STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Common Pleas Court
Carmen Tevis Mullen, Circuit Court Judge
Civil Action No. 2007-CP-07-00995
South Carolina Court of Appeals
Unpublished Opinion No. 2012-UP-623

L. Paul Trask, Jr., Individually, as a Citizen, Resident, Taxpayer and Registered Elector of the State of South Carolina, and on behalf of others similarly situated,.....Petitioner,

v.

South Carolina Department of Public Safety; Beaufort County; Beaufort County Management Information Systems; Beaufort County Coroner Curtis Copeland in his official capacity; Beaufort County Sheriff P.J. Tanner in his official capacity,..... Respondents.

RESPONSE TO PETITION OF CERTIORARI OF BEAUFORT COUNTY; BEAUFORT COUNTY MANAGEMENT INFORMATION SYSTEMS; BEAUFORT COUNTY CORONER CURTIS COPELAND IN HIS OFFICIAL CAPACITY; BEAUFORT COUNTY SHERIFF P.J. TANNER IN HIS OFFICIAL CAPACITY

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INDEX

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. **Was the Court of Appeals correct in affirming the Circuit Court's finding that for the purpose of summary judgment, a governmental entity has complied with the express terms of the FOIA where it produces all requested public records under its control and possession thus rendering the issue moot?**

II. **Was the Court of Appeals correct in affirming the Circuit Court's finding the Public Records Act cannot be "bootstrapped" to the Freedom of Information Act to create an implied cause of action against a governmental entity?**

COUNTER-STATEMENT OF THE CASE

Respondents Beaufort County, Beaufort County Management Information Systems, Beaufort County Coroner Curtis Copeland in his official capacity; Beaufort, County Sheriff P.J. Tanner in his official capacity (hereinafter collectively referred to as "Beaufort County Respondents") concur with Appellant's statement of procedural history insofar as it contains properly preserved matters for this court to review.

It should be noted, however, that Trask never sought amendment of his Complaint to include FOIA requests made subsequent to the filing of his Summons and Complaint; as the court will see, there are many alleged FOIA violations that were never included in Trask's Complaint (R. pp 19-31). These twenty FOIA requests were the only FOIA requests before the Court at the summary judgment hearing, and were properly the only requests addressed by the trial court in its Order granting Summary Judgment. (R. p. 1144; R pp 5-13) Trask only appealed the Order granting Summary Judgment and Order denying the Motion for Reconsideration (R pp 3-4); no other Orders are relevant to this appeal. Because this appeal only relates to Judge Mullen's Order granting summary judgment and Order denying motion to reconsider, the only salient facts to this appeal relate to what requests were made in the Complaint, what the response was, and whether there was a "continuing violation" of the FOIA [as understood in Sloan v. Friends of Hunley, Inc. 369 S.C. 20, 630 S.E.2d 474 (2006)] for the trial court to remedy.

As presented to the trial court, the Respondent's outlined, in painstaking

detail, the salient facts of this case concerning each and every purported FOIA request, the date of the request, and the disposition and response to the request by way of their (1st) Supplement to Memorandum of Law in Support of Summary Judgment and FOIA Summary Chart, filed December 19, 2008 and (2nd) Supplement to Memorandum of Law in Support of Summary Judgment and FOIA Summary Chart, filed December 19, 2008. (R. pp 589-605; pp 606-173) As the Court noted during the motion for summary judgment hearing, it only considered the twenty (20) FOIA requests as set forth in the Complaint. (R. p. 1144) These were the only FOIA requests addressed by the Court in its Order, and Trask never raised any additional FOIA requests to the Court in its Motion to Reconsider. (R. pp 3-4; R. pp 727-750)

The Court of Appeals, following oral argument on the matter, affirmed pursuant to Rule 220(b)(1), SCACR, as to the Beaufort County Respondents and dismissed the appeal for failure to properly serve the notice of appeal as to the SC Department of Public Safety. This appeal follows.

