayor Jimmy Carroll per Plaintiff Hooser's September 2020 FOIA request. Mayor Carroll admitted he shared city business with all of council, including City Administrator Desiree Fragoso, in these "private" electronic messages. The public deserves to know how Mayor Carroll did in-fact "share this with all of council including Desiree" when discussing city business on "private" electronic devices. Mayor Carroll was further discovered to be sending electronic messages to all of city council on their private devices live during a city council webcam meeting on August 25, 2020.

Here, the flippant behavior displayed by the Isle of Palms governing body warrants a preliminary injunction to protect the public from secret government activity.[3]

[3] "When there is no South Carolina case directly on point, [South Carolina] courts may look to persuasive authority from other jurisdictions." *State Farm Mut. Automobile Ins. Co. v. Goyenche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019) (citing *Williams v. Morris*, 320 S.C. 196, 200, 464, S.E.2d 97, 99 (1995)). Therefore, Plaintiff Hooser urges this Court to begin its "unprecedented and neoteric juridical journey in facing this novel issue by visiting other jurisdictions for edification and enlightenment." *Bass v. Isochem*, 365 S.C. 454, 478, 617 S.E.2d 369, 381 (Ct. App. 2005).

Here, "courts from other jurisdictions interpretating similar statutory language [in their state FOIAs and PRAs] have reached the same conclusion. *Auto Owners Ins. v. Rollison*, 378 S.C. 600, 610, 663 S.E.2d 484, 489 (2008). That is, courts from other jurisdictions have required the disclosure of electronic correspondences that discuss public business to the public—even if they take place on privately owned devices. For example, in *City of Champaign v. Madigan*, the Illinois Appellate Court held that "communications from an individual city council member's personal electronic devices" constitute public records "subject to FOIA" disclosure requests if they "pertain[ ] to [a] transaction of public business[and] are sent or received during the time a city council meeting was in session" to enough council members to constitute a quorum. 992 N.E.2d 629, 639–40 (Ill. App. Ct. 2013). "To hold otherwise would allow members of a public body, to subvert . . . FOIA requirements simply by communicating about city business during a city council meeting on a personal device." *Id. See also Better Gov't Ass'n v. City of Chicago*, 2020 WL 451997,

Further, any discussions held on electronic devices that include a quorum of city councilmembers—including discussions to decide whether to have a special meeting to respond to the COVID-19 pandemic—meets the statutory definition of meetings. *See* S.C. Code Ann. § 30-4-20(d), (e). *See also* S.C. Code Ann. § 30-4-70 ("electronic communication may [not] be used in circumvention of the spirit of the requirements of [FOIA]"). The City's governing body should be enjoined from any further meetings on "private" electronic devices, and their electronic communications need to be disclosed. *See Bellamy v. Brown,* 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) (holding that the "FOIA creates an affirmative duty on the part of public bodies to disclose information."); *see also Perry v. Bullock*, 409 S.C. 137, 144, 761 S.E.2d 251, 254 (2014) (admonishing courts "to strictly construe the FOIA in favor of disclosure.").

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at * 8 (Ill. App. Ct. Aug. 5, 2020) ("In sum, we hold that communications pertaining to public business within public officials' personal text messages and e-mail accounts are public records subject to FOIA.").

Likewise, in *Comstock Residents Ass'n v. Lyon Cnty. Bd. of Comms.*, the Supreme Court of Nevada held that "records of communications regarding [a] zoning change in Lyon County" that "exist on the commissioners' private phones and servers" are "communications made in the performance of the commissioners' duties on behalf of the public." 414 P.3d 318, 322 (Nev. 2018). As a result, "records maintained on [these] private devices or servers" are "not *categorically* exempt . . . from disclosure." *Id.* at 323 (applying Nevada's PRA) (emphasis added).

