

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Beaufort County
Honorable Carmen T. Mullen, Circuit Judge
Civil Action No.: 2007-CP-07-0995

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,

Appellant,

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.

FINAL BRIEF OF THE APPELLANT

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I. STATEMENT OF ISSUE ON APPEAL

- A. Did The Circuit Court Properly Grant The Respondents Summary Judgment Notwithstanding Mr. Trask's Substantial Evidence Of The Respondents' Multiple Violations Of The South Carolina Freedom Of Information Act?
- B. Did The Circuit Court Properly Grant The Respondents Summary Judgment Notwithstanding Mr. Trask's Substantial Evidence Of The Respondents' Multiple Violations Of The South Carolina Public Records Act?

II. STATEMENT OF THE CASE

On April 11, 2007, the Appellant, 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 ("Mr. Trask"), brought this action against the Respondents, South Carolina Department of Public Safety ("SCDPS"); Beaufort County; Beaufort County Management Information Systems ("BCMIS"); Beaufort County Coroner Curtis Copeland in his official capacity ("Coroner Copeland"); and Beaufort County Sheriff P.J. Tanner in his official capacity ("Sheriff Tanner" or "BCSO"). (R.p.5; R.pp.19-31).¹ Mr. Trask asserted claims against the Respondents for violations of the South Carolina Freedom of Information Act (the "FOIA").² (R.pp.5-6; R.pp.20-30, paras. 10-12, 14-24, 26-39, 41-46, 48-56, 58-65). Mr. Trask asserted specific individual FOIA violations against the SCDPS (R.pp.20-23, paras. 10-12, 14-24), Coroner Copeland (R.pp.20-21, 23-26, paras. 10-12, 26-39), BCMIS (R.pp.20-21, 26, paras. 10-12, 41-46), Sheriff Tanner (R.pp.20-21, 27-28, paras. 10-12, 48-56), and Beaufort County. (R.pp.20-21, 28-30, paras. 10-12, 58-65). Mr. Trask sought to require the Respondents to produce various public documents which had been previously requested, but not produced, as well as statutory attorneys' fees and costs and a recalculation and reimbursement of incorrectly charged copying costs. (R.p.30).

¹ Due to the number and various natures of the Defendants below (*i.e.*; State entities, County entities), they will collectively be referenced herein as the "Respondents" unless an individual designation is required.

² See S. C. Code Ann. §§ 30-4-10, *et seq.* (Thomson West 2005).

The Respondents initially moved to dismiss the action (R.pp.41-42), but that motion was denied. (R.p.18). The Respondents then answered (R.pp.43-52), denying the material allegations (R.pp.43-51, paras. 1, 12-12, 17, 20-24, 27, 30, 32-39, 42-46, 50-56, 61-66) and asserting the affirmative defenses of, *inter alia*, protections under the FOIA (R.p.51, para. A), failure to state a claim for relief (R.pp.51-52, para. B), laches (R.p.52, para. C), and statute of limitations. (R.p.52, para. E).

On or about 16 November 2007, Mr. Trask subsequently served various discovery requests upon the Respondents. (R.pp.58-70). The Respondents served their answers/responses on 21 February 2008, and 28 February 2008. (R.pp.71-83). Mr. Trask also sought to take the deposition of various individuals, including Beaufort County Staff Attorney Kelly Golden, Esquire. (R.pp.84-89).

Due to the deficient nature of the Respondents' discovery answers and responses, as well as, the Respondents' attempt to prevent the Kelly Golden deposition, Mr. Trask moved to compel the various discovery responses. (R.pp.55-89). The Trial Court heard the motion on 22 April 2008 (R.p.15),³

³ The Trial Court's order issued in responses to Mr. Trask's Motion to Compel addressed both discovery response deficiencies in this action, as well as in another action filed by Mr. Trask and his wife. See L. Paul Trask, Jr., Personally, and as Next of Kin and as the Duly Appointed Personal Representative of the Estate of L. Paul Trask, III, deceased, and Meredith C. Trask v. Beaufort County, Curtis Copeland, in his official capacity as Coroner of Beaufort County and individually; and Copeland Company of Beaufort, LLC (Beaufort County Court of Common Pleas, Civil Action No. 2007-CP-07-0993, filed 17 April 2007) ("Trask v. Beaufort County"). Much like this case, Trask v. Beaufort County is also on appeal to this Court of Appeals.

and issued its order compelling certain discovery responses on 8 May 2008. (R.pp.15-17). Thereafter, on 20 August 2008, Mr. Trask served the Respondents with supplemental interrogatories (R.pp.301-305) and supplemental requests for production. (R.pp.306-310).

The Respondents moved for summary judgment in April 2008 (R.pp.53-54) and Mr. Trask did the same on 24 October 2008. (R.pp.90-91). He submitted two affidavits in support. (R.pp.107-254; R.pp.293-298). The Respondents filed an Amended Motion for Summary Judgment on 9 December 2008. (R.pp.314-315). The Respondents submitted two supporting affidavits. (R.pp.316-317; R.pp.318-319).

The Trial Court heard the parties' respective motion on 19 December 2008. (R.p.5; R.p.1067). The Trial Court ultimately issued its written order on March 13, 2009.⁴ (R.p.13), granting summary judgment to the Respondents. (R.pp.5-13). The Trial Court, by implication, also denied Mr. Trask's Motion for Summary Judgment. (R.pp.5-13).

Mr. Trask then filed a Motion for Reconsideration, to Amend to Amend Court's Findings, and to Alter or Amend Judgment. (R.pp.727-750). The Trial Court denied the motion by written order dated 13 October 2009. (R.pp.3-4). This appeal followed.

⁴ In the interim time between the hearing and the date the Trial Court issued its summary judgment order, Mr. Trask filed another Motion to Compel seeking responses to his supplemental interrogatories and supplemental requests for production of documents. (R.pp.299-300). The Respondents had failed to serve any answers and/or responses to this supplemental discovery. (R.p.300). Additionally, on 27 January 2009, Mr. Trask again moved for summary judgment (R.pp.714-716) and attached a supporting affidavit. (R.pp.717-726).

III. STATEMENT OF THE FACTS

A. Paul Trask's Accident

In late November 2005, Paul Trask, a 20-year old sophomore at The Citadel (R.p.20, para. 10; R.p.717, para. 4), was on Thanksgiving holiday visiting his parents in Beaufort, South Carolina. (R.p.20, para. 10; R.p.93; R.p.717, para. 4). On the evening of November 21, 2005, Paul Trask drove his father's 1999 Isuzu Trooper automobile (R.p.20, para. 10; R.p.93) to the Xpress Lane, Inc. ("Xpress Lane") – a gasoline station located on Boundary Street in Beaufort. (R.p.20, para. 10; R.p.93; R.p.717, para. 5).⁵

After leaving the Xpress Lane at approximately 11:58 p.m. (R.p.20, para. 11; R.p.93), Paul Trask drove the 22 miles from the Xpress Lane to Fripp Island arriving at the security gate sometime between 12:00 midnight and 1:00 a.m. (R.p.20, para. 11; R.p.93; R.p.717, para. 6).⁶ Thereafter, Mr. Trask drove back north on the Sea Island Parkway (U.S. Highway 21) for approximately 3.8 miles from the Fripp Island security gate. (R.p.20, para. 11; R.p.93; R.p.717-718, paras. 6-7). Tragically, while approaching a curve in the road, Paul Trask apparently lost control of his vehicle. (R.p.20-21, para. 11; R.p.93, p.2). The Isuzu Trooper then collided with a tree on the side

⁵ Paul Trask, using \$80.00 cash he withdrew from the on-site ATM machine, Mr. Trask purchased two 24-ounce cans of beer and a pack of Camel cigarettes from the Xpress Lane. (R.p.717, para. 5). The Xpress Lane's sales clerk apparently failed to (a) require Paul Trask to produce a picture and/or age identification or (b) determine if he was already impaired as a result of prior alcohol consumption.

⁶ The security guard at the gate, James Irby ("Mr. Irby"), denied him a pass to enter the community. (R.p.717, para. 6).

of the Sea Island Parkway and upon impact, the vehicle burst into flames (the "Accident"). (R.pp.20-21, para. 11; R.p.93; R.p.718, paras. 7-8). Paul Trask sadly died from his injuries. (R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8).

B. The Accident "Investigation"

All of the Respondents, in one capacity or another, either individually and/or through one or more representatives, were involved in the investigation of Paul Trask's untimely death and/or possessed critical public record pertaining to the investigation. The Accident Investigation ultimately involved Coroner Copeland and his subordinate investigators, various other law enforcement and/or public safety officers, and/or retired former colleagues. The Respondents were required by law to maintain and preserve the records of their respective investigations. Furthermore, all of the Respondents received written notice from Mr. Trask specifically requesting each of them preserve all of their records of the investigation. (R.pp.21-22, paras. 12, 15-19; R.p.45, paras. 16, 19; R.p.93; R.p.108, paras. 3-4; R.p.119, lines 10-18; R.p.718, paras. 10, 12(a)).⁷ Mr. Trask, pursuant to his various FOIA requests sent to the Respondents, sought to obtain information and/or

⁷ For example, on 15 December 2006, Mr. Trask requested Coroner Copeland to conduct an inquest into Paul Trask's death. (R.pp.23-24, para. 27; R.p.46, para. 27). Coroner Copeland agreed to so do and directed his investigator to begin a preliminary inquest investigation. (R.pp.23-24, para. 27). Captain Robert Bromage of the Beaufort County Sheriff's Office was assigned to the Coroner's Office as its death investigator. Mr. Trask also requested Coroner Copeland to ask the SCHP's Multidisciplinary Accident Investigation Team ("MAIT") "to conduct an official investigation into the facts and circumstances of the accident". (R.pp.23-24, para. 27).

documentation regarding the Respondents' participation in and ultimate findings arising from the accident/death investigation. (R.p.21, para. 12; R.p.93; R.p.718, para. 10).

The Respondents refused to comply with many of Mr. Trask's *FOIA* requests by simply ignoring them and providing absolutely no response (R.p.108, para. 1; R.p.125; R.p.719, para. 13(a)) or, alternatively, by wrongfully withholding public records on the pretext they were "exempt" from disclosure. (R.pp.24-25, para. 33; R.p.108, para. 3; R.p.137, lines 2-8; R.p.145). Even more troubling, and in contravention of both the law (R.p.135, lines 8-16) and Mr. Trask's numerous written requests to preserve all records, the Respondents destroyed countless public records, "shredded" investigatory notes and reports, "double deleted" and otherwise destroyed computer electronic records and e-mails pertaining directly to and involving the accident/death investigation, and violated the Trial Court's order requiring production of the relevant computer hard drives.⁸ (R.pp.22-25, paras. 20, 28-33; R.pp.46-47; R.pp.93-94; R.p.108, paras. 2-3; R.p.109, paras. 1-2; R.pp.125-128; R.p.130, line 1 – R.p.131, line 21; R.p.132, line 17 – R.p.133, line 25, R.p.134, line 1 – R.p.135, line 7, R.p.135, line 22 – R.p.136, line 5; R.pp.143-144; R.pp.153-171; R.p.172; R.p.180, lines 11-20; R.p.181, lines 8-17; R.p.183, line 1 – R.p.184, line 3; R.p.197, lines 7-19; R.p.718-719, 720-721, paras. 12(a)-(b), 13(a), 15(a)-(b)).

⁸ In one instance, by removing and changing the hard drive (R.p.180, lines 11-16; R.p.181, lines 8-17) and, in the case of Coroner Copeland, by selling the computers containing the official records to a third-party. (R.p.136, line 6 – R.p.137, line 1).

Amazingly, and in a rather circular argument, the Respondents then claimed their unlawful destruction of the various investigatory records provided them with an absolute defense to Mr. Trask's FOIA requests since the public records no longer either physically and/or electronically existed and, therefore, could not be obtained and/or re-created so as to be produced.⁹

1. SCDPS' Actions And/Or Inactions

On 23 February 2006, approximately three months after the accident, Mr. Trask wrote to Corporal Paul J. Brouthers of the South Carolina Highway Patrol requesting the SCDPS "preserve all records related to the [A]ccident and the subsequent investigation". (R.p.21, para. 15; R.p.45, para. 15; R.p.114; R.p.93; R.p.107, para. 3; R.p.718, para. 12(a)). On 27 February 2006, Mr. Trask sent a FOIA request to SCHP Lieutenant Ted M. Strickland seeking copies of "all records, excluding photo[graph]s, pertaining to the [A]ccident". (R.p.21, para. 16; R.p.45, para. 16; R.p.107, para. 4; R.p.117; R.p.119, lines 10-18; R.p.718, para. 12(a)). This included copies of the audio radio transmissions related to the Accident. (R.p.117; R.p.119, line 19 – R.p.120, line 11). The SCDPS partially responded on 8 March 2006, but failed to include any handwritten notes or copies of recorded radio transmissions and, in addition, "many of the documents provided were illegible and of poor quality and impossible to read" (R.pp.21-22, para.

⁹ This "defense" obviously ignores the obvious point that had the Respondents retained the hard drives and produced them as directed by the Trial Court then, at least, there was a good chance the electronic investigatory records could have been produced as Mr. Trask repeatedly requested.

17; R.p.107, para. 4; R.p.718, para. 12(a)). Additionally, SCDPS' Leigh Watkins ("Ms. Watkins")¹⁰ testified the transmission should have been available on 27 February 2007, as they were to be retained for 180 days, but she did not recall sending them to Mr. Trask. (R.p.120, line 12 – R.p.123, line 9). She conceded the records no longer existed. (R.p.123, line 10 – R.p.124, line 22).

Mr. Trask, on 18 May 2006, requested Ms. Watkins to provide him with copies of the investigatory field notes and the coroner's toxicology report. (R.p.22, para. 18; R.p.45, para. 18; R.pp.661-662; R.p.718, para. 12(a)). The SCDPS provided illegible copies of the field notes on 20 June 2006. (R.p.22, para. 18; R.p.45, para. 18; R.p.718, para. 12(a)). Mr. Trask then repeatedly sought to review the original file, but was not allowed to see it until 10 July 2006. (R.p.22, para. 18; R.p.45, para. 18).

On 12 December 2006, Mr. Trask sent a written FOIA request to SCDPS seeking "e[-]mail communications between several of the investigating SCHP troopers BCSO Captain Robert Bromage[,] and Coroner Copeland." (R.p.22, para. 19; R.p.45, para. 19; R.p.718, para. 12(a)).¹¹ Ms. Watkins advised Mr. Trask on 15 December 2006, that the "SCDPS could not supply the requested records because the SCHP troopers had 'double deleted' the records from their e-mail accounts." (R.p.22, para. 20; R.p.718,

¹⁰ Ms. Watkins is the Information Office for the SCDPS' Office of General Counsel. (R.p.316, para. 3). Ms. Watkins received and ostensibly responded to all of Mr. Trask's FOIA requests. (R.p.316, para. 4).

¹¹ Captain Robert Bromage of the Beaufort County Sheriff's Office was assigned to the Beaufort County Coroner's Office as its death investigator.

para. 12(a)).¹² Mr. Trask made several subsequent requests to the SCDPS seeking restoration of the deleted e-mails, as well as a copy of the SCDPS' written policy governing its e-mail system. (R.p.22, para. 20; R.p.718, para. 12(a)). SCDPS never provided either any of the deleted e-mails or an explanation of its e-mail use/retention policy. (R.p.22, para. 20; R.p.718, para. 12(a)). In addition, Mr. Watkins ultimately advised Mr. Trask that SCDPS had provided him all of the "records to which he was entitled" (R.p.22, para. 20).

2. Coroner Copeland's Actions And/Or Inactions

Mr. Trask, on 23 January 2006, requested Coroner Copeland to provide him with a copy of any statement Coroner Copeland obtained from Mr. James Irby – the Fripp Island Security Gate guard – but never received a response. (R.p.108, para. 1; R.p.125; R.p.719, para. 13(a)). On 21 February 2006, Mr. Trask wrote to Coroner Copeland "requesting the Coroner's office preserve all records, including audio recordings and e-mail correspondence related to the accident." (R.p.24, para. 28; R.p.46, para. 28; R.pp.93-94; R.p.108, para. 3; R.p.143). A month later, on 20 March 2006, Mr. Trask submitted a written request to Coroner Copeland seeking "a copy of the Coroner's report and also [Captain] Bromage's inquest investigation field notes and reports, as well as the reports from the MAIT investigation. (R.p.24; R.p.46, para. 29; R.p.108, para. 2; R.p.109, para. 1; R.p.126;

¹² "Double-deleting" e-mails involves deleting an e-mail from the e-mail service mailbox which, in turn, moves the electronic document to the e-mail "deleted items" folder and, thereafter, purposively deleting the document from the "deleted items" folder. (R.p.134, line 14 – R.p.135, line 7).

R.p.721, para. 15(a)). Coroner Copeland partially responded on 7 April 2006, but failed to provide a "copy of his own handwritten field notes[,] any reports pertaining to the MAIT investigation, or any . . . field notes and reports prepared by [Captain] Bromage" (R.p.24, para. 30; R.p.46, para. 30; R.p.108, para. 2; R.pp.109-110, paras. 1-2; R.pp.153-171). Seven days later, Mr. Trask submitted another written request to Coroner Copeland concerning Captain Bromage's and the other investigator's handwritten notes, as well as Coroner Copeland's handwritten notes. (R.p.24, para. 31; R.p.47, para. 31; R.p.108, para. 2; R.pp.109-110, p.3, para. 1; R.pp.127-128; R.p.132, line 17 – R.p.133, line 12; R.p.721, para. 15(b)). Coroner Copeland advised Mr. Trask on 19 April 2006, "all of the handwritten notes and reports from the interviews . . . had been 'destroyed'." (R.p.24, para. 32; R.p.47, para. 32; R.p.109, paras. 1-2; R.pp.172-173; R.p.130, line 1 – R.p.131, line 21; R.p.132, line 17 – R.p.133, line 25).¹³ Captain Bromage confirmed he routinely destroyed all his handwritten interview notes made during his investigations as he usually reduced the notes to an incident report or the like. (R.p.183, line 1 – R.p.184, line 3).

Mr. Trask made a written FOIA request to Coroner Copeland on 22 June 2006, seeking certain cell phone records and e-mail communications. (R.pp.24-25, para. 33; R.p.47, para. 33; R.p.108, para. 3; R.p.144; R.pp.718-

¹³ Captain Bromage repeatedly refused Mr. Trask's requests for a copy of the Fripp Island Security Gate logs. On 1 September 2006, Captain Bromage advised Mr. Trask the handwritten logs were maintained but not disseminated to other than law enforcement personnel on privacy grounds. (R.p.175, lines 1-20). Captain Bromage ignores the fact that once the logs came into his official possession they became public documents producible under FOIA.

719, para. 12(b)).¹⁴ Coroner Copeland responded on 13 July 2006, refusing to produce the cell phone and e-mail records asserting they were not covered by FOIA and refusing to produce the e-mail records. (R.pp.24-25, para. 33; R.p.108, para. 3; R.p.137, lines 2-8; R.p.145). Mr. Trask made another written FOIA request to Coroner Copeland on 20 July 2006, seeking a list of the Deputy Coroners, their certificates of appointment, and the identity of the person or persons administering the oath to them. (R.p.25, para. 34; R.p.108; para. 5; R.p.148; R.p.137, lines 8-15; R.p.720, para. 13(c)). No response was forthcoming. (R.p.25, para. 34; R.p.108, para. 5; R.p.137, lines 8-23; R.p.720, para. 13(c)).