COUNTER-STATEMENT OF FACTS AS TO THE BEAUFORT COUNTY RESPONDENTS

This matter arises out of various Freedom of Information Act (hereinafter "FOIA") requests made to various Beaufort County agencies and constitutional officers that were made by Trask following his son's death in a motor vehicle accident in 2005. (R. pp 19-40 pp. 27, 28, 29, 31, 33, 34, 35, 36, 37, 42, 49, 51, 52, 59, 62, 64) In these requests, Trask sought, among other things, information related to his son's death, the subsequent investigation thereof, and procedures associated with the handling of the investigation of his son's death. (Id., 1-65) The Beaufort County Respondents argued and the trial court ruled that each and every FOIA request had been responded to by Beaufort County Respondents and, consequently, the FOIA issues in the complaint were moot and the court could offer no further relief. The Court of Appeals, following oral argument on the matter, affirmed pursuant to Rule 220(b)(1), SCACR.

STANDARD OF REVIEW

Rule 242, SCACR, addresses the standard for granting a petition for certiorari by the Supreme Court to review a final decision of the Court of appeals. That rule provides in relevant part:

> **(b) Considerations Governing Review.** A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court

Rule 242, SCACR

Furthermore, in reviewing the grant of summary judgment, this Court applies the same standard that governs the trial court and the Court of Appeals review under Rule 56, SCRCP. That is summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sloan v. Friends of Hunley, Inc. 369 S.C. 20, 630 S.E.2d 474 (2006); South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004) (quoting Osbourne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings; rather, the opponent must present specific facts showing a genuine issue for trial. Rule 56 (c), SCRCP; Shirley's Iron Works, Inc. v. City of Union, 387 S.C. 389, 693 S.E.2d 1 (Ct..App. 2010)

LAW AND ANALYSIS

As set forth above, Rule 242, SCACR, addresses the standard for granting a petition for certiorari by the Supreme Court to review a final decision of the Court of Appeals. That rule provides in relevant part:

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The issues raised in the case *sub judice*, are neither "special or important" in the context of the body of this state's case law. While certainly not to lessen the import of this tragic matter to the Trask family, the issues raised in this appeal have been addressed before, as evidenced by the Court of Appeals Opinion pursuant to Rule 220(b)(1). The Petitioner failed to point in his Petition for Writ of Certiorari to any of the considerations set forth above, or give any other

compelling reason as to why this appeal should receive the consideration of this Court. Likely, this is because none of the considerations specifically addressed in Rule 242 would apply to this matter. This case is not novel. There was no dissent. It does not conflict with a prior decision of this Court. There are no substantial constitutional issues involved. And lastly, there is no federal question involved which would conflict with the rulings of the US Supreme Court. Rather, the opposite is true as the ruling of the Court of Appeals below was based in part on the precedents previously established by this court and the US Supreme Court. Simply put, there is no compelling reason for this Court to grant Certiorari in this matter pursuant to Rule 242, SCACR. However, for the benefit of this court's review the issues raised by the Petitioner are addressed below.

I. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE FINDING OF THE CIRCUIT COURT THAT FOR PURPOSES OF SUMMARY JUDGMENT, A GOVERNMENTAL ENTITY HAS COMPLIED WITH THE EXPRESS TERMS OF THE FOIA WHERE IT PRODUCES ALL REQUESTED PUBLIC RECORDS UNDER ITS CONTROL AND POSSESSION, THUS RENDERING THE ISSUE MOOT.

