

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Judge

Appellate Case No. 2021-000518
Court of Appeals Op. No. 2024-UP-160

Adele J. Pope.....Appellant,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina,.....Respondent.

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 242 (b) of the *South Carolina Appellate Court Rules*, Petitioner Adele J. Pope (“Petitioner”) respectfully asks that this Court grant a writ of certiorari to review the panel opinion of the court of appeals Op. No. 2024-UP-160 (May 8, 2024); reverse the dismissal of the case; and remand to the circuit court with direction that the South Carolina Attorney General provide a full and proper response to Petitioner’s June 30, 2011 request under the South Carolina Freedom of Information Act (“FOIA”) and subsequent requests for the documents requested in the June 30, 2011 FOIA request.

Certification of Counsel

The undersigned counsel for Petitioner certify that a Petition for Rehearing was timely filed after issuance of the court of appeals' opinion and that the petition was denied by Order of May 29, 2024.

Questions Presented

- I. Did the Court of Appeals err in dismissing this appeal in 2024 based solely on the finding that the Appellant's June 30, 2011, FOIA request was not properly received, where the earlier 2019 opinion of the Court of Appeals remanded the matter to identify specific rules of civil procedure which constitute FOIA exemptions, without addressing the Attorney General's additional sustaining ground that Petitioner's FOIA request was not properly received?**

- II. Did the Court of Appeals err in failing to consider, or remand this 2011 FOIA case for consideration of the \$4.7M Valuation, after being notified in March 2024 that the Attorney General had been in possession of the \$4.7M Valuation since at least 2017?**

- III. Did the Court of Appeals err in failing to consider that judicial economy and the purpose of FOIA will be served by remanding this FOIA case to the circuit court with direction to require the Attorney General to provide a proper FOIA response to Petitioner's August 30, 2011 FOIA request and Petitioner's subsequent FOIA requests for the same documents?**

STATEMENT OF THE CASE

This FOIA action was commenced by Petitioner in Newberry County on August 3, 2011. Original Defendants were the Attorney General of South Carolina (AG) and the James Brown Legacy Trust (Legacy Trust). The Complaint sought the following documents from the AG under a June 30, 2011, Freedom of Information Act ("FOIA") request:

All correspondence email and/or other communications between any member of the Office of the South Carolina Attorney General and Russell L. Bauknight between August 1, 2010 and May 4, 2011 related [to] the value of the assets of the Estate of James Brown and/or the James Brown Irrevocable Trust.

AND

The final and all drafts, signed and unsigned, of the James Brown Legacy Trust.

An overlapping FOIA request, also dated June 30, 2011, sought the Legacy Trust documents from the Legacy Trust. The Complaint contains a number of attachments.¹

On September 2, 2011, the AG moved to dismiss or strike and attached various exhibits. The AG asserted that another action, Case 4900 (Richland County Case No. 2010-CP-40-4900), was pending among the parties and that venue was improper in Newberry County.² Petitioner opposed dismissal.

On September 29, 2011, Petitioner moved for summary judgment.

Prior to a hearing held on January 11, 2012, the parties served various motions, responses and memoranda, supporting their respective positions. [R. 360-367]

The January 2012 hearing involved both this FOIA case and a separate FOIA case filed by Petitioner. [R. 360-367] Petitioner's counsel argued that transfer and consolidation with discovery in Case 4900 would delay FOIA compliance and treat Appellant differently from other citizens under FOIA because she was being sued by the AG.

The AG's FOIA counsel asserted that both FOIA cases, if not dismissed, should be transferred to Richland County and consolidated with Case 4900. [R. 128-131] Appellant argued

¹ Attachments to the FOIA Complaint include: both FOIA requests (Exhibits A & B); an affidavit of Petitioner related to the 2010 lawsuit filed by the AG, Legacy Trust and others against Petitioner and Robert Buchanan, Jr., Richland County Case 2010-CP-40-4900 (Case 4900), (Exhibit D); and a July 15, 2011 letter of the Legacy Trust's counsel denying the June 30, 2011, FOIA request. (Exhibit E). [R. 43-79]

² The Legacy Trust also moved to dismiss or strike. Hereafter certain actions of the Legacy Trust not relevant to this second FOIA appeal are omitted.

that it would be unjust to allow the private plaintiffs in Case 4900 to become involved in Petitioner's FOIA rights.

On January 11, 2012, the circuit court issued a Form 4 order transferring venue of this case to Richland County, and on February 2, 2012, the AG moved for consolidation of this FOIA case with Case 4900. [R. 10; 128]

On December 20, 2012, the AG moved to amend his Motion to Dismiss to assert lack of subject matter jurisdiction. [R 160] The Amended Motion to Dismiss attached an October 20, 2011 affidavit of AG staff attorney Tracy Meyers stating that Meyers had not received the June 30, 2011 FOIA request *from* Petitioner. The Meyers affidavit did not address two additional FOIA requests by Petitioner filed and rejected by the AG between the filing of the Complaint on August 3, 2011 and the October 20, 2011, affidavit.