Coroner Copeland testified he routinely "double deleted" his e-mails. (R.p.134, line 1 – R.p.135, line 7).¹⁵ He also admitted the e-mails he deleted

¹⁴ Coroner Copeland used his personal e-mail address and personal e-mail account for official county business even though he believed he had an official Beaufort County e-mail address. (R.p.137, lines 2-17). Coroner Copeland erased all of those e-mails even though for official county coroner business. (R.p.135, line 22 – R.p.136, line 5). Similarly, Captain Bromage accessed his personal e-mail address and account from his county-owned computer for official county business and routinely deleted the e-mails claiming "a volume issue." (R.p.176, line 2 – R.p.178, line 11). Captain Bromage did this even though he was assigned an official Beaufort County e-mail address. (R.p.196, p.43, lines 9-25). Moreover, Captain Bromage's county-issued computer's hard drive "fried sometime [in the] [S]ummer [of 2007]" and BCMIS "replaced the hard drive in the laptop [he] used", thereby completely eliminating any ability to re-create the e-mails. (R.p.180, lines 11-16; R.p.181, lines 8-17). None of Captain Bromage's information on the conveniently "fried" hard drive had been backed up. (R.p.180, lines 17-20; R.p.181, lines 8-17; R.p.197, lines 7-19).

¹⁵ Coroner Copeland stated he deleted the coroner's office correspondence "[b]ecause it beca[me] cumbersome" and did so as a matter of course. (R.p.135, line 22 – p.91, line 5). Coroner Copeland admitted he wished he had not deleted the e-mails. (R.p.136, lines 3-5).

were probably covered by Beaufort County's records retention policy – Section 12-518-3. (R.p.135, lines 8–16).¹⁶

On 11 December 2006, 5 February 2007, and 25 February 2007, Mr. Trask made several written FOIA requests to Coroner Copeland and/or his Deputy Coroner, Connie Herman, seeking, among other things, (a) e-mail correspondence on the Coroner's Office's computer hard drives,¹⁷ (b) various toxicology examinations conducted by the Coroner's Office, and (c) the radio call log for the night of the accident. (R.p.25, paras. 35-37; R.pp.47-48, paras. 35-37; R.p.104, para. 4; R.p.111, para. 3; R.p.146; R.p.148; R.p.149; R.p.151; R.p.138, line 24 – R.p.142, line 6; R.pp.719-720, paras. 12(c). 13(b)). Coroner Copeland never responded to any of these FOIA requests even though subsequent follow-up requests were made. (R.p.25, paras. 35-37; R.p.108, para. 4; R.p.111, para. 3; R.p.138, line 24 – R.p.142, line 6; R.pp.719-720, paras. 12(c), 13(b)).

3. BCMIS' Actions And/Or Inactions

The BCMIS "is responsible for comprehensive data management and support and service to other [Beaufort] [C]ounty departments for records

¹⁶ Coroner Copeland conceded he should not have double deleted any of the "official business" e-mails from his e-mail account, especially if they involved anything to do with a coroner's inquest since the Beaufort County record retention policy (Section 12-518.3) required him to maintain those records. (R.p.135, line 8 – R.p.136, line 12).

¹⁷ Coroner Copeland operated the Beaufort County Coroner's Office (same employees, same official vehicle, same cell phones, same computers, *etc.*) out of his funeral home business – Copeland Company of Beaufort, LLC (the "Copeland Funeral Home"). He refused, despite a court order, to produce the computer hard drive from his "office" computer as he has sold the Copeland Funeral Home and the computers, admittedly containing official Coroner's Office records, to third-parties and had erased the hard drive prior to the sale. (R.p.136, line 6 – R.p.137, line 1).

management. (R.p.26, para. 41; R.p.48, para. 41). Mr. Trask submitted a written request to the BCMIS on 12 December 2006, "requesting, *inter alia*, a copy of the Beaufort County records retention schedule for all e-mail correspondence." (R.p.26, para. 42; R.p.48, para. 42; R.p.112, para. 1; R.p.192, line 25 – R.p.194, line 13).¹⁸ BCMIS responded on 11 January 2007, providing certain information/documentation but omitting the e-mail correspondence retention schedule. (R.p.26, para. 43; R.p.112, para. 1). Mr. Trask's subsequent request for clarification as to the BCMIS' ability to re-create electronic records went unanswered. (R.p.194, line 14 – R.p.196, line 2; R.pp.253-254).

Even though charged with the duty "to restore damaged or destroyed public records," BCMIS failed to make any effort to restore any of the deleted e-mail correspondence and/or records related to the accident. (R.p.26, paras. 44-45; R.p.112, para. 1). Furthermore, Frank Guth confirmed that Beaufort County did not have any type of policy and/or procedure and/or standard governing the retention of official Beaufort County business e-mail correspondence. (R.p.196, p.43, lines 3-8).

¹⁸ Frank Guth, a BCMIS employee, confirmed that after the BCMIS' 30-day e-mail back-up period has ended any electronic document would be forever lost. (R.p.192, lines 7-24). Mr. Guth noted that certain software made it possible to retrieve "double-deleted" e-mails from a computer hard drive. (R.p.192, lines 1-22; R.p.197, lines 1-6). Clearly, had Sheriff Tanner's office needed to recover and/or re-create any e-mails which would have assisted in a criminal prosecution purpose, then Beaufort Court would have used such software without hesitation. (R.p.197, p.54, lines 1-6).

4. Sheriff Tanner's Actions And/Or Inactions

Mr. Trask, on 13 December 2006, sent a written request to Sheriff Tanner seeking copies of "e-mail records [from Captain] Bromage pertaining to the investigation of the accident." (R.p.27, para. 49; R.p.49, para. 49; R.pp.109-110, para. 3; R.p.181, line 2 – R.p.182, line 3; R.p.184, lines 10-24; R.pp.185-186; R.p.722, para. 15(c)).¹⁹ A follow-up request was made on 7 January 2007. (R.p.27, para. 49; R.p.49, para. 49; R.p.110, para. 3; R.p.147). Sheriff Tanner advised Mr. Trask that Beaufort County's legal counsel, Kelly Golden, Esquire ("Attorney Golden"), would be responding. (R.p.27, para. 49; R.p.49, para. 49; R.p.110, para. 3; R.p.147). On or about 11 January 2007, Attorney Golden advised Mr. Trask "some of the requested information [and/or documentation] did not exist in written form and could not

¹⁹ BCSO's Chief Deputy Michael Hatfield advised Captain Bromage of Mr. Trask's request for the BCSO to preserve all e-mail correspondence associated with the Trask Accident investigation, but Captain Bromage was never directed to actually preserve any of the information and/or documentation. (R.p.181, line 2 – R.p.182, line 3). Seems like a distinction without any real difference. Captain Bromage double deleted his e-mails from his county-owned computer even though some of the e-mails admittedly involved his investigations for the Coroner's Office – including specifically the investigation of Paul Trask's death. (R.p.176, line 2 – R.p.178, line 23; R.p.179, line 7 – R.p.182, line 20). Captain Bromage said no one in Beaufort County government told him to retain his e-mail correspondence. (R.p. 176, line 2 – R.p.178, line 23; R.p.181, line 18 – R.p.182, line 3). Nevertheless, Captain Bromage knew or should have known about Mr. Trask's request to Chief Deputy Hatfield. (R.pp.185-186). Moreover, Captain Bromage's superiors, both Chief Deputy Hatfield and Coroner Copeland, possessed Mr. Trask's written requests to preserve the investigatory records, including e-mails. (R.p.143; R.pp.185-186). In any case, Captain Bromage certainly would not have received any "guidance" from the Sheriff's Department as Beaufort County Chief Deputy Sheriff Michael Hatfield also double-deletes his e-mails. (R.p.203, line 16 – R.p.204, line 17). Chief Deputy Hatfield also double-deleted all of his e-mails. (R.p.203, line 3 – R.p.204, line 23). Frank Guth noted Beaufort County did not have any policy regarding a Beaufort County employee's use of his or her personal e-mail address and personal e-mail account for official county business. (R.p.196, p.43, lines 9-25).

be provided.” (R.p.27, para. 50; R.p.110, para. 3; R.p.187). That same day, even though Mr. Trask requested a written listing of the “records which could not be produced”, no listing was ever produced. (R.p.27, para. 51; R.p.110, para. 3; R.p.190).

On 3 February 2007, Mr. Trask submitted a written request to Sherriff Tanner seeking a copy of the written authorization which permitted Captain Bromage to use his personal e-mail account for official county business, as well as the BCSO’s written e-mail retention/destruction policy. (R.p.27, para. 52; R.p.110, para. 4; R.p.198, p.1). Sheriff Tanner never responded. (R.p.27, para. 52; R.p.110, para. 4).

Mr. Trask, on 24 March 2007, requested Sheriff Tanner to provide a copy of the investigating deputies’ “audio and video recordings generated by the equipment from the accident scene . . . and policies concerning the retention and management of [such] equipment”. (R.p.110; R.p.205, line 1 – R.p.207, line 10; R.p.722). Even though Mr. Trask made several follow-up requests, Sheriff Tanner did not fully respond. (R.p.110).²⁰ Chief Deputy Hatfield responded to the extent he indicated none of the responding BCSO deputies made either audio or video recordings of the Accident, but refused to answer Mr. Trask’s other questions regarding destruction of public records, recordings of radio traffic, etc. (R.p.207, line 11 – R.p.212, line 16; R.pp.213-219).

²⁰ The BCSO did have a “computer usage policy.” (R.pp.199-201). Unfortunately, SOP 214 did not address e-mail retention or mandatory back-up procedures. (R.pp.199-201).

5. Beaufort County's Actions And/Or Inactions

On 14 December 2006, Mr. Trask sent a written request to Beaufort County's Communications Supervisor, Gwen Duhon ("Ms. Duhon"), "seeking copies of all of the Beaufort County E911 audio and computer records, reports, photo[graph]s[,] and investigation records pertaining to [the] accident". (R.p.29, para. 59; R.p.50, para. 59). Mr. Trask's request included all of the "records for all personnel who [had] responded from the [Beaufort County] Sheriff's Office, EMS, Fire Department, Coroner's Office[,] and [SCHP]". (R.p.29, para. 59; R.p.50, para. 59). Ms. Duhon advised Mr. Trask the next day that she needed to obtain permission from each individual responding agency in order to release the information. (R.p.29, para. 60; R.p.50, para. 60). Ultimately, Ms. Duhon produced three compact discs containing the information and/or documentation (R.p.29, para. 60; R.p.50, para. 60), including computer voice time stamps for the Fire Department's audio calls. (R.p.29, para. 60). On 23 January 2007, Mr. Trask requested Ms. Duhon to have computer voice time stamps included for the Sheriff's Office's and EMS' recordings (R.p.29, para. 62), Ms. Duhon was unable to do so because of "the amount of time [which] had elapsed, as the [master recording] disc had been 'recycled'." (R.p.29, para. 62).

Additionally, since the original three CDs did not contain all of the recordings either to or from Coroner Copeland, Mr. Trask again submitted a written request to Ms. Duhon asking Beaufort County to produce any such recordings. (R.pp.29-30, para. 63). Beaufort County failed to produce the records because, as Ms. Duhon advised, the "master tape" had been recycled

after 60 days, the original audio records had been destroyed, there was no backup of the recordings, and she had failed to make a copy of the three CDs which she had originally provided to Mr. Trask. (R.pp.29-30, para. 63).

On 2 February 2007, Mr. Trask made a written request to Beaufort County seeking copies of the 911 system's intergovernmental agreements, as well as "the written operational procedures for the Beaufort County 911 system, the records inventory forms[,] and all other documents used to prepare records retention schedules for every type of record created by the operation and use of the Beaufort County 911 system. (R.p.30, para. 64; R.pp.110-111, p.4, para. 1; R.p.111, para. 2; R.p.151; R.p.220; R.p.319, para. 8; R.p.720, para. 13(d)). Although Attorney Golden submitted a very limited response on 23 February 2007 (R.pp.110-111, para. 1; R.p.151), Beaufort County never produced the 911 system documents. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.pp.221-223; R.p.720, para. 13(e)).

Mr. Trask made several other FOIA requests to Beaufort County (either original requests or follow-ups) on 5 February 2007, 25 February 2007, 10 May 2007, 16 May 2007, 20 May 2007, and 14 June 2007 (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.225, lines 22-25; R.p.231, line 6 – R.p.232, line 23; R.p.233, line 2 – R.p.234, line 15; R.p.235, lines 14-23; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.246, line 23; R.p.247; R.p.252; R.p.319, paras. 7-8; R.p.720, para. 13(f)), seeking, among other things, the "911 printout of telephone and cell phone numbers [which] called the Beaufort County dispatch system [on the night of the Accident]", a

"complete print-out of all Beaufort County computer aided dispatch . . . entries made [on the night of the Accident]", a copy of the "records including the operational manual and written operating procedures pertaining to the ComLog digital recording device in service at the Beaufort County 911 center", a copy of the "records including the operation manual and written operating procedures pertaining to the Beaufort County 800mhz radio system", and a copy of the "handbook entitled 'Freedom of Information Act Handbook for County Government' authored by [Attorney] Golden while she [was employed elsewhere]." (R.pp.111-112, paras. 2-6, 9-10; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.246, line 23). In response to those various requests Beaufort County either (a) failed to produce the documents, citing privacy or homeland security concerns, or (b) directed Mr. Trask elsewhere, or (c) asserted the information was unavailable, or (d) simply ignored the request. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.226, line 2 – R.p.228, line 25; R.p.229, line 9 – R.p.230, line 16; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.246, line 23; R.pp.248-249; R.pp.250-251; R.pp.719-721, paras. 12(c), 13(f), 14(a)-(c)).

Prior to **18 December 2008**, both Marshall Waldron, Esquire (previously representing the Respondents herein) (R.p.258, paras. 1, 3) and Mr. Winn, Director of Beaufort County's Emergency Management Department ("BCEM") (R.p.318, para. 3) **affirmed** that Beaufort County **had turned over all relevant documents** to Mr. Trask and complied with **FOIA**. (R.p.259, paras. 5-6; R.pp.318-319, paras. 4-6). Notwithstanding these sworn

affirmances to the contrary, the Respondents later provided Mr. Trask on **18 December 2008**,²¹ a file folder consisting of documents responsive to several of Mr. Trask's prior FOIA requests (the "Gwen Duhon File").²² (R.p.719, para. 12(c); R.pp.761-767; R.pp.419-588). Furthermore, on **19 December 2008**,²³ Beaufort County and Coroner Copeland finally produced the previously requested toxicology reports to Mr. Trask. (R.p.719, para. 12(d); R.p.1160).

Finally, Beaufort County's handling of Mr. Trask's request for the 911 written operational procedures demonstrates Beaufort County's and, generally speaking, the Respondents' overall handling of Mr. Trask's FOIA requests. On 2 February 2007, Mr. Trask sent William Winn a request asking him to "[p]lease supply [Mr. Trask] with a copy of the written operational procedures for the Beaufort County 911 system". (R.p.30, para. 64; R.pp.110-111, p.4, para. 1; R.p.111, p.5, para. 2; R.p.220; R.pp.221-223; R.p.301, para. 8; R.p.720, para. 13(d)). Attorney Golden submitted a very limited response on 23 February 2007. (R.pp.110-111, para. 1; R.p.687). Mr. Trask sent a second FOIA request (R.pp.221-223) specifically stating:

In addition, my request to you of February 2, 2007 stated: 'Please supply me with a copy of the written operational procedures for the Beaufort County 911 system.' **There has been no response from your office to my request for the**

21 This was the day immediately prior to the Trial Court's already scheduled hearing on the Respondents' Motion for Summary Judgment. (R.p.5; R.p.1067).

22 The Respondents' production of the Gwen Duhon File, albeit belatedly, begs the question as to why the documentation was not produced to Mr. Trask pursuant to his FOIA.

23 This was the day of the Trial Court's scheduled hearing on the Respondents' Motion for Summary Judgment. (R.p.1067).

written operational procedures. The table of contents shown above notes "Section P Dispatch Operational Procedures". Please be advised that the referenced individual procedures were not included in the documents I received under Ms. Golden's cover letter dated February 23, 2007. This is to serve as my 2nd official FOIA request to inspect and copy those documents. Please advise me when you will make the documents available.

(R.pp.221-223) (Emphasis added). Attorney Golden provided the "Table of Contents" which showed "Section P - Dispatch Operational Procedures" (Written operational procedures required under [S.C. Code Ann. §] 23-47-20(C)(9)). (R.p.687). Nevertheless, in its usual fashion, Beaufort County never produced the 911 system documents, including the individual referenced procedures. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.pp.221-223; R.p.236, line 14 – R.238, line 7; R.p.687; R.p.720, para. 13(e)).

Mr. Winn testified he knew Mr. Trask requested a copy of the 911 procedures, but did not know if the documents were ever provided to Mr. Trask. (R.p.233, line 21 – R.p.234, line 10). Mr. Winn noted he had privacy concerns about turning over the documents. (R.p.235, lines 10-23). Nevertheless, about six months later, Mr. Winn submitted his affidavit affirming "[t]o the best of [his] knowledge, all responsive public records were or ha[d] now been produced for inspection and copying [to Mr. Trask] in accordance with [S.C. Code Ann. §§] 30-4-10 *et seq.* (R.p.319, para. 6). Furthermore, Mr. Winn acknowledged the even though he had "received Mr. Trask's February 2, 2007[,] FOIA request regarding the operational

procedures for the 911 system . . . there [were] none to give him because there is no consolidated or written procedures for 911 because the 911 system is owned by a multitude of companies.” (R.p.319, para. 8).

On 18 December 2008, notwithstanding these “truths”, when Beaufort County finally turned over Gwen Duhon’s file at the 11th hour it contained several different draft letters from Mr. Winn in response to Mr. Trask’s initial 2 February 2007 FOIA request – none of which were sent. (R.pp.435-441; R.pp.447-452) Each draft letter references the requested 911 operating procedures which were never delivered, although the referenced production copying cost was noted to be approximately \$400.00. (R.p.435; R.p.438; R.p.439; R.p.447; R.p.450).

IV. ARGUMENT AND CITATION OF AUTHORITY

Summary Of The Argument

The Trial Court incorrectly and improperly granted the Respondents’ summary judgment on all of Mr. Trask’s claims. The record shows Mr. Trask had presented substantial and significant evidence demonstrating the Respondents’ had voluntarily, intentionally, and knowingly violated the FOIA. This decision should and must be reversed in all respects and this matter remanded back for a trial on the merits.

Undoubtedly, summary judgment is a drastic remedy which should be sparingly used.²⁴ More importantly, since “only ‘a mere scintilla of evidence’

²⁴ Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 149, 533 S.E.2d 597, 600 (Ct. App. 2000) (*citing* Carolina Alliance for Fair Employment v. S. C. Dept. of Labor, Licensing and Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999)).

is required to defeat a motion for summary judgment when[, as here,] the burden of proof is by a preponderance of the evidence,"²⁵ the Circuit Court should never have granted summary judgment to the Respondents in this case. Additionally, where, as herein, there is an overwhelming need to conduct further inquiry into the facts in order to clarify application of the law, summary judgment is not appropriate and prohibited.²⁶

Material issues of fact clearly existed regarding the Respondents' many, many FOIA and Public Records Act violations accomplished through a multitude of incomplete responses and/or complete failures to respond to Mr. Trask's legitimate requests for public records.

Standard of Review

Under Rule 56(c), SCRCP, summary judgment should only be granted if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law."²⁷ "In determining whether any triable issue of fact exists, [precluding] summary judgment, the evidence and all inferences which can be reasonably drawn therefrom **must be viewed in the light most**

²⁵ Weston v. Kim's Dollar Store, 385 S.C. 520, 529, 684 S.E.2d 769, 774 (Ct.App. 2009) (citing Hancock v. Mid-South Management Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). See also Shirley's Iron Works, Inc. v. City of Union, 387 S.C. 389, 397, 693 S.E.2d 1, 3 (Ct.App. 2010). The Trial Court issued summary judgment on 13 March 2008 (SI Order, p.9), and, therefore, did not have the benefit of the Supreme Court's bright-line "scintilla of evidence" standard adopted in Hancock v. Mid-South Management Co. to apply.

²⁶ Joyner v. Greenville Hotel Assoc. L.P., 364 S.C. 237, 240, 612 S.E.2d 727, 728 (Ct.App. 2005) (citing Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)).