Several other state supreme courts have reached similar results. *See, e.g.*, *O'Boyle v. Town of Gulf Stream*, 257 So.3d 1036, 1042 (Fla Dist. Ct. App. 2018) ("Strong public policy reasons [ ] support the conclusion that electronic information stored on privately-owned devices may be subject to disclosure under the Public Records Act. The purpose of the [PRA] is to ensure that citizens may review (and criticize) government actions. That purpose would be defeated if a public official could shield the disclosure of public records by conducting business on a private device."); *Toensing v. Attorney General*, 178 A.3d 1000, 1007 (2017) ("Strong public policy reasons support the conclusion that electronic information stored on private accounts is subject to disclosure under [Vermont's FOIA]."); *City of San Jose v. Superior Court*, 389 P.3d 848, 859 (Cal. 2017) ("The whole purpose of [California's FOIA] is to ensure transparency in government activities. If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny."); *Cheyenne Newspapers, Inc. v. Bd. of Trustees of Laramie Cnty. Sch. Dist. Number One*, 384 P.3d 679, 680 (Wyo. 2016) ("Because school board members use their personal email addresses to conduct school board business, the request required a search and retrieval of emails from personal email accounts of the board members as well as from the School District's computer system."); *Nissen v. Pierce Cnty.*, 357 P.3d 45, 49 (2015) (en banc) ("We hold that text messages sent and received by a public employee in the employee's official capacity are public records of the employer, even if the employee uses a private cell phone.").

The lesson from the persuasive authority is clear: "[I]t is vital in a democratic society that public business be performed in an open and public manner so that the 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," it is imperative that the messages sent by public officials discussing public business should be subject to FOIA disclosure—even if these messages are transmitted on private devices. S.C. Code Ann. § 30-4-15.

A preliminary injunction is necessary and lawful to enforce the South Carolina Freedom of Information Act. Without a preliminary injunction, Plaintiff Hooser will likely suffer irreparable harm.

2. Plaintiff is likely to suffer irreparable harm in the absence of preliminary relief.

Plaintiff Hooser has filed an action and is requesting a preliminary injunction to order Defendant City of Isle of Palms to fully respond to his FOIA requests and to prevent the City's governing body from meeting on private devices when conducting city business. Pursuant to S.C. Code Ann. § 30-4-100, any violation of the South Carolina Freedom of Information Act "must be considered to be an irreparable injury for which no adequate remedy at law exists."

If electronic records are deleted, destroyed, or otherwise eliminated, it is difficult or impossible to retrieve them. This circuit court may enjoin the City of Isle of Palms from "deleting, destroying[,] or otherwise eliminating" any electronic communications concerning city business. *See Brock v. Town of Mount Pleasant*, 411 S.C. 106, 114, 767 S.E.2d 203, 207 (Ct. App. 2014) (quotation omitted). Judicial intervention is necessary to order the City to gather the electronic messages from its governing board and ultimately disclose them as part of their FOIA responses. *See Grosshuesch v. Cramer*, 623 S.E.2d 833, 367 S.C. 1 (S.C. 2005) (stressing that "the quintessential hallmark of an injunction [is the] preservation of the property at issue until the matter has been adjudicated").

Plaintiff respectfully submits to this Honorable Court that he will suffer irreparable harm unless this Court orders the City:

> "To gather, transfer, and maintain all electronic messages by and between the mayor or city councilmembers currently stored on their "private" devices, using the City's current instructional technology contractor, VC3, located at 1301 Gervais St. Suite 1800, Columbia, SC 29201, at the City's sole expense."

The COVID-19 pandemic presented many challenges to governments and the people, but a slippery slope emerges if members of governing bodies are permitted to use "private" devices during a public health emergency without making those records readily available for inspection by the public. This issue creates an urgent need for future

guidance. The South Carolina Freedom of Information Act does not allow city leaders to convene meetings on private electronic devices or to create a "run around" by having one person—either the city administrator or mayor—poll its governing body and relay the information back to the group members undetected prior to the vote in public.

Plaintiff Hooser further respectfully submits to this Honorable Court that he will suffer irreparable harm unless this Court orders as follows:

> "The mayor and city councilmembers for the Defendant City of Isle of Palms shall not convene on "private" electronic devices and must comply with S.C. Code Ann. § 30-4-10, et. seq., regarding meetings."

