THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE 5th CIRCUIT COURT
The Honorable G. Thomas Cooper, Jr.
Richland County Circuit Court Judge

Case No. 2012-CP-40-08469
Appellate Case No. 2013-000577

Edward D. Sloan, Jr., individually and as taxpayers of all others, similarly situated and South Carolina Public Interest Foundation, ... Appellants,

v.

South Carolina Department of Revenue and James F. Etter, its Director, . . . Respondent

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FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On or about December 21, 2012, Appellants filed their Summons and Complaint and Notice of Motion and Motion for Preliminary Injunction in the Richland County Court of Common Pleas alleging that the Department had not properly responded to their request for documents under the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, et seq. The Department accepted service of the pleadings on January 7, 2013 and filed its Answer on February 5, 2013. A hearing was convened on February 6, 2013 on Appellants' Motion for Preliminary Injunction.[1] By Order dated February 8, 2013, the Circuit Court dismissed the Appellants' suit as moot because the Department provided the requested documents. No Rule 59(e), SCRCP motion to reconsider, alter or amend judgment was filed by either party. The Appellants subsequently appealed that decision to this Court.

STATEMENT OF FACTS

By letter dated November 19, 2012, the Appellant, Edward D. Sloan, Jr., issued a request under FOIA to the Department for certain information. According to the Appellants, the Department received the FOIA request on or about November 23, 2012.[2]

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[1]Contrary to the Appellants' assertion in their Statement of the Case, as evidenced by the positions taken by the Department, the Department believed that the only issue before the Court at the time was Appellants' request for injunctive relief and did not consent to any decision on the merits as to whether the Department violated FOIA. The Department's mootness argument was offered in response to the Appellants' insistence that the merits could be argued at the hearing on the Motion for Preliminary Injunction. The Department believes the circuit court's ruling that the case to be moot is correct and should be upheld.

[2]The date of receipt of the FOIA request by anyone acting on behalf of the Department is actually uncertain. The return receipt provided by the Appellants is addressed to Mr. James Etter and bears a post office stamp of November 23, 2012 but the

By letter dated December 10, 2012, the Department's Public Information Director responded to the Appellants' FOIA request as follows:

> The South Carolina Department of Revenue has received your Freedom of Information request dated November 19, 2012. Your request is currently being researched and reviewed. As soon as the information has been compiled, you will be contacted again and the requested information will be sent to you.
>
> If we are unable to located, obtain or release the requested file(s) you will be notified of the decision and the reasons for it.
>
> If you have questions, please do not hesitate to give me a call at (803) 898-5281.

The December 10, 2012 letter was sent to the Appellants on the 11th business day after the Department's receipt of the FOIA request.

By letter dated December 18, 2012, the Appellants, through counsel, mailed their Summons and Complaint and Notice of Motion and Motion for Preliminary Injunction to the Richland County Clerk of Court for filing; the pleadings were filed in Court on December 21, 2012. On January 7, 2013, counsel for the Department accepted service of the Summons and Complaint and Notice of Motion and Motion for Preliminary Injunction. On January 11, 2013, the Department supplemented its December 10, 2012 letter to the Appellants with a letter to Appellants' counsel enclosing the requested document - a copy of the Department's October 2012 contract with the Mandiant Corporation. On January 14, 2013, Appellants' counsel responded to the Department's

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Department's offices would have been closed on November 23, 2012 as this was the day after Thanksgiving. Moreover, the signature affixed to the receipt is not recognizable as that of a Department employee. Nevertheless, it is undisputed that the Department did receive the Appellants' FOIA request and for the instant matter, November 23, 2012, is an acceptable date of receipt.

January 11, 2013 correspondence with a letter indicating the Appellants' satisfaction with the production of the Mandiant Corporation contract and suggesting that the Appellant Sloan "is interested in receiving a copy of some of the investigative reporting on the invasion, produced by the Department or Mandiant" and further indicating that "he is likely to request it, unless the Department volunteers it in coming months." The Department has received no further FOIA requests from the Appellants.