²⁷ See Rule 56(c), SCRCP.

favorable to [Mr. Trask].²⁸ “If **any** triable issues exist, those issues must [be submitted] to the jury” for determination.²⁹ **“All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the [Respondents]”**, and “where further inquiry into the facts of the case is desirable to clarify the application of the law”, summary judgment is improper.³⁰

Summary Judgment Was Improper Since Mr. Trask Presented More Than A “Mere Scintilla” Of Evidence Showing The Respondents Had Repeatedly Violated Both The South Carolina Freedom Of Information Act And The South Carolina Public Records Act

Early on November 22, 2005, Mr. Trask believed his son, Paul Trask, died in a single-car accident on the Sea Island Parkway. (R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8). Mr. Trask only “believes” this because he really doesn’t know. Not only does Mr. Trask not know if Paul Trask actually died that early November morning, but, even if he did, Mr.

²⁸ Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000) (citing Strother v. Lexington County Rec. Commission, 332 S.C. 54, 504 S.E.2d 117 (1998)) (Emphasis added).

²⁹ Young v. S.C. Dept. of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999) (citing Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991)) (Emphasis added).

³⁰ Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 149, 533 S.E.2d 597, 600 (citing Carolina Alliance for Fair Employment v. S.C. Dept. of Labor, Licensing and Regulation, 337 S.C. 476, 523 S.E.2d 795; Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999)) (Emphasis added) “Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 149, 533 S.E.2d 597, 600 (citing Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000)).

Trask does not really know the “how” or the “why”. (R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8). Mr. Trask was entitled to have this knowledge as any parent would when having to bury a child. Mr. Trask was entitled to know if it was Paul Trask and, if so, how he died. (R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8).³¹ Tragically, the Respondents, heaping uncertainty, confusion, and deception upon Mr. Trask’s unbearable grief, prevented Mr. Trask from having answers to these critically important questions.

The Freedom Of Information Act

The FOIA³² granted Mr. Trask the right to inspect and/or copy any record of a public body, unless the record fits within one of several narrowly construed statutory exemptions.³³ In this vein, the clear legislative purpose behind the FOIA is as follows:

The [South Carolina] General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of [the FOIA] must be construed so as to make it possible for citizens, or

³¹ Mr. Trask, et al. brought a wrongful death, survival, negligence action against Hess Corporation, Xpress Lane, and others. See L. Paul Trask, Jr., as next of kin and as the duly appointed representative of the Estate of L. Paul Trask, III, deceased v. Hess Corporation; Xpress Lane, Inc. d/b/a Xpress Lane #3; and Xpress Lane, Inc., (Civil Action 2006-CP-10-1276, Beaufort County Court of Common Pleas). The case was ended through a monetary settlement and is immaterial to this matter.

³² S.C. Code Ann. §§ 30-4-10, *et seq.* (Thomson Reuters West 2008).

³³ S.C. Code Ann. § 30-4-30 (Thomson Reuters West 2008).

their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.³⁴

The FOIA applies to any “public body” which is statutorily defined to include any governmental body or political subdivision of the state including counties, municipalities, townships, or “any organization, corporation or agency supported in whole or in part by public funds or expending public funds. . . .”³⁵ Furthermore, the FOIA defines a “public record” which is subject to disclosure to include “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.”³⁶ The FOIA clearly specifies its application is not limited to paper documents, but necessarily includes e-mails, computer discs, audio tapes, videotapes, and any information stored on any form of electronic or other non-paper media.³⁷ Furthermore, the FOIA’s definition of “public record” inevitably encompasses e-mails stored and/or retrievable from a hard drive or back-up storage disk or tape. As such, e-mails and other electronically-stored

³⁴ S. C. Code Ann. § 30-4-15 (Thomson Reuters West 2008). *See generally* Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 280-281, 580 S.E.2d 163, 166 (Ct.App. 2003) (“The essential purpose of the FOIA is to protect the public from secret government activity.”).

³⁵ S.C. Code Ann. § 30-4-20(a) (Thomson Reuters West 2008). For example, a sheriff’s department is a public body under FOIA. *See* Burton v. York County Sheriff’s Dept., 358 S.C. 339, 594 S.E.2d 888 (Ct.App. 2004).

³⁶ S.C. Code Ann. § 30-4-20(c) (Thomson Reuters West 2008).

³⁷ S.C. Code Ann. § 30-4-20(c) (Thomson Reuters West 2008).

materials which have been deleted, erased, and/or emptied from a computer hard drive (or other storage device) and, in turn, which are still recoverable should reasonably be subject to disclosure under a FOIA request.³⁸

Our courts have consistently interpreted FOIA as being broadly pro-disclosure with all exemptions very narrowly construed. FOIA exceptions have been interpreted in the light of the purpose of the FOIA: “to protect the public from secret government activity,”³⁹ and “to guarantee the public reasonable access to certain activities of the government.”⁴⁰ This means the governmental entity has the burden of demonstrating an FOIA exception applies,⁴¹ instead of the requestor showing the exception does not apply. Moreover, when documents or other records containing information which is “public” and, at the same time contain exempt information via one or more FOIA exceptions, FOIA requires the public entity to redact the exempt portions and make the non-exempt portions available.⁴²

³⁸ See generally S.C. Code Ann. § 30-4-20(c) (Thomson Reuters West 2008).

³⁹ S.C. Tax Com’n v. Gaston Copper Recycling Corp., 316 S.C. 163, 169, 447 S.E.2d 843, 846 (1994) (citing Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991)).

⁴⁰ Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 281, 580 S.E.2d 163, 166 (citing Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996)).

⁴¹ Post Publishing Co. v. City of N. Chas., 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005).

⁴² See S.C. Code Ann. § 30-4-40(b).

FOIA requires each public body receiving a written request for records to advise the requestor of the public body's FOIA determination and reasons therefore within 15 days after receipt of the FOIA request.⁴³ FOIA also requires that "if the request is granted, the record must be furnished or made available for inspection or copying."⁴⁴ If, however, the public body fails to mail or personally provide the requestor written notification of the determination as to the public availability of the record within the 15 day limit, the request is deemed approved.⁴⁵ Furthermore, FOIA provides a private right of action to see judicial enforcement of FOIA's provisions.⁴⁶ In addition to declaratory and/or injunctive relief, if a requestor prevails, he/she may be awarded costs and attorney's fees along with other equitable relief as deemed appropriate.⁴⁷

As the South Carolina Supreme Court has noted, "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature [and] FOIA must be construed so as to make it possible for citizens to learn and report fully the activities of public officials."⁴⁸ The

⁴³ S.C. Code Ann. § 30-4-30(c).

⁴⁴ S.C. Code Ann. § 30-4-30(c).

⁴⁵ S.C. Code Ann. § 30-4-30(c). See Litchfield Plantation Co., Inc. v. Georgetown County Water & Sewer Dist., 314 S.C. 30, 32, 443 S.E.2d 574, 575 (1994)

⁴⁶ See S.C. Code Ann. § 30-4-100(a) (Thomson Reuters West 2007). See also S.C. Code Ann. § 30-4-110 (Thomson Reuters West 2007) (criminal penalties for a willful FOIA violation).

⁴⁷ S.C. Code Ann. § 30-4-100(b) (Thomson Reuters West 2007).

⁴⁸ New York Times Co. v. Spartanburg County School Dist. No. 7, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007) (citing Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864-865 (2001); S.C. Code Ann. § 30-4-15 (Thomson West Supp. 2007)).

underlying purpose of FOIA requires a public body in possession of public records to preserve and maintain such records and, therefore, FOIA necessarily imposes an implied duty on a public body to do so. Without such an implied duty to preserve and maintain public records, the legislative purpose behind FOIA is essentially eviscerated.

While South Carolina's courts have not expressly ruled that FOIA imposes an implied duty on a public body to preserve and maintain public records, the Michigan Supreme Court has done so based upon a similar freedom of information statute. In Walloon Lake Water System, Inc. v. Melrose Township,⁴⁹ the Supreme Court concluded the Michigan FOIA implied a duty to "preserve and maintain [records requested pursuant to the FOIA] until access has been provided or a court executes an order finding the record to be exempt from disclosure."⁵⁰ This ruling imposes a duty under Michigan's FOIA to preserve and not to destroy records once a FOIA request has been made.⁵¹ Likewise, the same implied duty is or, at the very minimum, should be imposed under South Carolina's FOIA to ensure that of the underlying legislative purposes of the FOIA are carried out in the true spirit of the law.

⁴⁹ Walloon Lake Water System, Inc. v. Melrose Township, 163 Mich. App. 726, 415 N.W.2d 292 (1987).

⁵⁰ Walloon Lake Water System, Inc. v. Melrose Township, 163 Mich. App. 726, 732, 415 N.W.2d 29, 295.

⁵¹ Walloon Lake Water System, Inc. v. Melrose Township, 163 Mich. App. 726, 732, 415 N.W.2d 29, 295.

Similarly, the United States Supreme Court, in Kissinger v. Reporters' Committee for Freedom of the Press,⁵² noted that while the Federal FOIA, "does not obligate agencies to create or retain documents; it [clearly] obligates them to provide access to those [documents] which it in fact has created and retained."⁵³ Stated otherwise, while either a state's and/or the federal government's particular version of the FOIA does not require or mandate that public bodies actually create public documents, a FOIA does require a state and/or federal public body to retain, preserve, and maintain those public documents which the particular public bodies have, in fact, chosen to create.⁵⁴

The Public Records Act

Unlike the FOIA, the South Carolina Public Records Act⁵⁵ actually does require a public body to create, retain, maintain, and preserve its public records. By analogy, as noted in Kissinger v. Reporters' Committee for

⁵² Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136 (1980).

⁵³ Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, 152.

⁵⁴ The Circuit Court did not address whether any of the Respondents had actual possession and/or control of the requested documents at the time Mr. Trask made his FOIA requests. In Office of Governor v. Washington Post Co., 360 Md. 520, 759 A.2d 249 (2000), the Maryland Supreme Court distinguished Kissinger v. Reporters Committee for Freedom of the Press on the basis that Supreme Court's interpretation of the federal FOIA statute referred to "agency records", while the Maryland FOIA statute, like South Carolina's FOIA, deals with "public records", noting "the cases interpreting the Maryland Act have broadly construed the terms "public record" and "instrumentality of the State government." Office of Governor v. Washington Post Co., 360 Md. 520, 536, 759 A.2d 249, 258.

⁵⁵ See S. C. Code Ann. §§ 30-1-10, *et seq.* (Thomson Reuters West 2007).

Freedom of the Press, “the Federal Records Act, and not the FOIA, requires an agency to actually create records”⁵⁶ The same situation exists in South Carolina.

The Public Records Act creates comprehensive records management programs for South Carolina’s public entities and, importantly, imposes criminal liability on persons who unlawfully and/or illegally remove, delete, deface, alter, mutilate, and/or otherwise destroy public records, unless the destruction or deletion is done pursuant to an approved records retention and/or destruction schedule.⁵⁷ In this vein, the Public Records Act specifically provides:

The legal custodian of public records shall protect them against deterioration, mutilation, theft, loss, or destruction Records must be maintained, copied, or repaired, renovated, rebound, or restored in accordance with standards required by regulation and approved by the department if they are worn, mutilated, damaged, difficult to read, or in danger of loss at the expense of the public body having custody

⁵⁶ Kissinger v. Reporters’ Committee for Freedom of the Press, 445 U.S. 136, 152 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-162 (1975); Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 192, (1975)). The Supreme Court recognized an “agency’s failure to [create and maintain public records] deprives the public of information which might have otherwise been available to it.” Kissinger v. Reporters’ Committee for Freedom of the Press, 445 U.S. 136, 152. See also generally State of Hawai’i Organization of Police Officers (SHOPO) v. Soc. of Professional Journalists – University of Hawai’i Chapter, 83 Hawai’i 378, 402, 927 P.2d 386, 393 (1996) (Finding Hawai’i’s FOIA “requires agencies to provide access to those records that are actually maintained, but nowhere imposes an affirmative obligation to [initially] maintain records.”).

⁵⁷ See S. C. Code Ann. §§ 30-1-30 through 30-1-60, 30-1-80 through 30-1-100 (Thomson Reuters West 2007). See Op. S.C. Atty. Gen., 21 May 2007 (2007 WL 1651338 *6, filed 21 May 2007) (citing Op. S.C. Atty. Gen., 25 August 1997) (“[T] the public policy of this State is ‘to preserve, rather than destroy public records.’ ”) (Emphasis added).

or responsibility if these records are of long term or archival value as determined under the provisions of this chapter.**58**

Consequently, in accordance with statutory law, public records must be “repaired” and/or “restored” if they are “damaged,” at the expense of the public body having custody or responsibility. Importantly, the Public Record Act provides:

No records of long term or enduring value created, including those filed, kept, or stored electronically, or those records converted from paper to magnetic, optical, film or other media in the transaction of public business may be disposed of, destroyed, or erased without an approved records schedule. All records disposals that are carried out in accordance with duly approved records schedules must be documented and reported in accordance with procedures developed by the Archives.**59**

Additionally, the Public Relations Act imposes liability on the records custodian and/or the applicable public official when any public records have been unlawfully destroyed or otherwise disposed of in violation of the law.**60**

58 See S. C. Code Ann. §§ 30-1-30 through 30-1-70 (Thomson Reuters West 2007). The South Carolina Attorney General’s Office has “interpreted [S.C. Code Ann. § 30-1-30] as preventing the destruction of public records in the absence of specific guidance from the Legislature authorizing the destruction of such records. Op. S.C. Atty. Gen., 21 May 2007 (2007 WL 1651338 *7) (citing Op. S.C. Atty. Gen., 30 May 1990) (1990 WL 599196).

59 See S. C. Code Ann. §§ 30-1-90(D) (Thomson Reuters West 2007).

60 See S. C. Code Ann. §§ 30-1-140 (Thomson Reuters West 2007).

Of note, the administrative regulations implementing the Public Records Act contain a number of specific document retention/destruction schedules for various public bodies, including state agencies⁶¹ and counties.⁶² For example, the Public Records Act requires coroners to permanently retain their case files⁶³ which are described to contain, among other things, the following:

documents relating to deaths reported to the Coroner: coroner's report, law enforcement report, autopsy report, evidence report, burial permits, death certificate, forensic request and report, investigative notes, photographs, medical and dental records, subpoenas, and newspaper clippings. Information includes names and addresses, times, dates, places, signatures, and titles. ⁶⁴

County Sheriff's Departments are required to retain, *inter alia*, incident reports for at least five years,⁶⁵ case files for 30 years,⁶⁶ evidence case files until one

⁶¹ See S.C. Adm. Code § 12-1200 (Thomson Reuters West 2009). While some electronic documents may be disposed of, the regulations do not apply to "electronic records which should be retained permanently[an, therefore,] [o]fficial copies of electronic records not covered . . . may not be disposed of unless authorized by the State Archives." See S.C. Adm. Code § 12-1200.

⁶² See S.C. Adm. Code § 12-500 (Thomson Reuters West 2009). Application of the "retentions and dispositions [schedules] apply regardless of physical format, i.e., paper, microfilm, electronic storage, digital imaging, etc. and "[b]efore disposing of public records . . . county governments should insure that the records have no further audit, legal, or fiscal value." S.C. Adm. Code § 12-500.

⁶³ See S.C. Adm. Code § 12-518.3 (Thomson Reuters West 2009).

⁶⁴ See S.C. Adm. Code § 12-518.3.A (Thomson Reuters West 2009).

⁶⁵ See S.C. Adm. Code § 12-502.1 (Thomson Reuters West 2009) ("Records the original report of a[n] . . . incident and pertinent facts surrounding the offense. Information includes incident type, case number, NCIC entry, incident code, premise type, incident location, incident date, time date, reporting area, complaint, victim information,*subject (suspect) data, arrest data, vehicle data witness data, narrative, and UCR data administrative section."). See S.C. Adm. Code § 12-502.1.A (Thomson Reuters West 2009).

⁶⁶ See S.C. Adm. Code § 12-502.10 (Thomson Reuters West 2009).

year after final action in the case,⁶⁷ and dispatch records for three years.⁶⁸ Emergency Services departments must, inter alia, retain dispatch cards for 911 emergency call for three years,⁶⁹ 911 telephone logs for three years,⁷⁰ and radio logs for three years.⁷¹

The Public Entities Failed To Comply With FOIA Or The Public Records Act

Mr. Trask asserted various claims against the Respondents for their numerous FOIA violations. The evidence Mr. Trask presented to the Circuit Court far exceeded the “mere scintilla” requirement needed to defeat the Respondents’ request for summary judgment.⁷² Material issues of fact clearly existed regarding the Respondents’ FOIA violations. The Circuit Court

⁶⁷ See S.C. Adm. Code § 12-502.11 (Thomson Reuters West 2009).

⁶⁸ See S.C. Adm. Code § 12-502.23 (Thomson Reuters West 2009) (“Records each time an officer is dispatched in response to a citizen's call. Information includes complainant's name, complainant's address, and complainant's phone number.”). See S.C. Adm. Code § 12-502.23.A (Thomson Reuters West 2009).

⁶⁹ See S.C. Adm. Code § 12-502.1 (Thomson Reuters West 2009). This includes information “documenting emergency calls dispatched to the Fire Department, the Sheriff's Department, the Police Department[,] or to Emergency Medical Services. Information includes dispatch number, location, incident type, caller name, call back number, unit and dispatch information[,] or unit and response information.” See S.C. Adm. Code § 12-502.1.A (Thomson Reuters West 2009).

⁷⁰ See S.C. Adm. Code § 12-502.3 (Thomson Reuters West 2009). This includes information disclosing the caller’s “name, address, phone number, time and date of call.” See S.C. Adm. Code § 12-502.3.A (Thomson Reuters West 2009).

⁷¹ See S.C. Adm. Code § 12-502.4 (Thomson Reuters West 2009). (“Log of the calls received, calls dispatched, and other radio traffic. Information includes date; time; verbal communications; complainant's name, address and phone number; and responding officer's unit number.”) See S.C. Adm. Code § 12-502.4.A (Thomson Reuters West 2009).

⁷² Weston v. Kim's Dollar Store, 385 S.C. 520, 529, 684 S.E.2d 769, 774 (citing Hancock v. Mid-South Management Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803).

improperly granted summary judgment to the Respondents. That decision must be reversed in all respects and this matter remanded for a trial on the merits.