On April 17, 2007, Trask brought an action under S.C. Code Ann. §30-4-10, et seq, (hereinafter referred to as "FOIA") the South Carolina Freedom of Information Act, alleging, in sum, that the various governmental entities failed to produce certain requested records and, "failed to establish and develop standards, procedures, techniques, and schedules designed to protect and preserve the public records", arguing that, consequently, these entities violated the FOIA. In this action, Trask sought an Order requiring the Beaufort County Respondents to produce the requested documents in their entirety, a finding that

the Beaufort County Respondents acted arbitrarily or capriciously in withholding the requested information, awarding reasonable attorneys' fees and costs incurred in preparing, filing, and pursuing this action in accordance with S.C. Code Ann. §30-4-100(b) and other precedent, requesting a re-calculation and reimbursement for any and all overcharges for copies of documents that had been produced, and requesting other relief as the Court deemed proper. The Beaufort County Respondents have fully complied with the express terms of FOIA. The requested records, to the extent they existed or were in the Beaufort County Respondents' possession, had been produced to Trask. Consequently, there was no further relief for the court to have provided to Trask.

A. THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT AND DUTIES OF A PUBLIC BODY UNDER FOIA

S.C. Code Ann. §30-4-10, et seq., commonly referred to as the South Carolina Freedom of Information Act (hereinafter referred to as "FOIA") sets forth the duties that a governmental entity has when responding to a FOIA request. In reviewing the exercise of those duties by governmental entities, our courts have stated that, "[t]he essential purpose of the FOIA is to protect the public from secret government activity." Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (S.C.App.,2003)(internal citations omitted); see also Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 274, 580 S.E.2d 163 (Ct.. App. 2003) (the FOIA was enacted to prevent the government from acting in secret) "South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government." Fowler v. Beasley, 322 S.C. 463, 468,

472 S.E.2d 630 (1996). The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. Quality Towing, 580 S.E.2d 163 (Ct.App 2003). The FOIA meets, "'the demand for open government while preserving workable confidentiality in governmental decision making.' " Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 292, 99 S.Ct. 1705, 60 L.Ed 2d 208 (1979)). The FOIA creates an affirmative duty on the part of public bodies to disclose information. Bellamy, 305 S.C. at 295, 408 S.E.2d at 221. The purpose of the Act is to protect the public by providing for the disclosure of information. Id. As fully explained below, the Beaufort County Respondents have complied with both the express duties under the FOIA and has adhered to the spirit and purpose of the FOIA by providing Trask with every public record requested to the greatest extent practicable.

There are four express and unambiguous duties with which a governmental entity must comply when it receives a FOIA request. A responding governmental entity has a duty to (1) produce and/or make available for inspection and copying all public records (See §30-4-30(a)); (2) provide a response to the FOIA requester within fifteen days whether the request is approved or not (See §30-4-30(c)); (3) charge a reasonable and uniform fee for the copying of public records (See §30-4-30(b)); and, (4) if an exemption is claimed by the governmental entity, to separate the exempt material from the non-exempt material (See S.C.Code Ann. §30-4-40(b)). "Public Records" are defined in S.C. Code Ann. §30-4-20(c) as being documents that are, "prepared,

owned, used, in the possession of, or retained" by a governmental entity.

South Carolina's case law is abundantly clear: Where the requested public records have been produced [to the requesting party], any claims for alleged prior violations under the FOIA are considered to be moot because there is no "continuing violation" for the court to remedy. See Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 30 S.E.2d 474 (2006) (Court affirmed summary judgment because all public records had been produced to Plaintiff prior to hearing on motion for summary judgment.) The Sloan Court reasoned that:

> **"[b]ecause the information Sloan sought ha[d] been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment. Therefore, we find that the question is moot, and any judgment by this Court would constitute an advisory opinion. Accordingly, the trial court did not err in granting Friends' motion for summary judgment as to Sloan's request for a declaratory judgment.**

In Sloan, the Plaintiff brought a suit in order to gain access to various public records in the possession of Friends of Hunley. Implicit in this opinion is the fact that he did not receive these records within the fifteen (15) day time frame required under the FOIA, as some of the documents were provided during the course of litigation. Nevertheless, because the records were ultimately produced (and access provided) to the FOIA requester, the Court held that there was no further remedy that the Court could offer to remedy the situation, and the underlying purpose of providing public access to government records had been fulfilled. Consequently, the Court found the FOIA issues to be moot, and found summary judgment was appropriate. Id.