LEGAL ARGUMENTS

I. THE TRIAL COURT CORRECTLY RULED THAT THE CASE IS MOOT BECAUSE THE DEPARTMENT HAS FURNISHED THE DOCUMENT REQUESTED BY THE APPELLANTS.

In the seminal case of Sloan v Friends of the Hunley, 369 S.C. 20, 630 S.E2d 474 (2006) (Friends), the South Carolina Supreme Court ruled that the underlying FOIA case had become moot because the defendant therein provided the requested documents to the plaintiff:

> Generally, this Court only considers cases presenting a justiciable controversy. Byrd v. Irmo High School, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract. Id. at 431, 468 S.E.2d at 864. A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). If there is no actual controversy, this Court will not decide moot or academic questions. Id. (citing Jones v. Dillon-Marion Human Res. Dev. Comm'n., 277 S.C. 533, 535, 291 S.E.2d 195, 196 (1982)); see also Wallace v. City of York, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981). Although this Court has not addressed the issue of mootness as it pertains to FOIA,

> other courts have held that once the requested documents are produced, a justiciable controversy no longer exists. Trueblood v. U.S. Dept. of Treasury, I.R.S., 943 F.Supp. 64, 67 (D.D.C.1996); Misegades Douglas v. Schuyler, 456 F.2d 255, 255 (4th Cir.1972); Kaye v. Burns, 411 F.Supp. 897, 901 (S.D.N.Y.1976).
>
> In the instant case, Sloan concedes that Friends has provided all documents requested pursuant to FOIA. Additionally, since the filing of this appeal, Friends has conceded that it is presently a public body as related to this litigation. The purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies. Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). Because the information Sloan sought has been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment Additionally, Sloan has further conceded that his interest in this matter is purely academic. 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.

(Emphasis added).

Based on Friends, this Court should affirm the lower court's dismissal of the Appellants' case on the grounds that it has become moot. Because the Department produced the requested documents -- by the Appellants' own admission completely satisfying their FOIA request -- no "real and substantial controversy which is appropriate for judicial determination" remains.[3]

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[3]The Friends Court's further comments are instructive: "Because the information Sloan sought has been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment. Additionally, Sloan has further conceded that his interest in this matter is purely academic. Therefore, we find that the question is moot, and any judgment by this Court would constitute an advisory opinion." Id., 369 S.C. at 26, 630 S.E.2d at 478. Here, in a January 14, 2013 letter to the Department, Appellant Sloan, through counsel, acknowledged that he had received all the

The Appellants, however, seek to bifurcate their action against the Department. While conceding that the claim for injunctive relief is moot,[4] the Appellants contend that the claim for declaratory relief remains a "real and substantial controversy."[5] For a number of reasons, the Appellants' arguments have little merit such that trial court's order rendering the entire case moot should be affirmed.

A. The Appellants' Defenses To The Finding That The Case Is Moot Were Not Preserved For Appellate Review.

As an initial matter, it is important to note that the Appellants failed to raise defenses to mootness – that while the claim for injunctive relief was moot, the claim for declaratory relief was not - to the trial court, and, of course, the trial court did not rule on them. An issue is not preserved for appellate review unless the issue was raised to and ruled upon by the trial court.

In Elam v. SC Department of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2004), our Supreme Court addressed this issue in the following manner:

> Second, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have

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documents he wanted and further, was simply interested in a concession that the Department's "December 10 response to his FOIA request was insufficient to satisfy the requirements of the law. . . ." The justiciable controversy in this case ended at the time the document was produced. The Appellants' January 14, 2013 letter is clear evidence that all that remains is an "academic" exercise that is not appropriate for court resolution.

[4]In their Initial Brief at p. 6, the Appellants make the following statement: "Appellants are compelled to agree that after the Respondents produced the document in question, Appellants' claim for injunctive relief was effectively, moot."

[5]"Second, the Respondents argued that Appellants' claim for declaratory judgment was mooted by the production of the documents. However, the production of those documents did not moot the claim for declaratory judgment, which the statute also authorizes." Appellants' Initial Brief, p. 7.

> emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *E.g.*, Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).
>
> In recently clarifying the law on the presentation and use of additional sustaining grounds in an appeal, we emphasized we did not "mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000); [4] *see also* Jean Hoefer Toal, et al., Appellate Practice in South Carolina 55-60 (2002).

(Emphasis added).

During the hearing on the Appellants' Motion for Preliminary Injunction, in response to the Appellants' contention that the trial court should render a decision on the merits of the case and issue a declaratory judgment that the Department had violated FOIA, the Department pointed out that the case was mooted by its production of documents:

> **The Court**: Well, what about his position that it's not appropriate to issue a declaratory judgment without some factual findings or some testimony or other evidence in the record when your motion is for a preliminary injunction?
> **Mr. Carpenter**: Well, Your honor, we both – both submitted in response to the -- in support of the complaint,

I submitted exhibits that show Mr. Sloan's letter, their letter is response. Then I quoted the statute. In their – in their motion they submitted much the same thing.

The Court: Wait a minute. Hold it. Their memorandum?

Mr. Carpenter: Their memorandum, yes, Your Honor. I'm sorry.

The Court: Okay. Go ahead.

Mr. Carpenter: They submitted the same letter from Mr. Sloan as Exhibit A. I think it's the same photocopy, if I look at my handwriting. Exhibit B, is their same letter, the same as ours. Then they added a few other things that show what happened later on. But there is no dispute Mr. Sloan sent them the letter in November, and they sent the letter back December 10 and they said we'll tell you – we'll make a decision and we'll tell you the reasons for it.

The Court: You say there is no other evidence to be ---.

Mr. Carpenter: I can't think of any, Your Honor. Maybe Mr. Kimpson can, but I can't think of any other. The sole issue is that paragraph in their response didn't meet the statute, and to me it's fairly clear that it didn't.

The Court: Okay. Mr. Kimpson?

Mr. Kimpson: Judge Cooper, I'd point out – and we have recited a long provision from the 2006 Sloan case. This case is moot. We have provided the documents.

* * *

The Court: There are numerous Sloan cases.

Mr. Kimpson: I'm sorry, Your Honor. Sloan versus Friends of the Hunley.

The Court: Hunley.

Mr. Kimpson: This is the first Supreme Court opinion, the 2006 decision, where in that case by the time the case wound its way through the court, the documents had been produced. The Court essentially agreed with the trial Court that there was no longer a judicial, excuse me, a justiciable controversy.

The Court: Right.

Mr. Kimpson: And declared the case to be moot. So there are legal arguments that need to be made. There's some arguments, factual presentations, that we would certainly want to present to the Court with regard to an attorney's fee issue, but, Your Honor, even more so, there are legal reasons why the case can't go forward because it's moot.

The Court: All right.

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> **Mr. Carpenter**: I'm familiar with the Sloan versus Hunley case, Your Honor. I dealt with it for five years. This case is different in that they've got an explicit statement that is to me an explicit contradiction of the statutory requirement.
> **The Court**: All right. I'll take a look at their memorandum, and I'll let you know.
> **Mr. Kimpson**: Yes, Your Honor. Thank you.
> **Mr. Carpenter**: Thank you, Your Honor.

(R., pp. 45-48; Tr.; p. 10:12 - p 12:12; p. 12:21 – p. 13:4).

As illustrated by this excerpt from the hearing, at no time did the Appellants raise the issues or articulate the arguments opposing mootness, which they are now seeking to make before this Court. Their recent concession that the motion for preliminary injunction was mooted by the production of the document but the request for declaratory judgment survived was not articulated as such to the trial court.[6] Furthermore, to the extent the Appellants now argue that some exception to the mootness doctrine applies, these arguments were similarly not made before the trial court.[7] Certainly, there were no rulings by the trial court on any of the arguments now proffered by the Appellants in their

[6]At one point, counsel for the Appellants does state ". . . any citizen can seek declaratory and/or injunctive relief for a violation of FOIA. Injunctive relief, as Mr. Kimpson will soon argue, that there's – there's not a point that we need an injunction to get the documents. What we need is declaratory relief that says this response did not fulfill the public body's obligation under FOIA." (Tr., p. 5:19-25) Whatever inference can be drawn from this statement, however, falls well short of the articulation of legal argument needed to adequately raise an issue before the trial court. Certainly, there is no ruling by the trial court on whether the case can be determined moot for purposes of the preliminary injunction but not for purposes of the declaratory judgment action.