On February 27, 2013, the Supreme Court, in its first, later substituted, decision in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013), addressed this FOIA suit and Case 4900 at footnote 29.

The AG filed an Answer in this case on March 7, 2013. The Answer included the defenses asserted in the Motion to Dismiss, and added the defense of lack of subject matter jurisdiction, asserting that Appellant failed to accomplish mailing or delivery of her June 30, 2011, FOIA request as required by §30-4-30 (c), and because the items requested were exempt from disclosure under FOIA because they are subject to the rules regarding discovery in the Rules of Civil Procedure .[R. 190] The Answer also included the defense that the Office of the AG had no documents that could be considered responsive to the FOIA request except for a draft of the

Legacy Trust attached to the Answer. The AG also filed a Motion for Judgment on the Pleadings on March 7, 2013. [R. 241]

In March 2013 the AG advised the Supreme Court that he was getting out of Case 4900 and that he hoped to conclude the FOIA cases promptly. The Supreme Court, in its final *Wilson v. Dallas* decision on May 8, 2013, footnote 30, noted the AG's position.

On March 15, 2013, the Legacy Trust moved to stay this FOIA case. [R. 244]

On May 10, 2013 the AG's Case 4900 counsel sought an indefinite stay of this FOIA case and Case 4900, and informed the circuit court of its opinion that the omission of footnote 29 from the final decision of the Supreme Court in *Wilson v. Dallas* meant that the Supreme Court placed no primacy on the prompt conclusion of this FOIA case or Case 4900.

Although Petitioner requested hearings, no hearings were held in this FOIA case between March 2013 and March 2016, and no documents were distributed to Petitioner under FOIA. In 2015 the court in an unrelated FOIA case directed the AG to release under FOIA a number of the documents sought in this FOIA case. [R. 861]

On May 17, 2016, a hearing was held in this FOIA case.

On June 14, 2016, the circuit court dismissed this case, adopting the AG's argument with respect to civil discovery. The circuit court found that the documents at issue were potentially discoverable in pending litigation in Richland/Lexington counties and would be governed by the Rules of Civil Procedure. [R. 16-18] On June 20, 2016, the circuit court granted the Legacy Trust's motion to dismiss.

The circuit court denied Petitioner's motions to alter or amend the dismissal orders and the first appeal of this FOIA case was filed in 2016.

In 2017 the Office of the AG received a copy of the “\$4.7M Valuation,” one of the documents responsive to Petitioner’s 2011 FOIA requests. [Ltr. AG to Ct. App., 3/19/24]

In April 2017, Petitioner filed her brief in the first appeal of this case. [Brief, Ct. App. Case No.2016-001727, 4/14/17]

On April 12, 2017, the AG filed its final brief in the first appeal of this FOIA case. The AG argues that Tracy Meyers of the Office of the AG had written Petitioner on August 5, 2011, and that the Office had not received the FOIA August 30, 2011 request. Footnote 1, page 2, quoted a portion of the Meyers affidavit stating that “...She never received from Ms. Pope the June 30 letter Ms. Pope claims to have sent to the Office of the Attorney General...” [AG, Final Brief 2016-001727, p.4] Oral argument in the first appeal of this 2011 FOIA case was held on February 12, 2019.

On June 19, 2019 a *per curiam* unpublished decision of the court of appeals found the Legacy Trust should no longer be a party to this FOIA case and reversed the circuit court’s order as to the AG. Citing section 1 of its published opinion in *Pope v. Wilson*, Op. No. 5657 (S.C. Ct. App. filed Jun 19, 2019), the Court of Appeals remanded the matter for the dismissal of the Legacy Trust and for the AG to identify any specific rule(s) of civil procedure which it asserted constituted exemptions under FOIA. The Court of Appeals did not address the AG’s additional sustaining ground that the AG had never properly received the FOIA request. Specifically, the Court of Appeals did not dismiss Pope’s appeal on this ground, even though the decision recites a portion of the Meyers letter of August 5, 2011, stating that she did not receive Petitioner’s June 30, 2011 FOIA request from Petitioner.

The AG timely sought a petition for rehearing. Argument II of the petition detailed the AG's position that the 2011 FOIA request was not properly received by the AG, and that "[t]his case may be completely resolved if this Court would address and adopt this additional sustaining ground." Petitioner also sought rehearing. In the AG's return to Petitioner's petition, filed August 9, 2019, the AG continued to assert that the AG did not have the \$4.7M Valuation and had not properly received Petitioner's June 30, 2011 FOIA request. [Ret. App. Pet., 8/9/19, p. 3]

On August 22, 2019, both petitions for rehearing were denied and timely petitions for a writ of certiorari were filed with the Supreme Court.