(a) **FOIA Requests to Which the Public Bodies Did Not Respond**

Mr. Trask made numerous FOIA requests to one or more of the Respondents. Unfortunately, the Respondents, clearly contrary to FOIA's mandatory nature and directives, unilaterally chose **not to respond** to many of those requests in any manner whatsoever. For example:

- Mr. Trask's 11 December 2006, FOIA request to Coroner Copeland's office for all official records, including e-mail records and the hard drive from Deputy Coroner Herman's personal and business computers along with all backup files. (R.p.25, para. 35; R.p.47, para. 35; R.p.108, para. 4; R.p.138, line 24 – R.p.142, line 6; R.p.146; R.p.719, para. 12(c));
- Mr. Trask's 13 December 2006, and 7 January 2007, FOIA requests to Sheriff Tanner's office for Captain Bromage's e-mail records generated during the course of Captain Bromage's investigation on behalf of Coroner Copeland's office. (R.p.27, para. 49; R.p.49, para. 49; R.pp.109-110, para. 3; R.p.147; R.p.181, line 2 – R.p.182, line 3, R.p.184, lines 10-24; R.pp.185-186; R.p.722, para. 15(c));
- Mr. Trask's 23 January 2006, FOIA request to the Coroner Copeland's office requesting a copy of any statement concerning Coroner Copeland's conversation with Mr. Irby of Fripp Island Security. (R.p.108, para. 1; R.p.125; R.p.719, para. 13(a));
- Mr. Trask's 2 February 2007, FOIA request to BCEM for a copy of the inter-governmental agreements required under S. C. Code Ann. § 23-47-20(A) pertaining to the use of the Beaufort County 911 system. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.p.220; R.pp.221-223; R.p.319, para. 8; R.p.720, para. 13(d));

- Mr. Trask's 2 February 2007, and 25 February 2007, FOIA requests to BCEM for the written operational procedures for the Beaufort County 911 system required under S. C. Code Ann. § 23-47-20(C)(9) and copies of all inter-governmental agreements pertaining to the use of the Beaufort County 911 system. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.p.220; R.p.221-223; R.p.319, para. 8; R.p.720, para. 13(d));
- Mr. Trask's 3 February 2007, FOIA request to Sheriff Tanner's office for a copy of written e-mail policy for Beaufort County Sheriff's Office. (R.p.27, para. 52; R.p.110, para. 4; R.p.198);
- Mr. Trask's 5 February 2007, and 25 February 2007, FOIA requests to BCEM and to Coroner Copeland's office for Coroner Copeland's complete radio log (Call Sign 601) for November 22, 2005. (R.pp.111-112, paras. 2-6, 9-10; R.p.221-223; R.p.225, lines 22-25; R.p.231, line 6 – R.p.232, line 23; R.p.233, line 2 – R.p.234, line 15; R.p.235, lines 14-23; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.246, line 23; R.p.247; R.p.252; R.p.319, paras. 7-8; R.p.720, para. 13(f));
- Mr. Trask's 5 February 2007, FOIA request to Coroner Copeland and Deputy Coroner Herman for toxicology reports and related documentation from Coroner Copeland's office for the time period of 1 June 2005, through 31 December 2005. (R.p.25, para. 36; R.pp.47-48, para. 36; R.p.108, para. 4; R.p.111, para. 3; R.p.138, line 24 – R.p.142, line 6; R.p.149; R.pp.719-720, paras. 12(c); 13(b));
- Mr. Trask's 27 February 2006, FOIA request to the SCDPS for audio recordings of the radio transmissions of State Highway Patrol Troopers Perry & Harrison. (R.p.21, para. 16; R.p.45, para. 16; R.p.117; R.p.107, para. 4; R.p.119, lines 10-18; R.p.718, para. 12(a));
- Mr. Trask's 16 May 2007, FOIA request to Attorney Kelly Golden for a copy of the handbook entitled "*Freedom of Information Act Handbook for County Government*" she authored in 1999, while a registered lobbyist for the South Carolina Association of Counties. (R.pp.111-112, paras. 2-6, 9-10; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.p.246, line 23).

Moreover, Mr. Trask made another FOIA request to Coroner Copeland's office on 20 July 2006, seeking a list of all Beaufort County Deputy Coroners serving from 1 January 2000, forward, including certificate of appointments and the names of individuals who administered the statutorily required oaths of office.⁷³ (R.p.25, para. 34; R.p.108, para. 5; R.p.148; R.p.137, lines 8-15; R.p.720, para. 13(c)). Coroner Copeland failed to respond. (R.p.25, para. 34; R.p.108, para. 5; R.p.148; R.p.137, lines 8-15; R.p.720, para. 13(c)). Nevertheless, Mr. Trask ultimately received the requested records through discovery in this lawsuit. Coroner Copeland's failure to provide the records prior to Mr. Trask having to bring this action directly violated FOIA and should have precluded summary judgment.

Indisputably, S.C. Code Ann. § 30-4-30 required the Respondents to respond to Mr. Trask's FOIA requests and to provide the requested information or notify him within 15 days as to why the Respondents decided not to disclose the requested information.⁷⁴ Moreover, the Respondents' failure to respond to Mr. Trask's FOIA requests within the 15-day limit meant the disclosure of non-exempt materials had been approved as a matter of law.⁷⁵

⁷³ 39 South Carolina Jurisprudence, Coroners, § 7 (S.C. Bar CLE Division 1992) (citing S.C. Code Ann. § 17-5-70 (Thomson West 2007)).

⁷⁴ See S.C. Code Ann. § 30-4-30(b).

⁷⁵ See S.C. Code Ann. § 30-4-30(c). See also Litchfield Plantation Co., Inc. v. Georgetown County Water and Sewer Dist., 314 S.C. 30, 443 S.E.2d 574.

Given the fact that the Respondents failed to uphold their statutorily mandated duty to produce the requested public documents upon Mr. Trask's various proper FOIA requests, the Circuit Court should have refused to grant the Respondents summary judgment. This Court of Appeals should reverse the Circuit Court's decision in all respects and remand this case for trial on the merits.

(b) **Public Records The Public Bodies Either Improperly Destroyed And/Or Wrongfully Withheld As Exempt**

In addition to the referenced instances where the Respondents ignored their statutory responsibilities under FOIA by failing to respond whatsoever to Mr. Trask's FOIA requests, there were numerous other instances where the Respondents violated FOIA by either (1) wrongfully claiming records were exempt from disclosure or (2) by destroying public records and failing to preserve records subject to public disclosure.

For example, on 2 February 2007, Mr. Trask submitted FOIA requests to BCEM for copies of the 911 computer printout of telephone and cell phone numbers which called the Beaufort County dispatch system from 12:00 am to 6:00 am on November 22, 2005 and the complete print-out report of all Beaufort County computer aided dispatch (CAD) entries made during that same time period. (R.p.30, para. 64; R.pp.110-111, para. 1; R.pp.111-112, paras. 2-6, 9-10; R.p.220; R.pp.221-223; R.p.319, para. 8; R.p.720, para. 13(d)). While Attorney Golden submitted a very limited response on 23 February 2007 (R.pp.110-111, para. 1; R.p.687), she ultimately stated the

requested records could not be provided due to privacy concerns. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.226, line 2 – R.p.228, line 25; R.p.229, line 9 – R.p.230, line 16; R.p.240, line 11 – R.p.243, line 4; R.244, line 3 – R.p.246, line 23; R.pp.248-249; R.pp.250-251; R.pp.719-721, paras. 12(c), 13(f), 14(a)-(c)).

Then on 20 May 2007, Mr. Trask made FOIA requests to BCEM for records including the operation manual and written operating procedures pertaining to the Beaufort County 800mhz radio system and the ComLog digital recording device in service at the Beaufort County 911 center. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.225, lines 22–25; R.p.231, line 6 – R.p.232, line 23; R.p.233, line 2 – R.p.234, line 15; R.p.235, lines 14–23; R.p.240, line 11 – R.p.243, line 4; R.p.244, line 3 – R.p.246, line 23; R.p.247; R.p.252; R.p.319, paras. 7-8; R.p.720, para. 13(f)). In response, Beaufort County advised Mr. Trask the requested records were exempt from inspection/copying pursuant to state and federal law and nothing was produced. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.226, line 2 – R.p.228, line 25; R.p.229, line 9 – R.p.230, line 16; R.p.240, line 11 – R.p.243, line 4; R.244, line 3 – R.p.246, line 23; R.pp.248-249; R.pp.250-251; R.pp.719-721, paras. 12(c), 13(f), 14(a)-(c)).

As the South Carolina courts have made clear, FOIA is interpreted as being broadly pro-disclosure and any exemptions are narrowly construed.⁷⁶ This means that the public body has the burden of demonstrating that the

⁷⁶ See S. C. Tax Com'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 166, 447 S.E.2d 843, 844.

claimed FOIA exception applies.¹¹ Here, the Respondents failed to provide any evidence concerning the legitimacy of the various alleged FOIA exemptions they asserted to thwart Mr. Trask's legitimate FOIA requests. At a minimum, there were significant questions of fact regarding whether the Respondents would be able to satisfy the heavy burden of demonstrating that any of the statutory FOIA exemptions actually applied to justify their withholding relevant public documents from Mr. Trask. Summary judgment was inappropriate and should never have been granted.

In response to Mr. Trask's FOIA requests for records such as (a) handwritten investigative notes and reports, (b) field notes taken at the accident scene, (c) e-mails, (d) computer data and backup files, (e) hard drives containing electronically stored records, (f) video recordings, and (g) assorted other forms of electronic media, the Respondents simply did not respond or notified Mr. Trask such documentary and/or electronic records could not be produced because they had been deleted and/or otherwise destroyed with no possibility of regeneration or restoration. (R.pp.107-113; R.pp.293-298; R.pp.717-732).

On 24 March 2007, 6 April 2007, and 16 April 2007, Mr. Trask made FOIA requests to Chief Deputy Hatfield for copies of all audio and video recordings generated by Deputies Eckard, Garst, or Arbello's equipment at the Accident scene, as well as policies concerning the retention and management of this audio/video equipment. (R.p.110, para. 5; R.p.205, line 1 – R.p.207,

¹¹ Post Publishing Co. v. City of N. Chas., 363 S.C. 452, 457, 611 S.E.2d 496, 499.

line 10; R.p.722, para. 15(d)). No video recordings were produced and Chief Hatfield stated there was no policy for preservation of video recordings on 22 November 2005. (R.p.207, line 11 – R.212, line 16; R.pp.213-219).

Moreover, the BCSO, Attorney Golden, and Frank Guth all advised Mr. Trask any e-mails and/or other forms of electronic media pertaining to and/or related to the Accident had previously been deleted and, in particular, the deleted e-mail records could not be regenerated and/or restored. (R.pp.107-113; R.pp.717-732).

Under FOIA and the Public Records Act, the legal custodian of public records for every public body is held responsible for protecting and restoring records against loss, destruction, deletion, etc.⁷⁸ Clearly, the public body responsible for maintaining public records (i.e.; the Respondents) should and must be held accountable for the destruction of electronic records, such as e-mails and other forms of electronically-stored media, which are expressly covered by either the FOIA, the Public Records Act, or their implementing administrative regulations. The Respondents' persistent practice of deleting public records at the end of an arbitrarily-established time period or their failure to adopt record retention schedules for such records has clearly deprived not only Mr. Trask, but also the public, of significant access to information about the activities of public officials in direct violation of FOIA.

⁷⁸ See e.g., S.C. Code Ann. § 30-1-70.

Where, as herein, a public body has intentionally destroyed beyond recognition or restoration e-mails and other electronic and/or documentary public records which are subject to disclosure, Mr. Trask, as the requestor, is entitled to compensation pursuant to FOIA. Here, Mr. Trask specifically requested each Respondent public body to restore the electronic records which the respective entity had either "lost" or unlawfully deleted. Given the technology then-existing, the e-mail data should still have existed on the relevant computer hard-drives and the Respondents should have taken steps to have the computed hard-drives examined and the records repaired in accordance with FOIA and the Public Records Act.

Numerous disputed issues of material fact existed as to whether the Respondents complied with (a) FOIA's and the Public Records Act's statutory requirements to retain, protect, and maintain such documentary and/or electronic information, as well as, (b) FOIA's statutory requirements to restore and/or produce such information when a legitimate FOIA request has been made such as those made by Mr. Trask.

FOIA allows both injunctive relief and a declaratory judgment to enforce its statutory provisions.⁷⁹ Moreover, as additional relief, FOIA explicitly provided a "court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for

79 S.C. Code Ann. § 30-4-100(a).

which no adequate remedy at law exists.”⁸⁰ Finally, in addition to declaratory, injunctive, and/or equitable relief, FOIA also allowed an award litigation costs and attorneys’ fees successful parties.⁸¹

During the Respondents’ summary judgment hearing, the Circuit Court directed counsel for the parties to research the electronic document retention/destruction policies for various South Carolina counties and provide the Circuit Court with copies of those policies. (R.p.1141, line 20 – R.p.1144, line 24). The Circuit Court also directed the parties to meet and try to determine which of the still-unproduced FOIA documents were required to actually be produced under FOIA. (R.p.1143, lines 9-12). The Circuit Court then stated that, (a) after legal counsel had an opportunity to meet to address the outstanding FOIA documents and (b) after legal counsel had obtained and forwarded the document retention policies from other counties. it planned to “have another hearing, and . . . see where we’re at at that point.” (R.p.1144, line 25 – R.p.1145, line 6). Furthermore, the Circuit Court specifically stated it was “certainly **not going to rule** on the [Respondents’ Motion for] [S]ummary [J]udgment until [the parties’ legal counsel] get that information [concerning the relevant FOIA documents and other public body document retention/destruction policies] back.” (R.p.1145, lines 8-11) (Emphasis added).

⁸⁰ S.C. Code Ann. § 30-4-100(a).

⁸¹ See S.C. Code Ann. § 30-4-100. The only prerequisite to an award of attorney fees and costs under this section is that the party seeking the monetary relief must prevail – either in whole or in part. See Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163; Cockrell by Cockrell v. Trustees of Dist. 20 Constituent School Dist., 299 S.C. 155, 382 S.E.2d 923 (1989). There is “no good faith exception . . . for an award of attorney fees under FOIA.” New York Times Co. v. Spartanburg County School Dist. No. 7, 374 S.C. 307, 649 S.E.2d 28.

Finally, the Circuit Court stated it “want[ed] answers to [the issues it was] specifically . . . asking [on that 18 December 2008, date] so we can better get a handle on [the dispute between Mr. Trask and the Respondents.]” (R.p.1147, lines 6-7).

Unfortunately, the Circuit Court pursued none of these avenues. Even though the parties’ legal counsel subsequently provided the Circuit Court with a number of document retention/destruction policies from South Carolina governmental entities, the Circuit Court proceeded to decide this matter without conducting the promised second hearing.

Regardless of whether a decision should have been made in the first instance, the Circuit Court’s reliance on Sloan v. Friends of Hunley, Inc.,⁸² is particularly misplaced and misguided. The Circuit Court found that certain of “the documents requested [in Mr. Trask’s FOIA requests] ha[d] been produced to the extent they [were] still in the [Respondents’] possession.” (R.p.9). While this is facially true to some extent, this “conclusion” completely misses the point of the FOIA and effectively rewards the Respondents’ illegal behavior. In Sloan v. Friends of Hunley, Inc., our Supreme Court found the alleged FOIA violations were moot because the documents had been provided.⁸³ In that case, unlike here, there was no issue regarding the public body’s admitted destruction of documents which ultimately prevented the production of those very same documents in compliance with FOIA.

⁸² Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006).

⁸³ Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477-478.

As the record shows, the Respondents had intentionally destroyed public documents and information, whether in paper or electronic format, with no ability to recover or regenerate that documentation/information. Thereafter, having done so, the Respondents asserted they have given Mr. Trask all of the documents/information the Respondents had in their possession. While that statement may be "true" to a certain extent, the very reason the Respondents cannot produce any more documents or electronic information was that they destroyed the documents. A public body cannot, on the one hand, intentionally (or otherwise) destroy FOIA documents and information and then, on the other hand, use the non-existence of the documents/information as a complete defense to producing the very same documents and information or of suffering the monetary or other consequences under either FOIA or the Public Records Act for not maintaining the documents and/or information. This proposition neither complies with either the letter or the spirit of FOIA⁸⁴ or the Public Records Act.

The Respondents admittedly kept and maintained a myriad of documents and electronic information associated with the Accident. Mr. Trask was vociferous in his attempts to have the Respondents preserve that documentary and electronic information. He clearly placed the Respondents on preservation notice early on after the Accident. Unfortunately, even in the

⁸⁴ As previously noted, FOIA does not require a public body to preserve, retain, and/or maintain public documents and/or records, simply only to preserve, retain, and maintain those public documents/records which the public body has decided to keep. The Public Records Act is the means to compel a public body to retain its public records.

face of the statutory mandates of FOIA and the Public Records Act, many of Mr. Trask's requests were ignored or given short shrift. Consequently, much of the relevant documentary and electronic information was intentionally destroyed and lost forever.

(c) The BCSO's Copying Costs Were Unreasonable

FOIA allows the public body responding to a FOIA request to "establish and collect fees not to exceed the actual cost of searching for or making copies of records [and such] [f]ees charged by a public body must be uniform for copies of the same record or document."⁸⁵ Nevertheless, such fees must be reasonable in order not to frustrate the purposes of FOIA.

While Mr. Trask asserted the BCSO charged excessive FOIA copying fees (R.p.28), the Circuit Court ruled otherwise. (R.pp.11-12). Nevertheless, there clearly were genuine disputes of material fact as to the reasonableness of the fees. Beaufort County had an established fee schedule (R.p.743) setting forth a cost of \$0.05 per page for printing costs and \$14.00 per hour for research and/or documents gathering time. (R.p.743). The BCSO failed to comply with this established set fee schedule by charging Mr. Trask (for the limited documents actually produced) costs substantially in excess of those which would have been charged under the set schedule. (R.p.877). In fact, Beaufort County generally asserted the "customary" copying fee for documents produced under FOIA was \$0.25 per page - **five** times the scheduled set amount. (R.p.743).

⁸⁵ S.C. Code Ann. § 30-4-30(b) (Thomson Reuters West 2009). See generally Seago v. Horry County, 378 S.C. 414, 422-423, 663 S.E.2d 38, 42 (2008).

(d) **The Respondents' Waived and/or Are Estopped to Assert the Statute of Limitations**

The Circuit Court incorrectly granted summary judgment on the ground Mr. Trask failed to timely bring his claims for FOIA violations. (R.pp.7-8). The record shows the Respondents are estopped from claiming application of the statute of limitations as a defense since Mr. Trask's delay in bringing the action was clearly induced by Defendants' conduct.⁸⁶ The Respondents repeatedly assured Mr. Trask they would produce all available documents responsive to his FOIA requests, even though their individual and collective actions demonstrated otherwise.

Moreover, it is reasonable to assert the Respondents made these assurances/representations to Mr. Trask about their forthcoming document production solely to "lull" Mr. Trask into a false sense of security so that the one-year time period would run prior to him asserting his claims in court.⁸⁷

⁸⁶ Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994).

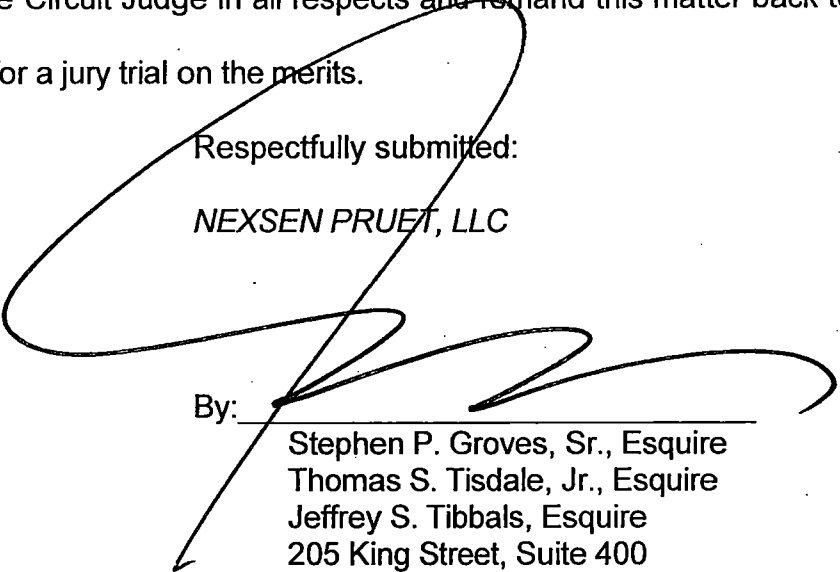
⁸⁷ See, e.g., Hopkins v. Floyd's Wholesale, 299 S.C. 127, 129, 382 S.E.2d 907, 908 (1989) (statute of limitations is tolled during a reliance period); Hooper v. Ebenezer Sr. Services and Rehab. Ctr., 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009).

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Appellant, 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, respectfully requests this Court of Appeals to reverse the decision of the Circuit Judge in all respects and remand this matter back to the Circuit Court for a jury trial on the merits.

Respectfully submitted:

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8 February 2011

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Case No. 2007-CP-07-0995

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, ... Appellant,

v.

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

BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY

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STATEMENT OF THE CASE

This is a Freedom of Information Act (FOIA) case. Following the death of his son in a single vehicle accident in November 2005, the Appellant L. Paul Trask, Jr. submitted numerous FOIA requests to the various Respondents in conducting his own investigation into the death. The Respondent South Carolina Department of Public Safety (SCDPS) received four FOIA requests from Trask in 2006. SCDPS responded to the FOIA requests and made available to Trask the documents and records that were available.

Unsatisfied with the responses by SCDPS and the other Respondents (collectively referred to as the "Beaufort County Respondents"), Trask filed this action alleging various violations of the Freedom of Information Act. The Respondents including SCDPS moved for summary judgment, and by order filed March 16, 2009, Circuit Court Judge Carmen Tevis Mullen granted that motion. (R. 5-13). A subsequent Rule 59(e) motion was denied by Judge Mullen by her order filed October 13, 2009. (R. 3-4).