[7]The Appellants referred to this matter as "a case of great public importance" but not in an attempt to carve out any exception to the mootness doctrine but instead to prompt the trial court to consider the merits of the case during the hearing on the Motion for Preliminary Injunction. (Tr., p.6:8-9).

brief. Pursuant to Elam, therefore, these issues are not preserved for appellate review because there were neither presented to, nor ruled upon, by the trial court.[8]

B. The Trial Court Correctly Ruled That The Appellants' Case Was Moot.

The Appellants spend a great deal of energy arguing that they have the right to claim both injunctive and declaratory relief in an action to enforce FOIA. The Department acknowledges that S.C. Code Ann. § 30-4-100 (Supp. 2012) allows a complainant alleging a FOIA violation to "apply to the circuit court for either or both a declaratory judgment and injunctive relief." The Department respectfully submits that this is not the real issue. Assuming, *arguendo*, that the Appellants adequately preserved the issue – which as outlined earlier, they have failed to do -- the real question that must be answered is whether in the context of the present case a justiciable controversy remained for the declaratory judgment action even after the requested documents had been produced. This question must be answered in the negative.

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[8]It is important to recognize the legal conundrum the Appellants have created for themselves. Despite the fact that the February 6, 2013 hearing was convened to consider their motion for a preliminary injunction, the Appellants nevertheless persisted in asking the trial court to rule on the merits of the case. The Department contended the case had been rendered moot by its disclosure of documents in an effort to persuade the trial court not to make a decision on the merits at that stage because it felt the need to fully present and develop all "legal arguments" to the trial court. By ruling that the case had become moot, the trial court granted the Appellants' request to go beyond the Motion for Preliminary Injunction and consider the merits. The Appellants are now unhappy with the trial court's decision. Because of their desire to go forward without developing all "legal arguments," the Appellants effectively failed to present any defense to the Department's contention that the case was moot. Having failed to present such issues and arguments to the trial court in either the hearing itself or by way of a Rule 59, SCRCP motion to alter, amend and/or for reconsideration, the Appellants certainly cannot do so now on appeal.

In declaring the plaintiff's action for a declaratory judgment that FOIA had been violated to be moot, the Friends Court recognized that "[t]he purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies." Friends, 369 S.C. at 26, 630 S.E.2d at 478. In Friends, by dismissing the claim as moot, the Court implicitly found that the purpose of FOIA had been satisfied by the release of the documents at issue. Id. Here, whether the Appellants' claim for injunctive relief or declaratory relief is under consideration, the requested information has been disclosed by the Department so that the real purpose of FOIA has been satisfied. The Appellants' claims, therefore, whether under the rubric of declaratory relief or injunctive relief, presented no justiciable controversy to the trial court. Here, just as in Friends, "[b]ecause the information Sloan sought has been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." Id.

This principle is further illustrated by the allegations and relief requested in Appellants' pleadings. In paragraphs 10 and 11 of their complaint, the Appellants challenge the legal sufficiency of the Department's December 10, 2012 letter responding to their FOIA request. In paragraph 13 of the complaint, the Appellants give an itemization of how the Department has allegedly violated FOIA:

> More than 15 days, excluding weekends and holidays, have passed, but Defendants have failed to:
> a. Comply with Plaintiffs' [Appellants'] request;
> b. Make a proper response to Plaintiffs' [Appellants'] request;
> c. Respond timely that the requested public records would be made available;
> d. Actually make the requested records available for copying; or

e. Furnish the records;
all in violation of section 30-4-30(c).