Like Sloan, the trial court in this matter also recognized that there was no

"continuing violation" of the FOIA to remedy, and thus found the FOIA issues to be moot. Specifically, the Court found that the alleged FOIA request violations contained in pp. 18, 19, 31, 32, 33, 35, 36, 37, 42, 49, 52, 59, and 64 of the Plaintiff's Complaint were moot because the various Defendants had, "produced the subject documents requested...to the extent they are in the Defendants' possession," and found that the Defendants had also produced responsive records that were time barred under FOIA. (R. p. 5) Moreover, it should be noted Trask provided no evidence to the Court that the requests *set forth in the complaint* had, in fact, not been produced. Indeed, Trask conceded in his brief before the Court of Appeals that he has, "ultimately received the requested records though discovery in this lawsuit." (App. Final Brief, p. 39)

Despite this concession, Trask continues to attempt to create new issues of fact and law for the court to sift through in the hopes that one of these issues will appear to be a "scintilla" sufficient to reverse the trial court. However, there is no evidence in this case that supports any inference other than that Trask has already received responses to each and every alleged FOIA violation as set forth *in the complaint*. (R. pp. 3-4; R. pp. 589-605; R. pp. 606-713)

The trial court and, subsequently the Court of Appeals, recognized that because Beaufort County Respondents had already produced the records, to the greatest extent they possibly could, there was no "continuing violation" of the FOIA for the court to remedy. The Court found that under Sloan these FOIA issues were moot and thus summary judgment appropriate.

The lower courts have also recognized that the "double deleted"[1] emails, disposed handwritten investigatory notes, and Coroner's hard drive complained of by Trask were all public records that the Beaufort County Respondents no longer exerted control or possession over, and thus the Beaufort County Respondents could not produce. Consequently, it was ruled that under Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 100 S.Ct. 960 (1980), because Beaufort County Respondents had shown that it no longer possessed or controlled the records, it had no duty under South Carolina's FOIA to produce such records and therefore summary judgment was appropriate. (R. pp. 5-13) Here, the Beaufort County Respondents did not use or possess the requested records at the time of Trask's FOIA requests. The lower courts correctly ruled on this issue, and summary judgment was appropriate.

Additionally, Trask argues that Beaufort County Respondents violated the FOIA because some responses were not made within the fifteen days specified under FOIA (though, as he acknowledges, the documents were ultimately produced). However, "a lack of timeliness or compliance with FOIA deadlines does not preclude summary judgment for an agency, nor mandate summary judgment for the requester." Landmark Legal Found. v. EPA, 272 F.Supp.2d 59, 68 (D.S.C. 2003). "[O]nce the Court determines that the agency has, 'however belatedly, released all nonexempt material, [it has] no further judicial function to

[1] So as to alleviate any concerns that could arise due to the inflammatory tone contained in Appellants Brief regarding the propriety of "double deleting" emails or throwing away handwritten investigatory notes, as was understood fully by the trial court in its Order, "double deleting" simply means deleting an email from the main inbox, and then deleting the email from the deleted items folder – a common and routine practice when maintaining computer files. As was fully known by Trask (and the trial court), the handwritten investigatory notes were disposed of after a printed conforming version was prepared in accordance with normal procedures (of which the County produced). Again, the FOIA requests for this information came long after such "records" were innocuously "double deleted." All of this information was presented to the trial court by way of Defendants various memoranda of law.

perform under the FOIA." Muhammad v. U.S. Customs & Border Prot., 559 F.Supp.2d 5, 7 (quoting Perry v. Block, 684 F.2d 121, 125 (D.C.Cir.1982)). Here, any public records which were produced, however untimely[2], does not preclude the grant of summary judgment.