The Appellant Trask subsequently filed a Notice of Appeal which was served on counsel for the Beaufort County Respondents but was never served on SCDPS's counsel. (R. 1187-1191).

ARGUMENTS

I. The Appellant's appeal against the Respondent South Carolina Department of Public Safety should be dismissed for lack of appellate jurisdiction because the Notice of Appeal was never served on counsel for the Department.

As described above, the Appellant L. Paul Trask, Jr. filed a complaint alleging certain violations of the Freedom of Information Act (FOIA) by the Respondents including SCDPS. After summary judgment was granted in the Respondents' favor and a Rule 59(e) motion was denied, Trask filed a Notice of Appeal on or about November 13, 2009. However, the Notice of Appeal was not served on SCDPS or on its counsel of record. The Notice of Appeal was served only on counsel for the Beaufort County Respondents. (R. 1190-1191).

The Respondents, SCDPS included, were originally represented by the law firm of Howell, Gibson and Hughes, P.A. By order filed January 21, 2009, William H. Davidson, II of Davidson and Lindemann, P.A. was substituted as counsel for SCDPS. (R. 1168-1171). Robert W. Achurch, III and Howell, Gibson and Hughes, P.A. were relieved as counsel for SCDPS. The order of substitution specifically directed that "[a]ll future correspondence and all other documents relating to this case are also to be sent to the attention of William H. Davidson, II." (R. 1169). Trask's counsel were provided with a copy of the order of substitution (R. 1498) and on numerous occasions served Davidson with filings and copied him with correspondence in this litigation. (R. 1173-1174, 1506-1508). Trask's counsel were clearly aware that Davidson represented SCDPS from January 21, 2009 forward.

As indicated, on November 13, 2009, Trask attempted to appeal the summary judgment orders issued by Judge Mullen. On that date, according to the proof of service signed by Trask's counsel, a Notice of Appeal was served only on Jason F. Ward of Howell, Gibson and Hughes, P.A.

(R. 1190-1191). That firm no longer represented SCDPS and had not done so for almost ten months. The proof of service does not reflect that the Notice of Appeal was served on SCDPS or its counsel of record.

Rule 203(b)(1), SCACR, provides in mandatory terms as follows: "A notice of appeal *shall be served on all respondents* within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR. (Emphasis added). Moreover, Rule 233(b), SCACR, governs service and provides that "[w]henver under these Rules service is required or permitted to be made upon a party represented by an attorney the service *shall be made upon the attorney ...*" Rule 233(b), SCACR. (Emphasis added).

Without question, Trask failed to comply with the mandatory requirement of service of the Notice of Appeal on SCDPS's counsel. This Court recognizes and has held consistently that "[t]he failure to timely serve a notice of appeal divests this court of subject matter jurisdiction and results in dismissal of the appeal." *Holroyd v. Requa*, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004).

When this issue was raised earlier,¹ Trask's counsel filed affidavits contending that there was "reasonable confusion" about the identity of the counsel of record for SCDPS and suggesting that there was "constructive service" of the Notice of Appeal when it was served on SCDPS's former counsel. The applicable facts and law do not support that position.

As an initial point, it is very telling what was *not* included in the lengthy affidavits of Trask's two attorneys. Neither Thomas Tisdale or Stephen Groves denies having been served with the Consent Order Substituting Counsel for Defendant South Carolina Department of Public Safety

¹ SCDPS filed an earlier motion to dismiss the appeal on this same basis. Judge Jasper Cureton issued an order filed June 9, 2010, directing that this jurisdictional issue should be briefed to the full panel. (R. 1-2).

filed January 21, 2009.² Therefore, there is no question that Trask through his counsel had proper notice of the change in counsel for SCDPS in January 2009.

The record demonstrates with equal clarity that Trask's counsel immediately acted upon that change in counsel for SCDPS. A series of correspondence and filings in January and February 2009 show that Tisdale was aware that William Davidson had become counsel for SCDPS. There are a number of letters generated by Tisdale and received by Tisdale which copy Davidson. *See*, Davidson Affidavit, para. 7, Ex. E. (R. 1486, 1500-1510). Interestingly, there are no letters *prior to January 2009* to Davidson or copying Davidson. That refutes any suggestion that Davidson was copied on certain correspondence only because he was believed to have been involved in other Trask litigation. The fact that Davidson began receiving and sending correspondence in January 2009 demonstrates Trask's counsel's recognition and understanding that he had become counsel of record for SCDPS *in this litigation*.³

² The record includes a copy of a cover letter dated January 29, 2009, showing that a filed copy of the Consent Order Substituting Counsel for Defendant South Carolina Department of Public Safety was sent to Thomas S. Tisdale, Jr. That cover letter, in fact, reiterated that William Davidson had been substituted as counsel of record for SCDPS. *See*, Davidson Affidavit, para. 6, Ex. D. (R. 1486, 1498). The record further includes a copy of a letter dated January 15, 2009, whereby Davidson forwarded the Consent Order Substituting Counsel for Defendant South Carolina Department of Public Safety to Judge Carmen Mullen for her signature. Tisdale was copied on that January 15, 2009 letter. *See*, Davidson Affidavit, para. 5, Ex. C. (R. 1585A, 1495-1496).

³ In their affidavits, Trask's counsel suggest that confusion was caused by another lawsuit filed by L. Paul Trask, Jr. which bears Civil Action Number 2007-CP-07-0993. Trask correctly points out that Andrew F. Lindemann, who practices with William Davidson, was and remains counsel of record in that case. Lindemann represents only non-governmental defendants in that litigation, namely Copeland Company of Beaufort, LLC and Curtis Copeland in his individual capacity. SCDPS is not a party to that litigation. Lindemann did not make an appearance in the present litigation (Civil Action Number 2007-CP-07-0993) until after the appeal was filed. *See*, Davidson Affidavit, paras. 8, 10. (R. 1486-1487). Moreover, there is no evidence that Davidson was ever involved in Civil Action Number 2007-CP-07-0993. *See*, Davidson Affidavit, para. 11. (R. 1487). Hence, Trask's suggestion that there was any bonafide confusion

Further, it is submitted that Trask's counsel's professed confusion is simply immaterial. South Carolina law does not recognize the concept of "constructive service." To the contrary, prevailing case law clearly explains that actual service of the Notice of Appeal is a jurisdictional requirement. The applicable Appellate Court Rules state in mandatory terms that the Notice of Appeal "*shall* be served on all respondents" and that the service "*shall* be made upon the attorney." Rules 203(b)(1) and 233(b), SCACR. (Emphasis added). South Carolina law does not provide for any exceptions or any discretion for this Court to excuse a failure to properly serve a Notice of Appeal. The Supreme Court has clearly held that "if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772, 775 (2004). *See also, USAA Property & Casualty Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008) (same). Trask has conceded that he did not serve the Notice of Appeal on SCDPS or its counsel of record. His error is not subject to "rescue" by this Court.

In sum, Trask's failure to serve the Notice on Appeal on SCDPS or its counsel of record is a jurisdictional defect. Because there was not timely service of the Notice of Appeal on SCDPS, this Court lacks appellate jurisdiction over the appeal of the order in favor of SCDPS. The appeal against SCDPS for alleged FOIA violations must be dismissed on this basis.

when in January 2009, Davidson was legally and properly substituted as counsel for SCDPS in Civil Action Number 2007-CP-07-0995 is unavailing.

II. The Appellant failed to raise the lower court's mootness and statute of limitations rulings in his Statement of Issues on Appeal, and as a result, the two-issue rule requires that the summary judgment order should be affirmed.

The lack of specificity in Trask's issues on appeal and the arguments made to this Court warrant an affirmance of Judge Mullen's rulings on the FOIA claims against SCDPS. In the "Arguments" section of his brief, Trask constantly refers to all of the Respondents collectively. He makes bald claims of acts or omissions by the Respondents collectively and then offers examples, a majority of which do not implicate SCDPS in any respect. The Court is urged to hold Trask to his proof and the evidence in the record. Any acts or omissions by the Beaufort County Respondents may not be imputed to SCDPS and vice versa.

In addition, the lack of specificity is particularly problematic in reference to the issues on appeal. In his opening brief, Trask raises only two issues on appeal:

(1) Did the Circuit Court properly grant the Respondents summary judgment notwithstanding Mr. Trask's substantial evidence of the Respondents' multiple violations of the South Carolina Freedom of Information Act?

(2) Did the Circuit Court properly grant the Respondents summary judgment notwithstanding Mr. Trask's substantial evidence of the Respondents' multiple violations of the South Carolina Public Records Act?

See, Appellant's Brief, p. 1. These are the *only* issues on appeal that have been properly raised.

Recently, in *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), the South Carolina Supreme Court warned that "[t]he statement of each issue on appeal shall be concise and direct, and broad general statements of issues may be disregarded by this Court." 692 S.E.2d at 903, *citing* Rule 208(b)(1)(B), SCACR. The Supreme Court further explained that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Id.*, *citing* *Forest Dunes Associates v. Club Carib, Inc.*, 301 S.C. 87, 390 S.E.2d 368,

370 (Ct. App. 1990). *See also, Sullivan Co., Inc. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993).

In *Jones*, the Supreme Court also addressed the two-issue rule which provides: "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). The *Jones* Court also explained how the application of Rule 208(b)(1)(B), SCACR, together with the two-issue rule, will result in an affirmance. In *Jones*, as in the present case, the appellant did not raise each separate, independent dispositive ruling by the circuit court in his statement of issues on appeal. The Supreme Court found that the issue that was raised was not concise or direct. As a result, the Court concluded that the appellant had not raised all issues on appeal and thereby affirmed under the two-issue rule.

The same should occur in this case. Judge Mullen granted summary judgment to SCDPS (and the other Respondents) on several independent bases including a mootness defense and a statute of limitations defense. (R. 7-9). However, neither the mootness ruling nor the statute of limitations ruling *are even remotely mentioned* in Trask's Statement of Issues on Appeal. Instead, Trask has only appealed on the basis that substantial evidence exists of "multiple violations" of the FOIA and the Public Records Act. *See*, Appellant's Brief, p. 1. Because Trask, just like the appellant in *Jones*, has not appealed each of the separate, independent bases for summary judgment, the two-issue rule should be applied, and the summary judgment in favor of SCDPS should be affirmed on that procedural basis.

III. The lower court correctly ruled that the Appellant's claims involving two FOIA requests against the South Carolina Department of Public Safety were time barred under Section 30-4-100(a).

The Freedom of Information Act includes a one-year statute of limitations. Section 30-4-100(a) provides in part as follows: "Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later." S.C. Code Ann. § 30-4-100(a).⁴

Trask has alleged four written requests to SCDPS that he contends were FOIA requests. The first two requests, which were made on February 23, 2006 and February 27, 2006, are essentially the same – they sought "all of the records in your possession related to my son's accident including all reports, drawings, and any evidence that was collected by the investigating troopers at the scene." (R. 35). Trask also requested a "CD copy of the radio transmissions." (R. 35). As alleged in the Complaint, Trask received a response to these FOIA requests on March 8, 2006. Trask alleged that the response was a "partial response" because he was not provided handwritten notes of the investigating troopers or recordings of the radio transmissions. *See*, Complaint, para. 17. (R. 21). Therefore, by Trask's own pleadings, he has established that

⁴ While the parties and the lower court have referred to Section 30-4-100(a) as a statute of limitations, it is actually a "statute of creation." In *Knight Publishing Co. v. University of South Carolina*, 295 S.C. 31, 367 S.E.2d 20 (1988), *reversed on other grounds*, *McLendon v. South Carolina Highways & Transportation*, 313 S.C. 525, 443 S.C. 539 (1994), the Supreme Court concluded that the time limitation contained in Section 30-4-100(a) is a statute of creation. According to the Supreme Court, "[a] statute that creates a new liability and affixes the time within which an action may be commenced is not a statute of limitation but a statute of creation; commencement within the time affixed is then an indispensable condition of the action." 367 S.E.2d at 22.

SCDPS violated FOIA by failing to make available certain records to him on March 8, 2006.⁵ The one-year statute of limitations (or statute of creation) on those requests, therefore, expired by March 8, 2007; yet, Trask did not file suit to acquire these records until April 17, 2007. Consequently, Judge Mullen was absolutely correct in ruling that the FOIA violations alleged in paragraphs 15, 16, and 17 of the Complaint are time barred under the Act.

On appeal, in addition to not raising this statute of limitations ruling in his Statement of Issues on Appeal, Trask does not challenge Judge Mullen's conclusion that two of his FOIA claims against SCDPS are time barred under Section 30-4-100(a). Instead, he argues in a conclusory fashion that "the Respondents are estopped from claiming application of the statute of limitations as a defense since Mr. Trask's delay in bringing the action was clearly induced by Defendants' conduct." *See*, Appellant's Brief, p. 47. There are four significant flaws to this argument. First, it is well settled that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also*, *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). Here, Trask makes his estoppel argument with a short, conclusory statement and offers no evidence to support it. The argument should be deemed abandoned. Second, as mentioned, the estoppel argument is unsupported in the record. Trask cites no evidence that even remotely suggests that SCDPS induced him not to file suit within the one year statutory limit. Third, as a statute of creation, the time limit set by Section 30-4-100(a)

⁵ *See, Skull Creek Club Limited Partnership v. Cook & Book, Inc.*, 313 S.C. 283, 437 S.E.2d 163, 166 (Ct. App. 1993) ("the allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action").

is not subject to estoppel or any tolling. The Supreme Court has described the necessity of filing within the one year period as "an indispensable condition of the action." *Knight Publishing Co. v. University of South Carolina*, 295 S.C. 31, 367 S.E.2d 20, 22 (1988).⁶ Finally, the estoppel argument was made for the first time in a Rule 59(e) motion and thus is untimely. At the summary judgment hearing, Trask's counsel only briefly addressed the statute of limitations defense and made no mention of an estoppel theory. (R. 1102-1103). Furthermore, it is well settled that a Rule 59(e) motion may *not* be used to present a new issue to the trial court that could have been presented prior to entry of judgment. In *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990), this Court held: "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." 392 S.E.2d at 482. In short, Trask's conclusory and unsupported contention that SCDPS should be estopped from asserting a statute of limitations (or statute of creation) defense is without any merit.

IV. The lower court correctly ruled that the Appellant's FOIA claims against the South Carolina Department of Public Safety are moot.

Likewise, Trask has not properly challenged the mootness defense nor shown that the defense is not applicable. In addition to the February 2006 FOIA requests which were held to be time barred, Trask made two additional requests to SCDPS. On May 18, 2006, Trask requested copies of field notes and the Coroner's toxicology report. *See*, Complaint, para. 18. (R. 22). The field notes were provided to Trask, and there is no toxicology report. Later, on December 12,

⁶ In *Simpson v. Sanders*, 314 S.C. 413, 445 S.E.2d 93 (1994), the Supreme Court acknowledged that a failure to timely commence an action within the statute of creation is no longer recognized to be "a subject matter jurisdiction defect" but the Court also did reaffirm that "an action under a statute of creation cannot be maintained unless brought within the time allowed by that statute." 445 S.E.2d at 94, n.1.

2006, Trask made a request for email communications between several troopers and Captain Robert Bromage of the Beaufort County Sheriff's Office and Coroner Curt Copeland. Trask alleges that he was informed that the emails had been "double-deleted" and were no longer available. *See*, Complaint, paras. 19-20. (R. 22).

Judge Mullen ruled that the FOIA requests alleged in paragraphs 18 and 19 of the Complaint were responded to and that documents in SCDPS's possession were produced. Hence, she concluded that those claims were moot. (R. 8-9). Judge Mullen relied on the Supreme Court's decision in *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006), where the Court explained that "[t]he purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies." 630 S.E.2d at 478. The Court further held that "once the requested documents are produced, a justiciable controversy no longer exists" and thus the claim is moot. 630 S.E.2d at 477. In other words, the Court concluded that "there is no continuing violation of FOIA" where the requests documents have been produced.

Trask insists that *Sloan* is distinguishable because, unlike the plaintiff in *Sloan*, he has not conceded that all requested documents have been produced. However, as Judge Mullen ruled, SCDPS and the other Respondents are only required to produced records within its possession. If documents are not in its possession or no longer available, then SCDPS has no obligation under FOIA to produce what it does not have. Consequently, the scenario in *Sloan* is substantially similar to that in the present case. The toxicology report does not exist and therefore cannot be produced. There is no apparent dispute about that. The "double-deleted" emails are no longer in SCDPS's possession and thus cannot be produced. Trask has presented no expert testimony to dispute or contradict Judge Mullen's conclusion that the emails are no longer in SCDPS's possession. In short, Judge Mullen has ruled that all documents that are in

SCDPS's possession relative to the May and December 2006 requests have been produced. Accordingly, under the holding in *Sloan*, the FOIA claims arising from those requests are moot.

V. The lower court was correct in rejecting the Appellant's claim that FOIA creates an "implied duty" to preserve or maintain public records and in rejecting any alleged FOIA violations that are not recognized under the Act.

In an attempt to create a judicable controversy, Trask argues that there is an "implied duty" under FOIA "to preserve and maintain public records." *See*, Appellant's Brief, p. 29. Trask's position lacks merit for three principal reasons.

First, South Carolina law does not recognize that a statute may give rise to any "implied duties." Trask has not cited any case law holding that FOIA gives rise to any such implied duty. In fact, Trask does not cite any case recognizing any implied duty created by *any* statutory scheme. In contrast, in *Y.C. Ballenger Electrical Contractors, Inc. v. Reach-All Sales, Inc.*, 276 S.C. 394, 279 S.E.2d 127 (1981), the Supreme Court found a since repealed provision in the Corporations Act did not create an implied duty. Likewise, in *Pitts v. Jackson National Life Ins. Co.*, 353 S.C. 319, 575 S.E.2d 502 (Ct. App. 2002), the Court of Appeals refused to read an insurance statute as creating any implied duty. Thus, there does not appear to exist any precedent for Trask's claim of an implied duty under FOIA. Furthermore, as Judge Mullen recognized, South Carolina law requires "[i]n construing a statute, [that] its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *First Baptist Church of Mauldin v. City of Mauldin*, 308 S.C. 226, 417 S.E.2d 592, 593 (1992). Moreover, if reasons exist for expanding or altering a statute's operation, such revisions must come from the General Assembly, not from the courts. *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760, 763 (1993). In short, Judge Mullen was correct in

declining to read into FOIA a duty of care that is not defined by the plain language of the statutes or FOIA violations that are not expressly provided.

Second, Trask's own position is inconsistent. Later in his brief, Trask writes: "FOIA does not require a public body to preserve, retain, and/or maintain public documents and/or records, simply only to preserve, retain and maintain those public documents/records which the public body has decided to keep." *See*, Appellant's Brief, p. 45, n.84. Thus, Trask concedes that there is no duty under FOIA for a public body to actually to preserve, retain or maintain records that it has chosen not to keep.

Third, Trask concedes that any duty to preserve, retain and maintain documents is not "implied" by FOIA but rather falls within the scope of the Public Records Act, S.C. Code Ann. § 30-1-10, *et seq.* *See*, Appellant's Brief, p. 45, n.84. This is an important concession because Trask clearly did not allege any claim under the Public Records Act. Trask's Complaint does not allege any claim under the Public Records Act nor even mention or cite to the Public Records Act. To the contrary, the caption to the Complaint states "Violation of Freedom of Information Act" in all capitals under "Complaint." (R. 19). The first cause of action in the Complaint, which is the only claim against SCDPS, is subtitled "Violation of Freedom of Information Act as to Defendant S.C. Dept. of Public Safety." (R. 21). In addition to not alleging a claim under the Public Records Act, Trask's counsel appropriately conceded at the summary judgment hearing that no claim was brought or could have been brought under the Public Records Act. Tom Tisdale informed Judge Mullen that: "Mr. Ward has done a real good job demonstrating that we don't have a right to sue under the Open Records Act. Of course, he's correct. We have not sued under the Open Records Act." (R. 1089). The parties thus agreed that the Public Records Act does not give rise to a private right of action.