Thereafter, in their claim for relief, the Appellants requested:

> WHEREFORE, Plaintiffs [Appellants] pray the Court for an Order:
> 1. Declaring that Defendants have violated FOIA;
> 2. Declaring that the request is deemed approved;
> 3. Enjoining the Defendants to provide Plaintiffs' [Appellants] a copy of all requested documents;
> 4. Awarding the Plaintiffs' [Appellants] attorney's fees and costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b); and
> 5. Granting Plaintiffs' [Appellants] such other and further relief as the Court deems just and proper.

"A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). The Appellants ask for a declaration that the Department has violated FOIA. Even if a court entered an order finding that the Department had committed all of the delicts itemized in paragraph 13 and further, ordered all of the direct relief Appellants requested in their prayer for relief, the Appellants would still get nothing more than they obtained in the Department's January 11, 2013 letter – a response from the Department enclosing the requested document.[9] Such a judgment would have no practical effect because no controversy *still* exists in this case, whether from the standpoint of injunctive relief or declaratory relief.

[9]"Direct" relief includes items 1-3 in the Appellants' prayer for relief. An award of attorney's fees here is only derivative of the award of all or some portion of the direct relief claimed.

As such, any judgment rendered would be purely academic or advisory and should not be entered by this Court.

C. Attorney Fees Are Not Warranted In This Case.

Under S.C. Code Ann. § 30-4-110(b) (2007), "if a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation." The statute further provides that in the event a party was to "prevail in part" a court may "in its discretion award him or it reasonable attorney fees or an appropriate portion thereof."

In Sloan v. Friends of the Hunley, 393 SC 152, 711 S.E.2d 895 (2011) (Friends II) – a case arising from the 2006 Friends of Hundley case cited earlier -- our Supreme Court decided whether a FOIA litigant could be a "prevailing party" when documents requested under FOIA were voluntarily produced to the requester by a public body but only after an enforcement lawsuit had been filed by the requester and the lawsuit subsequently declared moot. The Friends II Court ruled that the requester in that case did "prevail" within the meaning of the attorney's fee statute inasmuch as the documents were eventually produced thus granting the requester the ultimate relief he desired. Friends II, 393 S.C. at 156-157, 711 S.E.2d at 897-898. The Friends II Court only allowed attorney fees; however, up until the time the documents were produced. Id., 393 S.C. at 158, 711 S.E.2d at 898.

While it is clear from the Friends II case that attorney fees can be awarded up until the time the documents were produced by the Department, the question still remains whether such an award is proper. An award of attorney fees under § 30-4-110(b) is couched in permissive rather than mandatory terms. For a party who ostensibly prevails

in total, "he or she may be awarded reasonable attorney fees. . . ." For a party who prevails in part, a court may exercise "its discretion" to award a reasonable fee. The trial court here exercised its discretion in this case and did not make an award of fees.[10] Such a determination is certainly within the province of the Circuit Court. See, Litchfield Plantation Company v. Georgetown County Water and Sewer District, 314 S.C. 30, 443 S.E.2d 574 (1994) (Court upholds trial court's award of no attorney's fees to prevailing party.) The Department urges this Court to affirm the trial court on this issue as well.

Significantly, the Appellants failed to offer any evidence of attorney's fees or costs. The trial court specifically inquired about fees:

> **Mr. Carpenter**: ... So what we need is a decision and the basis – in the nature of a declaratory judgment. We filed our motion with the complaint----
> **The Court**: That's the only relief you're seeking.
> **Mr. Carpenter**: Yes, we filed a motion ---
> **The Court**: Not attorney's fees or ---
> **Mr. Carpenter**: Oh yes, attorney's fees, of course. Yes.
> **The Court**: Well, that's – that's why I am asking you.

(R., pp. 42-42; Tr., p. 6:17-25)

Despite this dialogue about attorney fees, the Appellants failed to offer any evidence of any attorney fees or the expenditure of any costs.[11] There is nothing in the record in this case to support any award of attorney fees or costs.