B. ONE YEAR STATUTE OF LIMITATIONS

Trask also argues that "the only evidence in the record shows Trask brought his claims within one year of the FOIA violations at issue," and that "to the extent [he] made certain FOIA requests [that] were made initially more than one year prior to the filing of the Complaint" these claims would be equitably tolled. (Petition for Certiorari, p. 20) His argument regarding equitable tolling was never raised at the summary judgment stage, and while raised by way of his Motion to Reconsider, the issue was not ruled upon by the trial court. Consequently, this issue was not preserved for review.[3]

Nevertheless, despite having not properly preserved this issue, the Court, in its' Order dated March 13, 2008, found that eight (8) of the FOIA violations as alleged in the complaint were time barred under the one year statute of the FOIA.

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[2] For instance, some toxicology reports (redacted in accordance with HIPAA) and/or the Beaufort County Emergency Management Services Operational Procedures were produced after this lawsuit had been filed under FOIA; this issue was fully recognized and considered by the lower court and appropriately held to be moot. (R. p. 1160)

[3] It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. See e.g., Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). Error preservation requirements are intended "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see also State v. Nelson, 331 S.C. 1, 5 n. 6, 501 S.E.2d 716, 718 n. 6 (1998) ("the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court."); 4 C.J.S. Appeal and Error § 213 (1993) ("At the very least, the matter must have definitely been called to the attention of the trial court sufficiently to obtain a ruling thereon."). Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error. Id.

Under S.C. Code Ann. §30-4-100, a citizen must apply for relief under the FOIA, "no later than one year following the date on which the alleged violation occurs." (R. p. 8; S.C. Code Ann 30-4-100). The alleged FOIA violations of 2/23/06 (contained in p. 15 of Complaint R. p. 21), 2/27/06 (p. 16 of Complaint R. p. 21), 3/8/06 (contained in p. 17 of Complaint R. pp. 21-22), 12/15/05 (contained in p. 27 R. pp. 23-24), 2/21/06 (contained in p. 28 R. p. 24), 3/20/06, 12/14/05 (contained in p. 59 R. p. 29), 1/23/06 (contained in p. 62 R. p. 29) all predated the complaint by one year and were consequently time barred. The court also found that, despite these FOIA requests being time barred, the requested records were nevertheless produced as fully set forth in the Memorandum of Law. (R. pp 5-13; pp. 3-4) Thus, because these records were also ultimately produced, the FOIA issues were found to be moot. Summary judgment was, therefore, wholly appropriate.

C. FOIA EXEMPTIONS

Nowhere in his Brief does Trask contend that there are records being improperly withheld on grounds of privilege or exemption, nor does he contend that the search for the requested records was inadequate. In fact, he concedes that he has "ultimately received any and all of the requested records through discovery" in this lawsuit. There are no contested material facts related to whether he received these records – it is agreed that he has received everything that these Respondents could produce. Moreover, the trial court found that even the records that were initially withheld on grounds of statutory privilege or exemption were ultimately produced in a properly redacted fashion. (R. pp 5-13;

pp. 3-4) These claims are thus moot as well, and summary judgment was proper.

II. The Public Records Act cannot be "bootstrapped" to the Freedom of Information Act to create an implied cause of action under the Public Records Act against a governmental entity.

Trask, at no time, pled that Beaufort County Respondents violated S.C. Code Ann. §30-1-10, et seq., (hereinafter referred to as the Public Records Act), in his complaint. Nor did Trask plead that there is an implied right of action under the FOIA for a violation of the Public Records Act. (See generally, R. pp. 19-40) At the hearing of this matter, Trask conceded that there is no private right of action under the Public Records Act. (R. p. 1089, l. 6-9) Nevertheless, he now argues that there is an implied right of action for negligence against Beaufort County Respondents under FOIA for failing to adequately comply with the mandates of the Public Records Act where that failure causes a FOIA requester to be unable to have access in accordance with the FOIA. As more fully set forth below, the alleged violation of the Public Records Act cannot be "bootstrapped" to the FOIA to create an implied right of action under the Public Records Act via FOIA. Consequently, Beaufort County Respondents would respectfully ask that this court affirm the trial courts grant of summary judgment.