Yet, despite the lack of pleading and the clear concession from Trask's counsel that no claim pursuant to the Public Records Act was being pursued, Trask now raises the following as one of his two issues on appeal: "Did the Circuit Court properly grant the Respondents summary judgment notwithstanding Mr. Trask's substantial evidence of the Respondents' multiple violations of the South Carolina Public Records Act?" *See*, Appellant's Brief, p. 1. Frankly, this issue on appeal has no merit and should be rejected for the reasons just stated.

Nonetheless, to the extent the Court is willing to consider an implied duty under FOIA "to preserve and maintain public records," SCDPS offers the following observations. Trask insists that "[w]ithout such an implied duty to preserve and maintain public records, the legislative purpose behind FOIA is essentially eviscerated." *See*, Appellant's Brief, p. 29. That is obviously untrue. As Trask concedes, the Public Records Act controls in this area. Section 30-1-70 requires that "[t]he legal custodian of public records shall protect them against deterioration, mutilation, theft, loss, or destruction." S.C. Code Ann. § 30-1-70. Moreover, the Public Records Act provides for criminal penalties for any "person who unlawfully removes a public record from the office where it usually is kept or alters, defaces, mutilates, secretes, or destroys it." S.C. Code Ann. § 30-1-30. Thus, there is a duty to preserve and maintain public records, but that duty is created and governed under the Public Records Act and is not implied under FOIA. In addition, while there is no private right of action for money damages under the Public Records Act, there is still a sufficient sanction to compel compliance with the statutory duties, that being criminal penalties. Consequently, the purpose behind FOIA is not eviscerated.

Furthermore, even if a purported "implied duty to preserve and maintain public records" were to exist under FOIA, there is no civil remedy provided under FOIA. Without citing any authority, Trask contends that he "entitled to compensation pursuant to FOIA" for public records

that were destroyed and not produced for him. *See*, Appellant's Brief, p. 42. However, monetary relief is clearly not available under FOIA. Section 30-4-100(a) provides that a court may issue "a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases." S.C. Code Ann. § 30-4-100(a). Moreover, "[t]he court may order equitable relief as it considers appropriate." *Id.* Yet, there is no provision for the award of money damages or "compensation" as Trask claims.⁷ In fact, in *Antley v. Shepherd*, 340 S.C. 541, 532 S.E.2d 294 (Ct. App. 2000), *aff'd in part*, 349 S.C. 600, 564 S.E.2d 116 (2002), this Court rejected an argument that a plaintiff could rely on FOIA violations to seek damages. The same principle is equally applicable here. Likewise, South Carolina law provides that "[w]here a cause of action is created by statute, the statute determines what damages [or other relief] may be recovered." *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 393 S.E.2d 162, 163 (1990). FOIA does not provide for the recovery of monetary relief. As a result, Trask cannot recover damages for any alleged FOIA violation.

In sum, Judge Mullen was correct in ruling that FOIA may not be construed as creating any implied duties. Likewise, FOIA may not be read as providing for violations that are not expressly included in the plain language of the statute. Trask simply cannot withstand summary judgment by asserting unpled claims under the Public Records Act, which he has admitted does not give rise to a private right of action, or by transposing any duties under the Public Records

⁷ This claim for "compensation" is yet another issue or argument made for the first time on appeal. In the prayer of his Complaint, Trask does not seek any compensatory damages. (R. 30). The only monetary relief he seeks is reimbursement of alleged overcharges by the Beaufort County Respondents, which is the equivalent of restitution, an equitable remedy.

Act on the Freedom of Information Act. The summary judgment in favor of SCDPS was correctly entered and should be affirmed.⁸

⁸ In accordance with Rule 208(b)(6), SCACR, SCDPS hereby adopts and incorporates herein any arguments from the brief submitted by the other Respondents that are not inconsistent with the arguments offered by SCDPS.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent South Carolina Department of Public Safety respectfully requests that this Court affirm the orders of Judge Carmen Tevis Mullen granting summary judgment in its favor.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent South Carolina Department of Public Safety certifies that the Final Brief of Respondent South Carolina Department of Public Safety complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent South Carolina Department of Public Safety certifies that the Final Brief of Respondent South Carolina Department of Public Safety complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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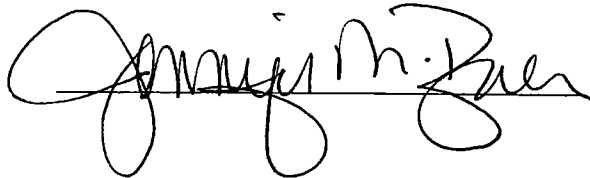
March 7, 2011

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, South Carolina Department of Public Safety, does hereby certify that service of the **Brief of Respondent South Carolina Department of Public Safety** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 7th day of March 2011:

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Common Pleas Court
Carmen Tevis Mullen, Circuit Court Judge
Civil Action No. 2007-CP-07-00995

Case No.: 2009145927

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,.....Appellant,

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.

**FINAL BRIEF OF RESPONDENTS BEAUFORT COUNTY;
BEAUFORT COUNTY MANAGEMENT INFORMATION SYSTEMS;
BEAUFORTCOUNTY CORONER CURTIS COPELAND IN HIS OFFICIAL
CAPACITY; BEAUFORT COUNTY SHERIFF P.J. TANNER IN HIS OFFICIAL
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STATEMENT OF ISSUES ON APPEAL

- I. For purposes of summary judgment, has a governmental entity complied with the express terms of the FOIA where it produces all requested public records under its control and possession?
- II. Can the Public Records Act be “bootstrapped” to the Freedom of Information Act to create an implied cause of action against a governmental entity?

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)

STATEMENT OF FACTS

The FOIA Requests

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 ¶¶ 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) 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. This appeal follows.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, this Court applies the same standard that governs the trial court under Rule 56, SCRCP, 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

I. FOR PURPOSES OF SUMMARY JUDGMENT, HAS A GOVERNMENTAL ENTITY COMPLIED WITH THE EXPRESS TERMS OF THE FOIA WHERE IT PRODUCES ALL REQUESTED PUBLIC RECORDS UNDER ITS CONTROL AND POSSESSION?

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

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.

i. DUTIES OF A PUBLIC BODY UNDER FOIA

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.

a. DUTY TO PRODUCE AND/OR MAKE AVAILABLE FOR INSPECTION AND COPYING ALL PUBLIC RECORDS AND TO PROVIDE A RESPONSE TO THE FOIA REQUESTER WITHIN FIFTEEN DAYS.

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 ¶¶ 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 concedes in his brief 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 this court to sift through in the hopes that one of these issues will appear to be a "scintilla" sufficient to reverse the trial court. By way of example, he argues that Beaufort County Respondents (the Coroner's Office) failed to respond to the December 11, 2006 FOIA request wherein he requested to, "inspect and copy all email communications maintained [on both] computer(s) or with [their] service provider(s) that pertain to Paul III's accident." FOIA request, (R. p. 5) He contends that the Coroner violated the FOIA by not responding to this request both within the fifteen days under FOIA and by not responding at all. (Appellant's Final Brief, p. 37) Even viewing this evidence in a light most favorable to Trask, this contention is, at best, without merit. Trask had made the same request, prior to December 11, 2006, and had already received the very same items requested prior to the December 11, 2006 FOIA request. (R. pp. 814-831; R. p. 806; R. pp. 5-13; R. pp. 589-605; R. pp 606-713)

Trask has already received responses to each and every alleged FOIA violation as set forth in Trask's complaint. (R. pp. 3-4; R. pp. 589-605; R. pp. 606-713) The trial court recognized that because Beaufort County Respondents had already produced the records, to the greatest extent practicable, there was no "continuing violation" of the FOIA for the court to remedy. The Court recognized that under Sloan these FOIA issues were moot and thus summary judgment appropriate.

The trial court also recognized that the “double deleted”¹ emails, disposed handwritten investigatory notes, and Coroner’s hard drive 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, the trial court found 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 trial court correctly ruled on this issue, and summary judgment was appropriate.

Lastly, 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.D.C.2003). “[O]nce the Court determines that the agency has, ‘however

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.

belatedly, released all nonexempt material, [it has] no further judicial function to 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 untimely², does not preclude the grant of summary judgment, as the essential purpose of South Carolina’s FOIA – protecting the public from government secrecy - has clearly been fulfilled by the ultimate production of the public records. The Beaufort County Respondents would urge this court to affirm the trial Court’s grant of summary judgment in this matter.

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. (Final Brief of Appellants, p. 14, ¶¶7, 8) 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

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.” l’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

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. 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 ¶15 of Complaint R. p. 21), 2/27/06 (¶16 of Complaint R. p. 21), 3/8/06 (contained in ¶17 of Complaint R. pp. 21-22), 12/15/05 (contained in ¶27 R. pp. 23-24), 2/21/06 (contained in ¶28 R. p. 24), 3/20/06, 12/14/05 (contained in ¶59 R. p. 29), 1/23/06 (contained in ¶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

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.

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. Can the Public Records Act 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

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.

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

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. Said another way, once the records that can be produced have been produced, the court no longer needs to function as the guardian of the public's interests in the activities of its government, as there can no longer be concerns over its' government keeping secrets.

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court affirm the trial court's Order granting summary judgment. Additionally, Respondents would ask that the Court affirm for any ground appearing on the record as provided by Rule 220(c), SCACR.

Respectfully submitted,



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February 7, 2011

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Beaufort County
Honorable Carmen T. Mullen, Circuit Judge
Civil Action No.: 2007-CP-07-0995

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,

Appellant,

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.

**FINAL REPLY BRIEF OF THE APPELLANT
TO THE BRIEF OF THE
SCDPS RESPONDENT**

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The Appellant 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, respectfully submits his Reply Brief in response to the brief of the Respondent, South Carolina Department of Public Safety.

ARGUMENT AND CITATION OF AUTHORITY

The Circuit Court should not have granted the SCDPS summary judgment herein. Mr. Trask presented sufficient evidence to show the SCDPS intentionally and knowingly violated FOIA. This decision must be reversed in all respects and this matter remanded back for a merits trial.

A. This Court Of Appeals Has Proper Appellate Jurisdiction To Consider Mr. Trask's Appeal On The Merits

The SCDPS seeks to escape liability by asserting its legal counsel¹ was not served with a copy of the Notice of Appeal filed in this case. (R.p.1209, para. 7; R.p.1471, para. 17).² Robert W. Achurch, III, Esquire and/or Jason F. Ward, Esquire of Howell, Gibson & Hughes ("Howell, Gibson & Hughes") originally represented the SCDPS. On 21 January 2009, the Circuit Court substituted Davidson & Lindemann for Howell, Gibson & Hughes. (R.p.1210,

¹ The legal counsel are William H. Davidson, II, Esquire and Andrew F. Lindemann, Esquire of Davidson & Lindemann ("Davidson & Lindemann").

² As this Court of Appeals is aware, on 14 April 2010, the SCDPS previously moved to dismiss that part of this appeal directed towards the SCDPS. (R.pp.1161-1162; R.pp.1163-1166). Mr. Trask vehemently opposed that motion. (R.pp.1192-1206; R.pp.1207-1466; R.p.1467-1474). This Court of Appeals ultimately denied the motion, but afforded the SCDPS the ability to raise the issue in its Respondent's brief and Mr. Trask to respond thereto in his Reply Brief. (R.pp.1-2).

para. 8; R.p.1469, para. 10). While Davidson & Lindemann were not sent a copy of the Notice of Appeal filed herein (R.p.1210, para. 10; R.p.1469, para. 9), a copy was served on Howell, Gibson & Hughes.³ (R.p.1210, para. 9; R.p.1471, paras. 16-17). Given the confusion associated with who represented the SCDPS, service of the Notice of Appeal was reasonable and appropriate under the circumstances. (R.pp.1211-1234, paras. 12-80; R.p.1472, paras. 20-21).⁴

The confusion as to SCDPS' legal counsel is shown through the correspondence between the parties and/or the Circuit Court (R.pp.1211-1220, paras. 12-19, 21-29, 32-36; R.pp.1223-1225, paras. 43-50; R.pp.1230-1232, paras. 65-68, 71; R.pp.1472, paras. 20-21), as well as, through the parties'/Circuit Court's many documentary filings. (R.pp.1211-1220, paras. 12-

³ This substitution was made some 30 days after the parties had argued their positions on the Respondents' Motion for Summary Judgment herein. (R.p.1470, para. 11). Furthermore, the Substitution Order was issued some 70 days after the parties had argued their respective positions to the Circuit Court on their cross motions for summary judgment filed in a related civil case which has recently been argued before this Court of Appeals (Case No. 2009114686). See L. Paul Trask, Jr., Personally and as Next of Kin and as the Duly Appointed Personal Representative of the Estate of L. Paul Trask, III, deceased, and Meredith C. Trask v. Beaufort County; Curtis Copeland, in his Official Capacity as Coroner of Beaufort County and Individually; and Copeland Company of Beaufort, LLC (Appeal from Beaufort County Court of Common Pleas, Case No. 2007-CP-07-0993) ("Trask v. Beaufort County"). (R.p.1470, para. 12).

⁴ Nexsen Pruet has been representing and continues to represent Mr. Trask and his family in this matter and in Trask v. Beaufort County. (R.pp.1470-1471, para. 13). Davidson & Lindemann have been represented and continue to represent Coroner Copeland and the Copeland Funeral Home in Trask v. Beaufort County. (R.pp.1221-1222, paras. 39-40; R.p.1228, paras. 58-59; R.p.1234, paras. 77-78; R.p.1471, para. 14). Marshall H. Waldron, Jr., Esquire, both prior to and after he joined Griffith, Sadler & Sharp, P.A. ("Griffith Sadler & Sharpe"), has been representing and continues to represent both Beaufort County and Coroner Copeland (in his official capacity) in Trask v. Beaufort County. (R.p.1227, paras. 56-57; R.p.1233, paras. 75-76; R.p.1471, para. 15).

19, 21-29, 32-36; R.pp.1223-1225, paras. 43-50; R.pp.1230-1232, paras. 65-68, 71; R.pp.1472, paras. 20-21). These documents reasonably indicated Howell, Gibson & Hughes still represented all of the Respondents, including the SCDPS. (R.pp.1211-1220, paras. 12-19, 21-36; R.pp.1223-1225, paras. 43-50; R.pp.1230-1232, paras. 65-68, 71; R.pp.1472, paras. 20-21).⁵ Furthermore, when Mr. Trask filed the (a) 4/3/2009 Motion for Reconsideration, (b) the 10/28/2009 Joint Motion for Reconsideration, and (c) the 11/19/2009 Opposition Memo, the respective Certificates of Service for each clearly provided that Howell, Gibson & Hughes was being served as legal counsel for all of the Defendants, including the SCDPS. (R.pp.1220-1221, paras. 37-38; R.p.1227, paras. 54-55; R.p.1233, paras. 73-74).⁶

Even after service/receipt of the same three pleadings, no one advised Mr. Trask either that Howell, Gibson & Hughes did not represent the SCDPS or that Davidson & Lindemann represented the SCDPS. (R.p.1222, paras. 41-42; R.pp.1228-1229, paras. 60-61; R.p.1234, paras. 79-80; R.p.1472,

⁵ In every proceeding in which Thomas S. Tisdale, Jr., Esquire attended and for which an attorney from Davidson & Lindemann appeared, Mr. Tisdale was under the impression and believed Davidson & Lindemann were in attendance in that law firm's capacity as legal counsel only for Coroner Copeland and the Copeland Funeral Home in Trask v. Beaufort County. (R.p.1472, para. 18).

⁶ Of note, those same Certificates of Service showed Davidson & Lindemann was being served as legal counsel for Coroner Copeland in his individual capacity (R.pp.1221-1222, paras. 39-40; R.p.1228, paras. 58-59; R.p.1234, paras. 77-78; R.p.1471, para. 17), or, as in the case of the latter two documents, also as legal counsel for the Copeland Funeral Home. (R.p.1228, paras. 58-59; R.p.1234, paras. 77-78; R.p.1472, paras. 20-21). No corrective information was forthcoming. The Certificates of Service for the 10/28/2009 Joint Motion for Reconsideration and the 11/19/2009 Opposition Memo also showed service upon Griffith, Sadler & Sharp as legal counsel for Coroner Copeland *in his official capacity* and for Beaufort County. (R.p.1227, paras. 56-57; R.p.1233, paras. 75-76; R.p.1472, paras. 20-21).

paras. 20-21). This is especially true given the fact the correspondence and/or pleadings from Howell, Gibson & Hughes all occurred after 21 January 2009 -- the date when Davidson & Lindemann was substituted for Howell, Gibson & Hughes. (R.pp.1212-1213, paras. 15, 19; R.pp.1215-1216, paras. 23, 26; R.pp.1218-1219, paras. 32, 36; R.pp.1224-1225, paras. 46, 50; R.p.1232, para. 71; R.p.1472, paras. 20-21). This is similarly true for the Circuit Court's electronic correspondence to the parties. (R.p.1230, paras. 65-66; R.p.1472, paras. 20-21).

Moreover, as this Court of Appeals is aware, Mr. Trask filed and served his Notice of Appeal on 13 November 2009. (R.pp.1236-1237, paras. 83-85; R.p.1469, para. 9; R.p.1471, paras. 16-17). The Proof of Service for the Notice of Appeal as well as the "Other Counsel Of Record" section states Howell, Gibson & Hughes was legal counsel for **all of the Respondents**, including the SCDPS, and service of the Notice of Appeal was being made upon Howell, Gibson & Hughes in that capacity. (R.p.1210, paras. 9-10; R.p.1471, paras. 16-17). Furthermore, Mr. Trask has filed several motions and documents with this Court of Appeals since 13 November 2009, and service of those motions and documents all have been made upon Howell, Gibson & Hughes as counsel for **all of the Respondents**, including the SCDPS. (R.pp.1237-1238, paras. 87-90; R.p.1472, paras. 20-21). After service of those motions/documents in this appeal, no one advised Mr. Trask that Howell, Gibson & Hughes did not

represent the SCDPS or that Davidson & Lindemann represented the SCDPS. (R.p.1222, paras. 41-42; R.pp.1228-1229, paras. 60-61; R.p.1234, paras. 79-80; R.p.1472, paras. 20-21).

Mr. Trask reasonably believed Howell, Gibson & Hughes still represented all of the Defendants below and Respondents herein, including the SCDPS. (R.p.1240, para. 96; R.p.1472, paras. 20-21). Mr. Trask reasonably served Howell, Gibson & Hughes with the Notice of Appeal as counsel for **all of the Respondents** herein, including the SCDPS. (R.p.1240, para. 97; R.p.1472, paras. 20-21). Furthermore, service of the Notice of Appeal on Howell, Gibson & Hughes as counsel for all of the Respondents herein, including the SCDPS, constituted correct and proper service.⁷

There was a significant level of confusion and/or apparent inadvertent misinformation by both the Circuit Court and Howell, Gibson & Hughes as to the correct identity of the SCDPS' legal counsel. (R.pp.1212-1213, paras. 15, 19; R.pp.1215-1216, paras. 23, 26; R.pp.1218-1219, paras. 32, 36; R.pp.1224-1225, paras. 46, 50; R.p.1232, para. 71; R.p.1472, paras. 20-21). Both the

⁷ Service of the Notice of Appeal on Howell, Gibson & Hughes as counsel for SCDPS, constituted proper service (either actual or constructive) of the Notice of Appeal upon all of the Respondents herein and complied with Rule 203(b)(1), SCACR. See generally O'Connell, Goyak & Ball v. Silbernagel, 297 Or. 207, 681 P.2d 1159 (1984). The Oregon Supreme Court, approving the Oregon Court of Appeals' dismissal of an appeal, did so in part because the "Petitioners ma[d]e no allegation that they were confused about who was representing [one or more parties to the appeal]." O'Connell, Goyak & Ball v. Silbernagel, 297 Or. 207, 212, 681 P.2d 1159, 1162. The Oregon court implied if there had been confusion as to the identity of the proper legal counsel the outcome likely would have been different. O'Connell, Goyak & Ball v. Silbernagel, 297 Or. 207, 212, 681 P.2d 1159, 1162,

Circuit Court and Howell, Gibson & Hughes, albeit wrongly, consistently identified Howell, Gibson & Hughes as counsel for all of the Defendants below. (R.pp.1211-1235, paras. 12-81; R.p.1272, paras. 20-21).