Pursuant to the South Carolina Freedom of Information Act, preliminary injunctive relief is necessary to prevent irreparable harm. Without a preliminary injunction, Plaintiff Hooser will have no adequate remedy at law.

3. <u>There is no adequate remedy at law should the injunctive relief be denied.</u>

Plaintiff Hooser has made credible allegations that the Defendant City of Isle of Palms violated the South Carolina Freedom of Information Act, and a FOIA violation "must be considered to be an irreparable injury for which no adequate remedy at law exists. *See* S.C. Code Ann. § 30-4-100. A preliminary injunction is necessary to preserve the *status quo* pending litigation on the merits. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.* , 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010).

No other adequate remedy for Plaintiff Hooser exists at law should injunctive relief be denied. *See generally Ballard v. Newberry Cnty.,* 432 S.C. 526, 854 S.E.2d 848 (S.C. App. 2021) (holding that private citizen lacks standing per the Public Records Act to hold accountable a public body who inadvertently deleted public records in the past). Injunctive relief is necessary to preserve public records currently stored on "private" electronic devices used to conduct City business by the governing body for the City of Isle of Palms. *Cf. Grosshuesch v. Cramer*, 367 S.C. 1, 5, 623 S.E.2d 833, 835 (2005) (issuing an injunction to protect against the destruction or alteration of "accounts, monies, and personal property . . . until the matter [was] adjudicated").

Without a preliminary injunction, Plaintiff Hooser will be left without an adequate remedy at law. A preliminary injunction is also in the public's interest.

4. The balance of equities tips in Plaintiff's favor as the preliminary injunction is in the public interest.

The balance of equities, while not required, tips in favor of Plaintiff Hooser because a preliminary injunction mandating disclosure is in the public interest. *See Poynter Invs. Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010) (explaining that the "balancing the equities" requirement is "neither necessary nor appropriate in a preliminary injunction case"). Beyond Plaintiff's request for a preliminary injunction, there is an urgent need for future guidance here. *See, e.g., ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008) ("[t]he key to the public importance analysis is whether a resolution is needed for future guidance").

The South Carolina Freedom of Information Act's essential purpose is to protect the public from secret government activity. *See Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). Because FOIA is remedial in nature, it should be liberally construed to carry out the purpose mandated by the legislature. *See Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 166 (Ct.App.2003). The legislation's stated purpose is "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 (emphasis added).

A slippery slope toward the use of private devices goes against the very foundations of the South Carolina Freedom of Information Act: an open and accessible government. It is certainly not in the public's interest that governing bodies be able to use "private" devices without disclosing those electronic communications. A preliminary injunction is necessary to learn the scope of the City's FOIA violations. There is also no lawful reason for the City of Isle of Palms governing body to have group discussions on their private devices moving forward. A preliminary injunction will prevent them from meeting on private devices when conducting city business.

Conclusion

Under these circumstances, Plaintiff Joshua Hooser respectfully submits to this Honorable Court that preliminary injunctive relief is necessary to preserve the *status quo* pending adjudication on the merits. Plaintiff Hooser has a likelihood of success on the merits of this action because he is likely to prevail on one or more of his allegations pursuant to the South Carolina Freedom of Information Act. Plaintiff Hooser will suffer irreparable harm if Defendant City of Isle of Palms is not subject to a court order because electronic communications may likely be deleted, destroyed, or otherwise eliminated pending adjudication. Plaintiff Hooser has no adequate remedy at law should the injunctive relief be denied because the South Carolina Freedom of Information Act is the only practical tool the legislature has given private citizens to hold governments accountable and protect the public from secret government activity. The balance of equities tips in the Plaintiff Hooser's favor because a preliminary injunction mandating disclosure and preservation of public records currently stored on private devices is in the public interest.

There is an urgent need for future guidance here. Plaintiff Hooser will likely succeed on the merits of his case, but a preliminary injunction is necessary to preserve the *status quo* and prevent any electronic records from being deleted, destroyed, or otherwise eliminated pending adjudication.

Respectfully submitted,

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