On April 1, 2020 the petition for a writ of certiorari was denied. The Legacy Trust was dismissed as a party to this case by circuit court order dated May 15, 2020.

By order filed April 1, 2021, the circuit court granted the AG's motion to dismiss the 2011 FOIA complaint on the sole ground that that Petitioner has no claim under FOIA because her FOIA request was not properly received by mail by the AG. The circuit court found that attaching the FOIA request to the Complaint in the FOIA lawsuit or mailing it to retained counsel was not compliant with the FOIA statute. The circuit court did not require the AG to identify rules of civil procedure applicable to the 2011 FOIA request as directed by the Court of Appeals. Further, the circuit court did not address Petitioner's additional FOIA requests made before the October 20, 2011 Meyers affidavit, which the AG, through Ms. Meyers, had denied.

After a timely motion to alter was denied, this appeal followed.

Final briefs in the second appeal of this 2011 FOIA case were filed in October 2022. The AG's brief, filed October 3, 2022, continued to rely on the October 2011 Meyers affidavit. The AG's brief also addressed the \$4.7M Valuation documents, stating in part: "The Order of January

16, 2015, in the *Summer v. Wilson* case in Newberry County (R., VII, P. 861), concluded that the OAG did not have to produce the appraisal because it did not have it...”

On August 15, 2023, the AG moved to certify this FOIA appeal to the Supreme Court. Citing the August 30, 2011 FOIA request, the AG said: “The Office of the Attorney never received this letter.” The AG stated “[w]ithout proper mailing or delivery of the FOIA request to the OAG, the requirements of FOIA were never triggered.”

On August 23, 2023, Petitioner filed a return to the AG’s motion to certify. Petitioner agreed with the AG that this 2011 FOIA case relates to a matter of significant public interest [p. 1 – 8]. Petitioner also agreed that the case presents novel issues of law [p. 9-10].

The Supreme Court denied the motion to certify.

In January 2024 Petitioner made an additional FOIA request for the documents sought in 2011.

By March 1, 2024 notice, oral argument in the second appeal of this FOIA case was scheduled for April 2, 2024.

On March 19, 2024, the AG notified the Court of Appeals that it had possessed a \$4.7M Valuation which is a subject of the 2011 FOIA requests of Petitioner. The AG reported that it did not know how the AG had received the \$4.7M Valuation, but that it had been uploaded on the AG’s system by at least 2017. The AG claimed that the \$4.7M Valuation was confidential.

On March 29, 2024, Petitioner filed a Return to the AG’s letter/motion related to the \$4.7M Valuation. Petitioner asserted that the AG’s claim of confidentiality was incorrect.

On April 1, 2024, the AG filed a Motion of Attorney General to Strike Appellant’s Return and to Dismiss Appeal as Sanction, attaching various documents. The AG requested that the

Court consider cancelling oral argument and summarily granting the AG's motion. That day the Court notified the parties that oral argument would proceed.

Petitioner responded, asserting that the 2008 Confidentiality Order which the AG used as a basis for a claim of confidentiality of documents could not be used to make the \$4.7M Valuation confidential.

At oral argument on April 2, 2024, the panel denied the motion for dismissal and sanctions.

.By decision dated May 8, 2024 the panel affirmed the circuit court's decision finding that it lacked jurisdiction to hear the 2011 FOIA complaint. By order dated May 29, 2024 Petitioner's timely petition for rehearing was denied.

ARGUMENT

- I. **The Court of Appeals erred in dismissing this appeal in 2024 based solely on the finding that the Appellant's June 30, 2011, FOIA request was not properly received where the earlier 2019 opinion of the Court of Appeals remanded the matter to identify specific rules of civil procedure which constitute FOIA exemptions, without addressing the Attorney General's additional sustaining ground that Petitioner's FOIA request was not properly received.**

The Court of Appeals affirmed "the circuit court's finding that the AG did not receive the request *as required under the FOIA* and concluded the circuit court properly dismissed the action," based on *Freedom Watch v. Bureau of Land Mgmt.* 220 F. Supp. 3d 65 (D.D.C. 2016) [emphasis supplied]. Although repeatedly raised in the circuit court and the court of appeals, the Court of Appeals failed to address the undisputed delivery of the June 30, 2011 FOIA request to the AG's private counsel; the awareness of the Office of the AG of the June 30, 2011 FOIA request (as stated in the Meyers letter and quoted in the 2019 decision); and the actual receipt by

the AG of the FOIA request no later than the date of the service of the Summons and Complaint herein in 2011.