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[10]Unlike several of the Appellants' other contentions, the issue of attorney fees was raised before the trial court. In fact, the trial judge specifically asked the Appellants whether they wanted attorney's fees. (Tr., p. 6:22). Nevertheless, inasmuch as the trial court's order is silent on the issue of fees and the Appellants failed to file a post-trial motion, the Department asserts the issue is not preserved for appellate review.

[11]This failure of proof is exacerbated given the Appellants' strident opposition to the Department's argument that the case should not go forward on the merits in part because there were "factual arguments, factual presentations, that we [the Department]

II. NO EXCEPTION TO THE MOOTNESS DOCTRINE IS APPLICABLE HERE.

The Appellants neither raised nor argued any exception to the mootness doctrine to the trial court. Further, the trial court did not rule on the applicability of any exception. Nevertheless, the Appellants argue that any of three exceptions could apply here. The Appellants' arguments in this regard are misplaced.

A. The "Capable Of Repetition But Evading Review" Exception Does Not Apply.

The Friends Court disposed of the argument that this exception to the mootness doctrine saved the FOIA enforcement action at issue from becoming moot after the documents had been provided:

> In evaluating whether a moot issue is capable of repetition, yet evading review the Court does not require that the complaining party be subject to the action again. Byrd, 321 S.C. at 431, 468 S.E.2d at 864. However, the action must be one which will truly evade review. Id. at 432, 468 S.E.2d at 864 (finding short term student suspensions will evade review because they are, "by their very nature, completed long before an appellate court can review the issues they implicate"); but see Seabrook v. City of Folly Beach, 337 S.C. 304, 307, 523 S.E.2d 462, 463 (1999) (holding that an action that is capable of repetition does not necessarily evade review).
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> In Seabrook, the plaintiffs brought an action against the city alleging that the city imposed conditions on a residential development for which it had no authority. 337 S.C. at 304, 523 S.E.2d at 462. After the trial court found in favor of the plaintiffs, the city removed the conditions and approved the plat. In reviewing the appeal this Court found that the issue

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would certainly want to present to the Court with regard to an attorney's fee issue. . . . " (Tr., p.12:6-9). While hearings on attorney's fees can at times be held after rulings on the merits in FOIA cases, this approach is inconsistent with the Appellants' expressed fast track approach to the case.

> was moot, and that although the scenario was capable of repetition, it did not evade review.
>
> The instant case is analogous to Seabrook. Although Friends admits that the current situation is capable of repetition, it does not evade review. Should another person bring an action against Friends for a violation of FOIA and Friends fails to produce the requested documents, the Court will have the opportunity to review the issue.

Friends, 369 S.C. at 27, 630 S.E.2d at 478 (emphasis added).

Assuming that the FOIA violation alleged by the Appellants is "capable of repetition," [12] the issue becomes whether said violation will evade review. As postulated by the Friends Court, "[s]hould another person bring an action against Friends [the Department] for a violation of FOIA and Friends [the Department] fails to produce the requested documents, the Court will have the opportunity to review the issue." Id. As such, the capable of repetition yet evading review standard necessary for an exception to the mootness doctrine does not apply here.

B. The "Public Importance" Exception Does Not Apply.

The very same argument the Appellants now make before this Court regarding public importance was rejected by the Friends Court:

> In determining whether a moot issue should be reviewed under the public importance exception, the issue must present a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in "matters of important public interest." Sloan v. Greenville County, 361 S.C. 568, 570, 606 S.E.2d 464, 465-66 (2004) (citing Curtis, 345 S.C. at 568, 549 S.E.2d at 596). This evaluation must be made based on the facts of each indi-

[12] The Department does not concede that any violation of FOIA has occurred here. Further, the Department has no knowledge of the FOIA practices of other agencies. Nevertheless it is certainly possible that some future violation of FOIA may occur.