This confusion lead to service of the Notice of Appeal upon Howell, Gibson & Hughes as counsel for all of the Respondents herein, including the SCDPS. (R.pp.1210-1235, paras. 8-81; R.p.1240, paras. 96-97; R.p.1472, paras. 18-21). Howell, Gibson & Hughes made consistent post-21 January 2009, representations, either impliedly or directly, that they represented all of the Defendants – including the SCDPS (R.p.1211-1220, paras. 13-19, 21-36; R.pp.1223-1225, paras. 43-50; R.pp.1230-1232, paras. 67-71; R.p.1472, paras. 20-21).⁸ Under the circumstances, service of the Notice of Appeal on Howell, Gibson & Hughes was proper service sufficient to bring the SCDPS into this appeal as a party-Respondent. (R.p.1240, paras. 96-97; R.pp.1472-1473, paras. 18-22). This is further bolstered by the Circuit Court's own actions effectively "confirming" Howell, Gibson & Hughes represented the SCDPS. (R.p.1230, paras. 65-66; R.p.1472, paras. 20-21).

⁸ Howell, Gibson & Hughes' indication of its implied and/or direct representation of the SCDPS comes from Howell, Gibson & Hughes' failure to show copies of pleadings and/or correspondence being sent to Davidson & Lindemann via Davidson & Lindemann's inclusion as a "CC" or "CCE" on letters (R.pp.1211-1217, paras. 12-14, 16-17, 21-22, 24-25, 27-28; R.p.1219, paras. 33-35; R.p.1223-1225, paras. 43-45, 47-49; R.pp.1230-1231, paras. 67-68; R.p.1472, paras. 20-21) or as a designated counsel on various Certificates of Service. (R.p.1213, para. 18; R.p.1218, paras. 30-31; R.pp.1231-1232, paras. 69-70; R.p.1472, paras. 20-21). Furthermore, there were some occasions where Howell, Gibson & Hughes actively stated it represented all of the Defendants below. (R.p.1217-1218, paras. 29, 31; R.p.1223, para. 43; R.p.1232, para. 70; R.p.1472, paras. 20-21).

Moreover, the SCDPS cannot reasonably demonstrate that it has been prejudiced by the circumstances surrounding service of the Notice of Appeal in this case. Even though the SCDPS may allege that it has been “harmed” by the mere fact it has to respond in this appeal, there is no real prejudice since, had there been no confusion as to the SCDPS’ representation, Mr. Trask would have sent copies of the Notice of Appeal to Howell, Gibson & Hughes, as well as, Davidson & Lindemann. Furthermore, clearly Davidson & Lindemann received a copy of the Notice of Appeal and would have been required to respond in the normal course. In effect, that is precisely what Davidson & Lindemann have been able to do on behalf of the SCDPS. It is reasonable to assume Davidson & Lindemann have raised each and every appellate issue the SCDPS would have raised had they originally received a copy of the Notice of Appeal in November 2009. There has been no prejudice whatsoever.

This Court of Appeals should not dismiss Mr. Trask’s appeal against the SCDPS as the Notice of Appeal was, under the unusual circumstances of this case, properly served and sufficiently brought the SCDPS to the appellate table.⁹

⁹ As this Court of Appeals is aware, Mr. Trask filed his 4/3/2009 Motion for Reconsideration with the Circuit Court in early April 2009. (R.pp.1220-1221, paras. 37-40). The Circuit Court, via the 10/13/2009 Reconsideration Order, denied the motion. (R.pp.1225-1226, paras. 51-52). On 28 October 2009, Mr. Trask filed his 10/28/2009 Joint Motion for Reconsideration requesting the Circuit Court to reconsider certain matters in the 10/13/2009 Reconsideration Order. (R.pp.1226-1228, paras. 53-59). The 10/28/2009 Joint Motion for Reconsideration was not made upon the same grounds as the original 4/3/2009 Motion for Reconsideration and raised new issues not raised in the original 4/3/2009 Motion for Reconsideration. (R.p.1229, para. 82). The Circuit Court has not yet issued a decision on the second

B. This Court Of Appeals Does Not Have "To Grope In The Dark" Since Mr. Trask Properly And Correctly Raised His Appellate Issues Against The SCDPS¹⁰

The SCDPS again seeks to escape liability in this case, not on the merits of the appeal, but by asserting Mr. Trask failed to properly set forth his appellate issues as against the SCDPS. This argument is meritless.

The SCDPS, relying solely on Jones v. Lott,¹¹ argues Mr. Trask did not concisely and directly set forth his issues on appeal in this matter as against the SCDPS. (*SCDPS Brief*, p.6). The SCDPS' position is meritless. A review of Mr. Trask's Appellant's Brief demonstrates Mr. Trask clearly has clearly set forth

motion. Consequently, out of an abundance of caution, Mr. Trask filed his Notice of Appeal herein on 13 November 2009, so as to avoid a later assertion by one or more of the Respondents that the 10/28/2009 Joint Motion for Reconsideration did not stop the running of the appellate time and any subsequent Notice of Appeal was not timely filed. See generally Coward Hund Construction Company, Inc. v. Ball Corporation, 336 S.C. 1, 2-6, 518 S.E.2d 56, 57-59 (Ct.App. 1999); Quality Trailer Products, Inc. v. CSL Equipment Co., Inc., 349 S.C. 216, 219-221, 562 S.E.2d 615, 617-619 (2002). Therefore, this Court of Appeals could dismiss the Notice of Appeal filed in this case without prejudice as being premature until such time as the Circuit Court ultimately issues its ruling on the still-pending and as yet undecided 10/28/2009 Joint Motion for Reconsideration. Nevertheless, Mr. Trask would prefer this Court of Appeals to avoid that potentially lengthy delay and consider this matter on the merits at this present time.

¹⁰ Even though the SCDPS asserted Mr. Trask "failed" to preserve his arguments against either the statute of limitations or mootness, the SCDPS significantly undercuts its own arguments by itself specifically arguing (a) Mr. Trask missed the statute of limitation on his FOIA requests to the SCDPS (*SCDPS Brief*, pp.7-10) and, to the extent any FOIA requests came within the statute of limitations, (b) such FOIA requests were moot because the documents were subsequently produced. (*SCDPS Brief*, pp.10-11).

¹¹ Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010).

his arguments that the SCDPS repeatedly violated both the South Carolina Freedom of Information Act¹² and the South Carolina Public Records Act¹³ and, in turn, should not have been granted summary judgment in this case.

Mr. Trask set forth a chronology of his contacts with and FOIA requests to the SCDPS and, in turn, the SCDPS' failures to provide the documents requested either through prior destruction of the documents/recordings (R.pp.21-22, paras. 15-20; R.p.45, paras. 15-16, 18-19; R.p.117, paras. 3-4; R.p.114; R.p.93; R.p.107, paras. 3-4; R.p.119, line 10 – R.124, line 22; R.p.718, para. 12(a)) or that SCDPS had provided him all of the "records to which he was entitled" (R.p.22, para. 20). Mr. Trask also set forth a similar chronology as to the numerous FOIA and Public Records Act violations by the Respondents, Beaufort County; Beaufort County Management Information Systems ("BCMIS"/"BCEM"); Beaufort County Coroner Curtis Copeland in his official capacity ("Coroner Copeland"); and Beaufort County Sheriff P.J. Tanner in his official capacity ("Sheriff Tanner" or "BCSO") (collectively the "County Respondents").

Mr. Trask went on to specifically argue that the Circuit Court should not have granted the SCDPS or the County Respondents summary judgment on his claims. Any argument that the mootness issue and/or the statute of limitations issue was not subsumed in Mr. Trask's position is meritless.

¹² S.C. Code Ann. §§ 30-4-10, *et seq.* (Thomson Reuters West 2008).

¹³ *See S. C. Code Ann.* §§ 30-1-10, *et seq.*

The Circuit Court found some of Mr. Trask's claims against the SCDPS had been rendered moot via Sloan v. Friends of Hunley, Inc.¹⁴ (R.pp.6, 8-9). Mr. Trask clearly challenged the Circuit Court's misplaced reliance on Sloan v. Friends of Hunley, Inc.. (*Appellant's Brief*, pp.46-48). Mr. Trask argued that Sloan v. Friends of Hunley, Inc. mootness could not apply since public bodies, such as the SCDPS, could not, *on the one hand*, intentionally (or otherwise) destroy FOIA documents/information/recordings and then, *on the other hand*, use the non-existence of the very same documents/information/recordings as a complete defense to producing the those same documents/information/recordings or of suffering the monetary or other consequences under either FOIA or the Public Records Act for not maintaining the documents/information. Mootness was addressed.

Additionally, if the South Carolina Legislature intended, as the SCDPS essentially argues, that a post-FOIA litigation production of previously requested documents to render legitimate a reluctant governmental entity's pre-FOIA litigation refusal to produce documents then the Legislature would have stated that position.¹⁵ Instead, the Legislature specifically granted a FOIA requester, such as Mr. Trask, the "ability to apply to the [C]ircuit [C]ourt for either or both a declaratory judgment and injunctive relief to enforce [FOIA's] provisions"¹⁶ and, equally importantly, to be awarded attorneys' fees

¹⁴ Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006).

¹⁵ This would be analogous to the "safe harbor" provisions in Rule 11, SCRCivP.

¹⁶ See S.C. Code Ann. § 30-4-100(a) (Thomson Reuters West 2008).

and costs for having to do so.¹⁷ Rhetorically speaking, why would the Legislature provide for judicial enforcement of the FOIA, including the assessment of attorneys' fees and costs, if a FOIA request violator, once sued, could then simply "comply" with FOIA by providing the requested documents and escape completely unscathed (economically or otherwise)? It is an illogical position as it means the Legislature provided the public with a "remedy" to "enforce" FOIA, but, in actuality, provided a "remedy" without any real meaning or purpose. By enacting the FOIA enforcement provisions the Legislature could have only intended that when a governmental entity fails to comply with FOIA and the FOIA requestor is forced to file suit to insist on compliance, the FOIA violator cannot completely escape liability by simply producing the documents which should have been produced originally. The FOIA enforcement provisions necessarily mandate some type of sanction be imposed upon governmental entities which violate FOIA's clear and unambiguous production requirements.¹⁸

¹⁷ See S.C. Code Ann. § 30-4-100(b) (Thomson Reuters West 2008). Importantly, the Legislature also criminalized intentional FOIA violations. See S.C. Code Ann. § 30-4-110 (Thomson Reuters West 2008).

¹⁸ "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citing Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)). Furthermore, a " 'statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.' " State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (quoting In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (Internal citation omitted)).

In a similar fashion, the Circuit Court concluded some of Mr. Trask's claims against the SCDPS were allegedly barred by the statute of limitations.¹⁹ (R.pp.6-8). Mr. Trask challenged the Circuit Court's position asserting the SCDPS had effectively "sandbagged" Mr. Trask into biding his time and, therefore, the Respondents were estopped from asserting the applicability of the statute of limitations. (*Appellant's Brief*, pp.49-50).

Mr. Trask argued the record showed the SCDPS was estopped since Mr. Trask's delay in bringing the action was clearly induced by the SCDPS' conduct.²⁰ The SCDPS repeatedly assured Mr. Trask they would produce all of the documents they had available which would have been responsive to his various *FOIA* requests, even though the SCDPS' individual and collective actions demonstrated otherwise. Additionally, Mr. Trask argued the SCDPS made these assurances and/or representations to him about its alleged

¹⁹ S. C. Code Ann. § 30-40-100(a).

²⁰ *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994). See also *Hooper v. Ebenezer Sr. Services and Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting 54 C.J.S., *Limitations of Actions*, § 115 (Thomson West 2005) (" '[I]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.'"). See also generally *Hooper v. Ebenezer Sr. Services and Rehab. Ctr.*, 386 S.C. 108, 116-117, 687 S.E.2d 29, 33 (quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex.App. 2006)) (" 'The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.' ").

"forthcoming" document production solely to "lull" Mr. Trask into a false sense of security so that the one-year time period would run prior to him asserting his claims in Circuit Court.²¹ The statute of limitations issue was addressed.

Mr. Trask has given this Court of Appeals the proper "flashlight" to enable it to discern the appellate issues in this case. This Court of Appeals will not be required to "grope in the dark" for Mr. Trask's arguments.

C. The SCDPS Waived Or Was Estopped To Assert The Statute Of Limitations Bars Mr. Trask's Claims Against The SCDPS Or The Statute Of Limitations Was Equitably Tolloed

The Circuit Court incorrectly granted summary judgment on the ground Mr. Trask failed to timely bring his claims for FOIA violations. (*SJ Order*, pp.3-4). The record shows the SCDPS is or reasonably should be estopped from claiming application of the statute of limitations as a defense since Mr. Trask's delay in bringing the action was clearly induced by SCDPS' own delaying conduct.²²

On 23 February 2006, Mr. Trask wrote to SCHP Corporal Paul J. Brouters requesting the SCDPS to "preserve all records related to the [A]ccident and the subsequent investigation". (R.p.21, para. 15; R.p.45, para. 15; R.p.93; R.p.114; R.p.107, para. 3; R.p.718, para. 12(a)). On 27 February 2006, Mr. Trask sent a FOIA request to the SCHP seeking copies of "all records, excluding photo[graph]s, pertaining to the [A]ccident" (R.p.21, para.

²¹ See, e.g., Hopkins v. Floyd's Wholesale, 299 S.C. 127, 129, 382 S.E.2d 907, 908 (1989) (statute of limitations is tolled during a reliance period); Hooper v. Ebenezer Sr. Services and Rehab. Ctr., 386 S.C. 108, 117, 687 S.E.2d 29, 33.

²² Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171.

16; R.p.45, para. 16; R.p.117; R.p.107, para. 4; R.p.119, lines 10-18; R.p.718, para. 12(a)). including audio (*i.e.*; radio) transmissions related to the Accident. (R.p.117, paras. 3-4; R.p.119, line 19 – R.p.120, line 11). The SCDPS partially responded on 8 March 2006, but didn't include any handwritten notes or copies of recorded radio transmissions. (R.pp.21-22, para. 17; R.p.107, para. 4; R.p.718, para. 12(a)). Furthermore, "many of the documents provided were illegible[,] of poor quality[,] and [effectively] impossible to read" (R.pp.21-22, para. 17; R.p.107, para. 4; R.p.718, para. 12(a)).²³ On 8 August 2008, the SCDPS testified herein it would follow-up on Mr. Trask's FOIA requests, but not response has been forthcoming. (R.p.107, para. 3; R.p.119, p.57, line 10 – R.p.124, line 22).

The SCDPS assured Mr. Trask it would produce all available documents responsive to his FOIA requests, even though the SCDPS' individual and collective actions demonstrated otherwise. Moreover, it is reasonable to assert the SCDPS made these assurances and/or representations to Mr. Trask about its forthcoming document production solely to "lull" Mr. Trask into a false sense of security so that the one-year time period would run prior to him asserting his claims against the SCDPS in court.²⁴

²³ While the radio transmissions should have been available on 27 February 2007, as they were to be retained for 180 days (R.p.120, p.58, line 12 – R.p.123, line 9), they no longer exist. (R.p.123, line 10 – R.p.124, line 22).

²⁴ See, e.g., Hopkins v. Floyd's Wholesale, 299 S.C. 127, 129, 382 S.E.2d 907, 908; Hooper v. Ebenezer Sr. Services and Rehab. Ctr., 386 S.C. 108, 117, 687 S.E.2d 29, 33.

Our Supreme Court has recognized that " '[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.'" ²⁵ The principal of " '[e]quitable tolling is a nonstatutory tolling theory which suspends a limitations period.' " ²⁶ Furthermore, the Supreme Court noted " '[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.' " ²⁷

Given the SCDPS' actions and/or inactions, this Court of Appeals should conclude the SCDPS has effectively waived and/or is estopped from asserting the applicability of the statute of limitations as to Mr. Trask's claims against the SCDPS or, at a minimum, the statute of limitation has been equitably tolled.

²⁵ Hooper v. Ebenezer Sr. Services and Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (*quoting* 54 C.J.S., Limitations of Actions, § 115)) (Alteration in original).

²⁶ Hooper v. Ebenezer Sr. Services and Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (*quoting* Ocana v. American Furniture Co., 135 N.M. 539, 91 P.3d 58, 66 (2004)).

²⁷ Hooper v. Ebenezer Sr. Services and Rehab. Ctr., 386 S.C. 108, 116-117, 687 S.E.2d 29, 33 (*quoting* Hausman v. Hausman, 199 S.W.3d 38, 42).

D. The SCDPS Waived Or Was Estopped To Assert Mr. Trask's Claims Against The SCDPS Were Barred As Being Moot

The Circuit Court incorrectly granted summary judgment on the ground Mr. Trask's claims were moot since the SCDPS had either provided the documents requested or could not do so because they did not exist. (R.pp.6-9). As argued previously, this argument is meritless.

On 18 May 2006, Mr. Trask requested the SCDPS to provide him with copies of the investigatory field notes and the coroner's toxicology report. (R.p.22, para. 18; R.p.45, para. 18; R.pp.661-662; R.p.718, para. 12(a)). The SCDPS provided illegible copies of the field notes on 20 June 2006. (R.p.22, para. 18; R.p.45, para. 18; R.p.718, para. 12(a)). Mr. Trask then repeatedly sought to review the original file, but was not allowed to see it until 10 July 2006. (R.p.22, para. 18; R.p.45, para. 18). On 12 December 2006, Mr. Trask sent a written FOIA request to SCDPS seeking "e[-]mail communications between several of the investigating SCHP troopers and Beaufort County personnel." (R.p.22, para. 19; R.p.45, para. 19; R.p.718, para. 12(a)). Ms. Watkins advised Mr. Trask on 15 December 2006, that the "SCDPS could not supply the requested records because the SCHP troopers had 'double deleted' the records from their e-mail accounts." (R.p.22, para. 20; R.p.718, para. 12(a)). Mr. Trask made several subsequent requests to the SCDPS seeking restoration of the deleted e-mails, as well as a copy of the SCDPS' written policy governing its e-mail system. (R.p.22, para. 20; R.p.718, para. 12(a)). SCDPS never provided either any of the deleted e-mails or an

explanation of its e-mail use/retention policy. (R.p.22, para. 20; R.p.718, para. 12(a)). Eventually, SCDPS personnel advised Mr. Trask the SCDPS had provided him all of the "records to which he was entitled" (R.p.22, para. 20).

The SCDPS again makes the ridiculous argument, relying on Sloan v. Friend of Hunley, Inc.,²⁸ that it had produced all of the documents in its possession and could not produce any additional information as those sought-after documents and/or recordings (*i.e.*; SCHP trooper e-mails, SCHP trooper radio audio recordings, *etc.*) had already been destroyed. Once again, Mr. Trask takes the completely logical position that the mootness doctrine contemplated in Sloan v. Friends of Hunley, Inc. could not reasonably apply since public bodies, such as the SCDPS, should not be allowed, *on the one hand*, to unilaterally and intentionally destroy FOIA documents, information, and/or audio/video recordings and then, *on the other hand*, use the non-existence of those very same documents, information, and/or audio/video recordings as a complete defense to producing those documents, information, and/or audio/video recordings pursuant to FOIA requests or of suffering the monetary or other consequences contained within either FOIA or the Public Records Act for not maintaining (*i.e.*; improperly destroying) the documents, information, and/or audio/video recordings.

²⁸ Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474.

Given the SCDPS' actions in itself destroying the very documents sought by Mr. Trask, this Court of Appeals should conclude the SCDPS has waived and/or is estopped from asserting the applicability of the mootness doctrine as to Mr. Trask's claims against the SCDPS.