The Court of Appeal, in its 2019 decision had a record showing that the AG, through Meyers, had rejected two additional FOIA requests by Petitioner for the \$4.7M Valuation documents *before* the Meyers affidavit was signed on October 20, 2011. In addition the record in the first and second appeals of this FOIA case and the two 2019 decisions of the Court of Appeals make clear that from 2011 the AG FOIA staff, through Meyers, rejected FOIA requests for the \$4.7M Valuation documents,.

With this record, the 2019 decision of the Court of Appeals did not adopt the AG's claim that it lacked jurisdiction to proceed; proceeded; and reversed and remanded this case for the AG to identify any specific rule of civil procedure that prevented FOIA disclosure of the \$4.7M Valuation documents and the Legacy Trust documents.

Instead of following the Court's direction, the lower court found by decision dated April 1, 2021, that it lacked jurisdiction to hear this 2011 FOIA case, something the Court of Appeals had considered before issuing its remand. On appeal from the April 1, 2021 decision of the lower court the Court of Appeals changed its 2019 decision on whether the case should have been dismissed because the AG did not properly receive the FOIA. In the 2024 decision, from which Petitioner seeks Certiorari, the Court of Appeals dismissed the appeal on the ground that the AG did not properly receive the FOIA request.

The South Carolina Freedom of Information Act provides no specific method for delivering or transmitting FOIA requests to public bodies. As indicated by the AG's and the court of appeals' reliance on federal cases from other jurisdictions, the South Carolina courts

have no precedent to determine what constitutes receipt of a FOIA request “as required under the FOIA.”

The FOIA expressly requires that “provisions of this chapter must be construed so as to make it possible for citizens, or their representatives to learn and fully report the activities of their public officials at a minimum cost or delay.” S.C. Code Ann. §30-4-15. Petitioner submits that the April 1, 2021 opinion of the circuit court and the May 8, 2024 opinion of the Court of Appeals overlooked the earlier 2019 opinion of the Court of Appeals which remanded the case to determine if any exception to the FOIA request existed.

The decision to dismiss a 13-year-old FOIA case based on a change of the 2019 decision of the Court of Appeals in the same FOIA case, without a change in facts, presents a conflict within the Court and a novel issue of public importance to all citizen of South Carolina.

II. The Court of Appeals erred in failing to consider, or remand this 2011 FOIA case for consideration of the \$4.7M Valuation after being notified in March 2024 that the Attorney General had been in possession of the \$4.7M Valuation since at least 2017.

Two weeks before the 2024 oral argument in the 2021 appeal of this long running FOIA case, the AG revealed that the AG’s staff had been in possession since 2017 of the \$4.7M Valuation, a primary document sought not only in this FOIA case, but in other FOIA cases dating back more than a decade where the AG had, until 2024, represented he did not have the \$4.7M Valuation or related documents.

Instead of addressing this extraordinary revelation or remanding the case for a prompt determination of the AG’s claim that the document received from an unknown source at least seven years ago, is confidential, the Court of Appeals did nothing.

The AG is the state official charged with seeing that all public bodies and public officials comply with FOIA. The opinion of the Court of Appeals presents a serious question in FOIA matters. The facts related to the failure to release the \$4.7M Valuation documents under FOIA for at least 7 years, of which the AG possessed them, but said he did not, is a novel issue and one of public importance.

III. The Court of Appeals erred in failing to consider that judicial economy and the purpose of FOIA will be served by remanding this FOIA case to the circuit court with direction to require the Attorney General to provide a proper FOIA response to Petitioner's August 30, 2011 FOIA request and Petitioner's subsequent FOIA requests for the same documents.

The combination of the lower court's failure to address the issue on remand in this 2011 FOIA case and, instead, dismiss the complaint, combined with the \$4.7M Valuation issue, were compelling reasons to remand this FOIA case to the lower court with clear instructions to consider not only Appellant's June 30, 2011 FOIA requests, but the three additional requests for the \$4.7M Valuation and Legacy Trust documents spanning more than a dozen years. Instead, the Court of Appeals failed to consider either the stated purpose of FOIA or a course of judicial economy. This was error. No citizen should be required to properly pursue a FOIA case for 13 years only to find that the public official has been in possession of that document for 7 years, and then to have the case dismissed with no resolution.

The decision of the Court of Appeals not to address these important issues, or promptly remand them, was error. That error was novel and is of public importance.

Conclusion

For the reasons set out herein, as well as in the Briefs of Petitioner and the record in this matter, Petitioner submits that this Court should grant a writ of certiorari, reverse the Court of

Appeals and circuit court which dismissed on the ground the AG did not receive the FOIA request, and remand the matter with instructions for the Attorney General to provide a full and proper hearing on any exception to providing the requested FOIA documents as set out herein.

Respectfully submitted,

S/ _____
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