> vidual situation. Id. at 571, 549 S.E.2d 591, 606 S.E.2d at 466.
>
> Sloan's contention that his declaratory judgment action meets the public importance exception despite mootness is unsupported. Sloan does not present a "question of imperative and manifest urgency." Because Friends produced the requested documents, Sloan has been afforded the intended benefit of FOIA. Even assuming that this issue presents a matter of public importance, no imperative or manifest urgency exists in light of Friends' producing the requested documents and conceding that it is presently a public body under FOIA.

Id. (emphasis added).

When the facts of the instant case are examined, it becomes clear that there is no issue presented which "presents a question of imperative and manifest urgency" of the type necessary to trigger this exception to the mootness doctrine. On or about November 23, 2012, the Department received a FOIA request issued by the Appellants. While the Appellants challenge the sufficiency of the Department's December 10, 2012 response, at bottom, no documents were provided to the Appellants until January 2013. The Appellants lawsuit was filed on December 21, 2012. Thereafter, on January 8, 2013, the Department voluntarily accepted service of the pleadings. The Department produced the requested information to the Appellants on January 11, 2013. The Appellants have indicated their satisfaction with the document production such that there are no information requests outstanding. As in Friends, the Appellants here have "been afforded the benefit of FOIA" and as such, no "imperative or manifest urgency exists" to trigger an exception to mootness.[13]

[13]The Department believes that FOIA issues are important matters of public interest and strives to appropriately answer each FOIA request as soon as possible with

C. The Exception Regarding "Future Events Or Collateral Consequences" Does Not Apply.

The Appellants further argue that the "future events or collateral consequences" exception to the mootness doctrine applies. See, Holden v. Cribb, 349 S.C. 132, 561 S.E.2d 634 (2002). The Department respectfully disagrees.

In the two cases cited by the Appellants as support for their position, Sloan v. Department of Transportation, 365. S.C. 299, 618 S.C. 299, 618 S.E.2d 876 (2005) (DOT I), and Sloan v. Department of Transportation, 379 S.C. 160, 666 S.E.2d 236 (2008) (DOT II), the Court reviewed the lower court decisions despite mootness because the "issues were capable of repetition but evading review" and also because the "decision will affect future events." DOT I, 365 S.C. at 303, 618 S.E.2d at 878 and DOT II, 379 S.C. at 168-169, 666 S.E.2d at 240. In each of these cases, the plaintiff alleged that an improper method in the procurement process was used to award contracts for construction projects. The defendants countered that the cases were moot because the construction projects had been completed and therefore the procurement process leading up to the awarded contract should not be examined. DOT I, 365 S.C. at 303, 618 S.E.2d at 878 and DOT II, 379 S.C. at 166-167, 666 S.E.2d at 239-240. Failing to review the procurement process in these instances, however, potentially left an improper procurement procedure unevaluated without any meaningful relief in terms of review to the plaintiffs. Thus, these cases presented classic examples of situations that were capable of repetition yet evading review and where a decision will affect future events, i.e., if determined to be improper, the procurement processes will not be used again in

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the requested information.

like situations. These cases, and the need for the Court to review them despite mootness, presented issues fundamentally different that that now before this Court. Here, whether the Department's December 10, 2012 correspondence was correct or not, the requested documents were produced, meaning the Appellants received the relief they sought. [14]

III. THE DEPARTMENT'S DECEMBER 10, 2013 RESPONSE COMPLIED WITH FOIA.

As discussed, this case is moot and the trial court's decision to dismiss the same should be upheld. Nevertheless, in the event that the Court should decide to review the Appellants' claim, the Department asserts that the December 10, 2013 response in fact does satisfy its obligations under FOIA.

S.C. Code Ann. § 30-4-30(c) (Supp. 2012) requires the following:

> (c) Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons therefor. Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

(Emphasis added).

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[14]This is perhaps why the Friends Court did not list "decision will affect future events" as one of the mootness exceptions potentially available in the context of the FOIA enforcement action at issue. Friends, 369 S.C. at 26-27, 630 S.E.2d at 478 ("Two exceptions in which the court may address an issue despite mootness are 1) when the issue raised is capable of repetition yet evading review and 2) when the question considers matters of great public interest.")