The Federal Courts have addressed the same "bootstrapping" argument Trask attempts here. The U.S. Supreme Court, in Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136 (1980), held that the Federal Records Act of 1950 (a similar document preservation statute) did not create a private cause of action under the Federal FOIA for the wrongful removal of

documents, and held that the Federal Records Act cannot be "bootstrapped" to the requirements of the FOIA in order to create a cause of action. The Kissinger Court was, "unable to read the FOIA as supplying that congressional intent [to imply a private right of action in the Records Act]]" and also rejected an argument that the FOIA supplied the missing congressional intent to imply a private cause of action "to recover records wrongfully removed from Government custody." Id. The Court noted that, "most courts which have considered the question [of whether an agency has an obligation to compile or procure a record in response to an FOIA request] have concluded that the FOIA is only directed at requiring agencies to disclose those "agency records" for which they have chosen to retain possession or control." Moreover, the Kissinger Court assumed, "a wrongful removal *arguendo* for the purposes of th[e] opinion," and nonetheless noted that "the Federal Records Act establish[ed] only one remedy for the improper removal of a record from [an] agency." In sum, the remedy is that the head of the agency needs to notify the Attorney General if he has reason to believe records have been improperly removed, and the "Attorney General may bring suit to recover the records." *Id.*

The Kissinger Court considered the Plaintiff's arguments, but stated the following:

> "No provision of either the Federal Records Act of 1950, which establishes a records management program for federal agencies, or the complementary Records Disposal Act, which provides the exclusive means for record disposal, expressly confers a right of action on private parties nor can such a right of action be implied. The language of these Acts merely "proscribe certain conduct" and does not "create or alter civil liabilities and the Records Act also expressly provides administrative remedies for violations of the Act. Moreover, the legislative history of the Acts confirms that congressional silence as to a private right of action was purposeful, indicating that their

> purpose was not to benefit private parties but solely to benefit the agencies themselves and the Federal Government as a whole. Thus, regardless of whether Kissinger had violated these Acts, Congress has not vested federal courts with jurisdiction to adjudicate that question upon suit by a private party, such responsibility being vested in the administrative authorities."[Internal Citations omitted]

The logic of this opinion applies here with equal force and vigor.

Like the Plaintiff in Kissinger, Trask urges this Court to ignore the clear language of FOIA and find a private right of action under FOIA where none previously existed. Our Legislature did not provide for a private civil right of action in South Carolina's Public Records Act. See generally, §30-1-10, et seq. Rather, our legislature specifically provided for criminal penalties for the unlawful destruction of public records (See generally S.C. Code Ann §30-1-30) (providing for criminal penalties for violation of statute) Accepting this position by finding such a private right of action would improperly expand the scope of an unambiguous statute and would effect a change in the FOIA statute; a result that is impermissible under our jurisprudence. See Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) ("It is beyond the Supreme Court's power to effect a change in the statutes enacted by the Legislature.")

Not only would finding such a private right of action be contrary to established law, doing so creates a host of unintended consequences and issues. Reading a private right of action into FOIA for violations of the Public Records Act would create a negligence (per se) tort where none existed before, i.e. a duty to a specific private individual to adhere to the Public Records Act, a

breach of that duty owed to a private individual that causes a loss of a FOIA responsive document, and damages to the private individual. Assuming *arguendo* that such a tort were to be asserted against a government entity in a complaint, the government entity would be entitled to the specific protections and exceptions to the waiver of immunity under the applicable provisions of the S.C. Code Ann. §15-78-10, et seq., the South Carolina Tort Claims Act. Not only would Beaufort County Respondents be entitled to assert the defenses and immunities of the Tort Claims Act, but it would have been entitled to assert the Public Duty Rule to negate such claims.[4] Allowing a private individual in a FOIA case to assert a private right of action for violations of the Public Records Act would judicially create a right of action where none previously existed; a conclusion that the applicable statutes and relevant case law do not compel.