On December 10, 2012, less than 15 business days after its receipt of the Appellants' FOIA request, the Department responded in writing as follows:

> The South Carolina Department of Revenue has received your Freedom of Information request dated November 19, 2012. Your request is currently being researched and reviewed. As soon as the information has been compiled, you will be contacted again and the requested information will be sent to you.
>
> If we are unable to locate, obtain or release the requested file(s) you will be notified of the decision and the reasons for it.
>
> If you have questions, please do not hesitate to give me a call at (803) 898-5281.[15]

(Emphasis added).

Section 30-4-30(c) requires that the responding agency notify a requestor of its determination regarding the availability of records and the reasons therefor within 15 days of the receipt of the FOIA request. While the Department strives to produce requested records along with any determination that the same are available, the statute does not actually provide that production at the time of determination is required. The next sentence in the statute states in part that ". . . if the request is granted, the record must be furnished or made available for inspection or copying." It is this latter option -- records being made available for inspection or copying -- which provides a clear indication that it is not necessary that records be provided along with the agency determination Instead, all that is required under FOIA within 15 days after receipt of a request is that the agency notifies the requester of its determination.

[15]The Department has no record of any follow upcall or contact with Appellant Sloan in response to its December 10, 2012 letter other than the January 8, 2013 lawsuit.

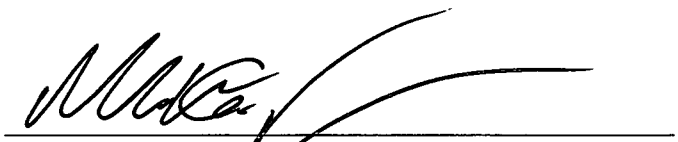
In its December 10, 2012 correspondence to the Appellants, the Department rendered such a determination that the requested information would be provided - "As soon as the information has been compiled, you will be contacted again and the requested information will be sent to you." This statement is unequivocal – the Department notified the Appellant Sloan that the record will be provided.

The subsequent qualifying language does not undercut this determination that the record will be produced. The December 10, 2012 response continues to state that "[i]f we are unable to locate, obtain or release the requested file(s) you will be notified of the decision and the reasons for it." In the first two alternatives – an inability to locate or obtain the record – the Department is making allowance that it may be impossible to provide the document, either because it does not have the record or the record cannot be obtained. The third alternative -- the Department cannot release the record – is consistent with the prevailing law inasmuch as applicable exemptions to FOIA disclosures are not waived even if not cited in an initial agency determination. Litchfield.

The Appellants will undoubtedly argue that this interpretation of § 30-4-30(c) impermissibly gives the responding agency an extension of time to produce documents in response to FOIA requests. But the Appellants argument is flawed. This is not the case. If an agency makes the determination that "the requested information will be sent," and further, it does not provide the records along with the determination, it must act reasonably to provide such documents as soon as possible. Any unreasonable delay will almost certainly result in an enforcement lawsuit.

CONCLUSION

For the forgoing reasons, pursuant to Rule 220(c), SCACR and for any other reason appearing in the record, the South Carolina Department of Revenue respectfully requests that this Court affirm the decision of the trial court in its entirety.



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August 28, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE 5th CIRCUIT COURT
The Honorable G. Thomas Cooper, Jr.
Richland County Circuit Court Judge

Case No. 2012-CP-40-08469
Appellate Case No. 2013-000577

Edward D. Sloan, Jr., et al., ... Appellants,

v.

South Carolina Department of Revenue, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Jean M. O'Connor, do hereby affirm that I have caused to be mailed, by United States Postal Service, postage prepaid, Defendants, South Carolina Department of Revenue's Final Brief in Edward D. Sloan, Jr., et al v. South Carolina Department of Revenue, et al, Case No. 2012-CP-40-08469, Appellate Case No. 2013-000577, to James G. Carpenter, Esquire, Carpenter Law Firm, P.C., 819 East North Street, Greenville, SC 29601, this 28th day of August 2013. Original of the same was hand delivered to the Clerk of Court, South Carolina Court of Appeals this same date.

Jean M. O'Connor