CONCLUSION

[4] Under South Carolina's public duty doctrine, public officials are not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than to anyone individually. *Tanner v. Florence Co. Treasurer,* 336 S.C. 552, 561, 521 S.E.2d 153, 158 (1999); *Jensen v. Anderson County Dep't of Soc. Servs.,* 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991); *Arthurs v. Aiken County,* 338 S.C. 253, 262, 525 S.E.2d 542, 546 (Ct.App.1999) (*Arthurs I*) *aff'd as modified,* 346 S.C. 97, 551 S.E.2d 579 (2001) (*Arthurs II*). The public duty rule is not a separate legal doctrine. *Arthurs I,* 338 S.C. at 262, 525 S.E.2d at 546; *Rayfield v. S.C. Dep't of Corr.,* 297 S.C. 95, 105, 374 S.E.2d 910, 915 (Ct.App.1988). The public duty rule is a special application of the broader principle that an action for negligence based upon an alleged violation of a statute cannot be maintained if the statute was enacted for a purpose other than preventing the complained of injury. *Arthurs I,* 338 S.C. at 262, 525 S.E.2d at 546; *Rayfield,* 297 S.C. at 105, 374 S.E.2d at 915. The rule applies to the special case of statutes which create or define the duties of a public office. *Rayfield,* 297 S.C. at 105, 374 S.E.2d at 915. The public duty rule "presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public." *Arthurs I,* 338 S.C. at 265, 525 S.E.2d at 548; *Tanner,* 336 S.C. at 562, 521 S.E.2d at 158; *Wells,* 331 S.C. at 308, 501 S.E.2d at 752. Generally, such statutes create no duty of care towards individual members of the public. *Arthurs I,* 338 S.C. at 265, 525 S.E.2d at 548. An exception is recognized where the plaintiff can establish the defendant owed a special duty of care to the plaintiff. *Bellamy v. Brown,* 305 S.C. 291, 294, 408 S.E.2d 219, 221 (1991); *Arthurs I,* 338 S.C. at 265, 525 S.E.2d at 548; *Wells,* 331 S.C. at 308, 501 S.E.2d at 752.

Where a government entity, such as Beaufort County Respondents, has provided the public access to the requested records (as clearly shown to the trial court and above) over which that entity exercises reasonable control, the express policy of FOIA has been fulfilled. Under Sloan, the issue is moot and the case is appropriate for summary judgment. Moreover, there is no implied right of action through the FOIA for an alleged violation of the Public Records Act. The Petition as set forth by the Petitioner provides no basis pursuant to Rule 242, SCACR for review.

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

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L. Paul Trask, Jr., Individually, as a Citizen, Resident, Taxpayer and Registered Elector of the State of South Carolina, and on behalf of others similarly situated,.....Petitioner,

v.

South Carolina Department of Public Safety; Beaufort County; Beaufort County Management Information Systems; Beaufort County Coroner Curtis Copeland in his official capacity; Beaufort County Sheriff P.J. Tanner in his official capacity,..... Respondents.

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing Response to Petition of Certiorari of Beaufort County; Beaufort County Management Information Systems; Beaufort County Coroner Curtis Copeland in his official capacity; Beaufort County Sheriff P.J. Tanner in his official capacity, upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 28 day of May, 2013 addressed to the following:

Thomas S. Tisdale, Jr., Esquire
Jason S. Smith, Esquire
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AND

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By: _____
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Attorney for Beaufort County; Beaufort County Management Information

Beaufort, South Carolina

May 28, 2013