E. FOIA And The Public Records Act Jointly Required The SCDPS To Create, Preserve, And Produce Public Records And The SCDPS' Failure To Do So Breached Its Duty To Mr. Trask And The Public

Given the statutory schemes and purposes of both FOIA and the Public Records Act, it is axiomatic that the SCDPS was obligated to create, maintain, and preserve its public records and, in appropriate circumstances, to produce copies of those very same public records pursuant to the public's FOIA requests, such as those made by Mr. Trask. The SCDPS' failure to create, maintain, and preserve its own public records, or to appropriately produce them violated the SCDPS' duty to do so both to the public at large and to Mr. Trask in particular.

The SCDPS wrongly asserts the SCDPS cannot be held liable to Mr. Trask for its failures to create, maintain, and/or preserve SCDPS' public records because there is no actual or implied right of action against the SCDPS vis-à-vis those records (*SCDPS Brief*, pp.12-15). In essence, the SCDPS asserts that, regardless of its admitted FOIA and Public Records Act violations, the SCDPS simply cannot be held liable to Mr. Trask regardless of the damage done, the pain caused, or the misery inflicted. The SCDPS, incorporating the arguments of the County Respondents (*SCDPS Brief*, p.15

n. 8), relies on Kissinger v. Reporters' Committee for Freedom of the Press,²⁹ for the proposition that there is no "private cause of action under . . . FOIA for the wrongful removal of documents" and, in addition, that a Public "Records Act cannot be 'bootstrapped' to [a FOIA's] requirements . . . in order to create a cause of action." (*County Respondents Brief*, p.18).

Both the SCDPS' and the County Respondents reliance is misplaced as they ignore the important factual differences between that matter and this case. The Supreme Court was addressing the **federal** FOIA law, a statute significantly different than the various States' FOIAs, including our State's version.

For example, the Maryland Supreme Court, in Office of Governor v. Washington Post Co.,³⁰ distinguished Kissinger v. Reporters Committee for Freedom of the Press on the basis that the Supreme Court's interpretation of

²⁹ Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136 (1980). The Supreme Court's principal and paramount holding in the case addressed whether a governmental agency could be deemed to have improperly withheld documents under the Federal FOIA when the agency no longer had possession of the documents at the time the FOIA request was made. See Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, 151-154. The majority of the cases subsequently interpreting and/or addressing Kissinger v. Reporters' Committee for Freedom of the Press, have dealt with whether the documents were "public documents" and/or were "improperly withheld", not the creation of a public right of action under FOIA and some State Records Act. See generally United States Department of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989); GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375, 384 (1980); Forsham v. Harris, 445 U.S. 169, 177 (1980); Consumer Federation of America v. Department of Agriculture, 455 F.3d 283, 287 (D.C. Cir. 2006); Affiliated Construction Trades Foundation v. Regional Jail and Correctional Facility Authority, 200 W.Va. 612, 626-627, 490 S.E.2d 708, 713-714 (1997); Workmann v. Illinois State Board of Education, 229 Ill.App.3d 459, 462, 593 N.E.2d 141, 144 (App. 2d Dist. 1992).

³⁰ Office of Governor v. Washington Post Co., 360 Md. 520, 759 A.2d 249 (2000).

the federal FOIA statute referred to "agency records", while the Maryland FOIA statute, like South Carolina's FOIA, deals with "public records", noting "the cases interpreting the Maryland Act have broadly construed the terms "public record" and "instrumentality of the State government."³¹ Moreover, the Maryland Supreme Court noted:

The coverage of the [Maryland FOIA] Act is dependent upon the scope of the term 'public records', and not upon whether the governmental entity holding the records is an 'agency' rather than some other type of governmental entity. Although this Court has examined the status of particular entities in order to determine if their records were covered by the [Maryland FOIA] Act, such examinations were for the purpose of deciding whether the entities were private or governmental. In each of these cases, the entities argued that they were private and that, for this reason, their records were not "public records" subject to disclosure under the [Maryland FOIA] Act.³²

This judicial interpretative scheme is very similar to or the same as that employed in South Carolina.³³

Furthermore, the Maryland Court distinguished Kissinger v. Reporters Committee for Freedom of the Press by recognizing that "[u]nlike the Federal [FOIA] Act, there [wa]s no statutory language or legislative history suggesting

³¹ Office of Governor v. Washington Post Co., 360 Md. 520, 536, 759 A.2d 249, 258.

³² Office of Governor v. Washington Post Co., 360 Md. 520, 534-535, 759 A.2d 249, 257 (Emphasis added).

³³ See generally Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474. The case was little concerned whether the documents Sloan sought from the Friends of Hunley were appropriately characterized as "public documents", but directly addressed the "public vs. private" nature of the Friends of Hunley entity itself.

that any unit of the Maryland Government [wa]s exempt from the Public Information Act's coverage."³⁴ Similarly, South Carolina's FOIA broadly defines both the terms "public record" and "public body" and does not appear to exempt any governmental unit, either state, county, municipal, and/or local, from being subjected to FOIA's coverage.³⁵

The SCDPS admittedly kept and maintained a myriad of documents and electronic information associated with the Accident.³⁶ Mr. Trask was vociferous in his attempts to have the SCDPS preserve all documentary and electronic information. He notified the SCDPS in writing and via certified U.S. Mail. Mr. Trask clearly placed the SCDPS on preservation notice early on after 22 November 2005.

Unfortunately, even in the face of the statutory mandates of FOIA and the Public Records Act, Mr. Trask's FOIA requests were essentially either completely ignored or given very short shrift. Consequently, much of the relevant documentary and electronic information was intentionally destroyed and lost forever. Additionally, the SCDPS did not make any attempt whatsoever to recreate/recover the destroyed documents even after Mr. Trask

³⁴ Office of Governor v. Washington Post Co., 360 Md. 520, 536, 759 A.2d 249, 258.

³⁵ See generally S.C. Code Ann. §§ 30-40-20(a), (c), 30-40-50(a) (Thomson Reuters West 2008).

³⁶ While FOIA does not require a public body to preserve, retain, and/or maintain public documents and/or records as a general course, FOIA does compel a public body to preserve, retain, and maintain those public documents/records which the public body has actually kept. The Public Records Act is the means to compel a public body to retain its public records.

requested the SCDPS to do so. The SCDPS simply sent Mr. Trask written notice stating no additional production would be made since the SCDPS had provided him all of the "records to which he was entitled" (R.p.22, para. 20). This Court of Appeals should ensure that does not happen again and that the SCDPS is compelled to comply with FOIA and the Public Records Act.

Furthermore, this Court of Appeals should not permit the SCDPS to intentionally and clearly violate the FOIA and the Public Records Act and then suffer no consequences whatsoever. The SCDPS owed a duty to the public at-large and to Mr. Trask in particular to comply with the laws of this State. The SCDPS admitted the laws were not followed. Moreover, the SCDPS intentionally destroyed public records (*i.e.*; documents, e-mails, electronic audio recordings, *etc.*) which admittedly should have been and were legally required to be preserved. Now the SCDPS asserts Mr. Trask, nor anyone for that matter, has a remedy against it. The SCDPS seeks this Court of Appeals' approval for its actions and inactions. Condemnation should be the only response.

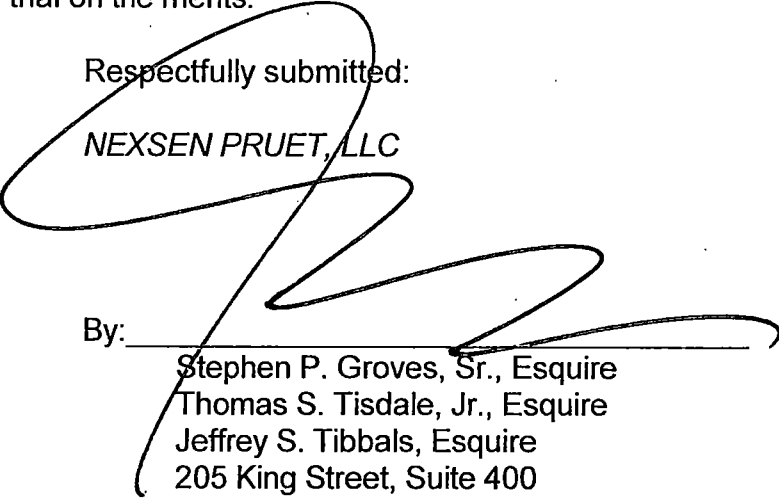
This Court of Appeals should and must reverse the Circuit Court's decision and remand this matter back for a trial on the merits.

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Appellant, 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, respectfully requests this Court of Appeals to reverse the decision of the Circuit Judge in all respects and remand this matter back to the Circuit Court for a jury trial on the merits.

Respectfully submitted:

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8 February 2011

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**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Beaufort County
Honorable Carmen T. Mullen, Circuit Judge
Civil Action No.: 2007-CP-07-0995

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,

Appellant,

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.

**FINAL REPLY BRIEF OF THE APPELLANT
TO THE BRIEF OF THE
BEAUFORT COUNTY RESPONDENTS**

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The Appellant 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 ("Mr. Trask"), respectfully submits this Reply Brief in response to the joint brief of the Respondents, Beaufort County; Beaufort County Management Information Systems ("BCMIS"/"BCEM"); Beaufort County Coroner Curtis Copeland in his official capacity ("Coroner Copeland"); and Beaufort County Sheriff P.J. Tanner in his official capacity ("Sheriff Tanner" or "BCSO").

ARGUMENT AND CITATION OF AUTHORITY

The Trial Court should not have granted the County Respondents' summary judgment on Mr. Trask's claims. The record shows Mr. Trask had presented substantial and significant evidence demonstrating the Respondents' had voluntarily, intentionally, and knowingly violated the FOIA and the Public Records Act. This decision should and must be reversed in all respects and this matter remanded back for a trial on the merits.

A. Mr. Trask's Evidence Demonstrated The County Respondents Were Not Entitled To Summary Judgment Since They Had Repeatedly Violated South Carolina Law

Mr. Trask intellectually believes his son, Paul Trask, died in a single-car accident on Beaufort County's Sea Island Parkway on 22 November 2005. (R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8). Tragically, Mr. Trask really doesn't ***know the truth*** of his son's situation where it counts the most - in his heart. Mr. Trask does not know if Paul Trask died that early November morning, but, even if Paul did, Mr. Trask does not know either the "how" or the

"why". (R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8). Mr. Trask was entitled to know these truths ((R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8) as any parent would when having to bury a child. Unfortunately, Mr. Trask is "in the dark" due to the County Respondents' actions in willfully and intentionally destroying public documents which should have been retained and preserved. Sadly, the County Respondents and others heaped uncertainty, confusion, and deception upon Mr. Trask's unbearable grief and effectively prevented Mr. Trask from having answers to these critically important questions.

Mr. Trask made numerous FOIA requests to the County Respondents seeking to determine the "how" and the "why" surrounding Paul Trask's Accident. Furthermore, Mr. Trask also made numerous FOIA requests to the County Respondents seeking to know the "how" and "why" of the County Respondents' intentional destruction of public documents and their extensive failures to comply with South Carolina law concerning maintenance and preservation of public documents.

The Freedom Of Information Act

The South Carolina Freedom of Information Act¹ afforded Mr. Trask the right to inspect and/or copy any public record of the County Respondents, unless the record fell within one of several narrowly construed statutory exemptions.² Our courts have recognized that FOIA "must be construed so as to make it possible for [Mr. Trask] to learn and report fully the activities of [his] public

1 S.C. Code Ann. §§ 30-4-10, *et seq.* (Thomson Reuters West 2008).

2 S.C. Code Ann. § 30-4-30 (Thomson Reuters West 2008).

officials at a minimum cost or delay.³ Moreover, our courts have consistently interpreted FOIA as being broadly pro-disclosure with any and all exemptions very narrowly construed.⁴ In fact, the involved governmental entities must demonstrate any asserted FOIA exception applies.⁵

Consequently, FOIA's underlying purpose required the County Respondents, once in possession of public records, to preserve and maintain such records and the FOIA necessarily imposed an implied duty on the County Respondents to do so. Without such an implied duty to preserve and maintain public records, once they have been created, the legislative purposes behind FOIA are completely eviscerated.

The Public Records Act

The South Carolina Public Records Act⁶ required the County Respondents to create, retain, maintain, and preserve its public records. Furthermore, the Public Records Act created comprehensive records management programs for public entities, such as the County Respondents, and imposed criminal liability on those who unlawfully and/or illegally removed, deleted, defaced, altered,

³ S. C. Code Ann. § 30-4-15 (Thomson Reuters West 2008).

⁴ S.C. Tax Com'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 169, 447 S.E.2d 843, 846 (1994) (citing Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991)). The "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature [and] FOIA must be construed so as to make it possible for citizens[, such as Mr. Trask,] to learn and report fully the activities of public officials."

⁵ Post Publishing Co. v. City of N. Chas., 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005). When public documents contain exempt information, FOIA requires the public entity to redact the exempt portions and make any non-exempt portions available. See S.C. Code Ann. § 30-4-40(b). See New York Times Co. v. Spartanburg County School Dist. No. 7, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007).

⁶ See S. C. Code Ann. §§ 30-1-10, *et seq.* (Thomson Reuters West 2007).

mutilated, and/or otherwise destroyed public records,⁷ unless the destruction/deletion was done pursuant to an approved records retention and/or destruction schedule.⁸ Moreover, the public records of public entities, such as the County Respondents, must be “repaired” and/or “restored” if they are “damaged,” at the expense of the public bodies having custody and/or control responsibility.

1. The County Respondents Failed To Comply With The FOIA And/Or The Public Records Act

Mr. Trask asserted various claims against the County Respondents for their numerous FOIA violations. Mr. Trask’s evidence far exceeded the “mere scintilla” requirement needed to defeat the County Respondents’ Motion for Summary Judgment.⁹ Material issues of fact clearly existed regarding the County Respondents’ FOIA violations. The Circuit Court improperly granted summary judgment to the County Respondents and that decision must be reversed in all respects and this matter remanded for a trial on the merits.

(a) Post-Litigation Document Production Insufficient

The County Respondents, relying on Sloan v. Friends of Hunley, Inc.,¹⁰ attempt to, in part, justify their illegal actions on the grounds they have allegedly given Mr. Trask all of the documents which he requested under FOIA, albeit after he filed suit against them to force the production and, therefore, there was “no harm, no foul”.

⁷ See generally S. C. Code Ann. §§ 30-1-140 (Thomson Reuters West 2007).

⁸ See S. C. Code Ann. §§ 30-1-30 through 30-1-60, 30-1-80 through 30-1-100 (Thomson Reuters West 2007).

⁹ Weston v. Kim’s Dollar Store, 385 S.C. 520, 529, 684 S.E.2d 769, 774 (citing Hancock v. Mid-South Management Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803).

¹⁰ Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006).

The County Respondents, however, read much too much into Sloan v. Friends of Hunley, Inc. A closer reading shows the case is easily distinguished from this case. After Friends of the Hunley, Inc. (an allegedly private entity) refused to provide Edward Sloan with certain documents via his FOIA request, Mr. Sloan filed a declaratory judgment action seeking a declaration that Friends of Hunley was a public entity subject to FOIA.¹¹ After the Friends of Hunley conceded it was subject to FOIA and provided Mr. Sloan with all of the documents he had requested, the Trial Court granted summary judgment to Friends of Hunley and dismissed Mr. Sloan's action.¹² The Supreme Court affirmed the summary judgment, not specifically because the documents Mr. Sloan requested under FOIA had been produced, but because the alleged public entity conceded it was subject to FOIA and, therefore, the need for a declaratory judgment on that issue was moot.¹³ Consequently, contrary to the County Respondents' position (*County Respondents' Brief*, pp.11-13), the Supreme Court did not determine that the post-FOIA litigation production of previously FOIA requested documents rendered legitimate and non-sanctionable a governmental entity's pre-FOIA litigation refusal to produce documents in response to a FOIA request.

Furthermore, if the South Carolina Legislature intended that a post-FOIA litigation production of previously requested documents to render legitimate a reluctant governmental entity's pre-FOIA litigation refusal to produce documents

¹¹ Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477-478.

¹² Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477-478.

¹³ Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477-478.

then the Legislature would have stated that position.¹⁴ Instead, the Legislature specifically granted a FOIA requester, such as Mr. Trask, the "ability to apply to the [C]ircuit [C]ourt for either or both a declaratory judgment and injunctive relief to enforce [FOIA's] provisions"¹⁵ and, equally importantly, to be awarded attorneys' fees and costs for having to do so.¹⁶ Rhetorically speaking, why would the Legislature provide for judicial enforcement of the FOIA, including the assessment of attorneys' fees and costs, if a FOIA request violator, once sued, could then simply "comply" with FOIA by providing the requested documents and escape completely unscathed (economically or otherwise)? It is an illogical position as it means the Legislature provided the public with a "remedy" to "enforce" FOIA, but, in actuality, provided a "remedy" without any real meaning or purpose. By enacting the FOIA enforcement provisions the Legislature could have only intended that when a governmental entity fails to comply with FOIA and the FOIA requestor is forced to file suit to insist on compliance, the FOIA violator cannot completely escape liability by simply producing the documents which should have been produced originally. The FOIA enforcement provisions necessarily mandate some type of sanction be imposed upon governmental entities which violate FOIA's clear and unambiguous production requirements.¹⁷

¹⁴ This would be analogous to the "safe harbor" provisions in Rule 11, SCRCivP.

¹⁵ See S.C. Code Ann. § 30-4-100(a) (Thomson Reuters West 2008).

¹⁶ See S.C. Code Ann. § 30-4-100(b) (Thomson Reuters West 2008). Importantly, the Legislature also criminalized intentional FOIA violations. See S.C. Code Ann. § 30-4-110 (Thomson Reuters West 2008).

¹⁷ "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would

(b) Intentional or Voluntary Destruction is Not Equivalent to
"Lack of Possession or Control"

The County Respondents also assert their actions did not violate the FOIA in certain instances, on the basis that the "County Respondents no longer exerted control or possession over" the documents sought such as the " 'double deleted' emails, disposed of handwritten investigatory notes, and [Coroner Copeland's] hard drive" (*County Respondents' Brief*, p.14). The County Respondents state when Mr. Trask made his FOIA requests, they did not have possession or control over the requested documents in order to respond. They then incredibly admit they did not have the documents due to the County Respondents' intentional destruction of the e-mails and the handwritten notes and the disposal of Coroner Copeland's business computer's hard drive.¹⁸

Incredibly, the County Respondents seek to have this Court of Appeals approve, in part, their lack of FOIA production based solely on the grounds that the County Respondents admittedly destroyed the very documents and information sought before Mr. Trask could make his FOIA requests. The County

defeat the plain legislative intention." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (*citing Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)). Furthermore, a " 'statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.' " State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (*quoting In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (Internal citation omitted)).

¹⁸ In Kissinger v. Reporters' Committee for Freedom of the Press, a case strongly relied on by the County Respondents (*County Respondents Brief*, p.14), the United States Supreme Court found the Department of State did not violate the Federal FOIA because the documents at issue had been transferred from State to another government agency and State no longer had possession or control of the documents. Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, 151-155 . On the other hand, it was crystal clear that State had not destroyed, either intentionally or otherwise, any of the documents and, in fact, the documents still existed.

Respondents, of course, completely ignore the fact that the documents and/or information sought were public documents containing information concerning public business and activities which were required to be preserved and which should not have been destroyed in the first instance.¹⁹ The fact the County Respondents destroyed the documents and information, either prior to Mr. Trask's FOIA requests or otherwise, is not a grounds for redemption, but the basis for condemnation. If this position was the law, then every governmental entity would immediately destroy all of its public records as soon as they were "created" so that the entity would never have to respond to a FOIA request due to its alleged "lack of control or possession".

The United States Supreme Court noted, in Kissinger v. Reporters' Committee for Freedom of the Press, that while the Federal FOIA, "does not obligate agencies to create or retain documents; it [clearly] obligates them to provide access to those [documents] which it in fact has created and retained."²⁰ The Supreme Court noted that, unlike the Federal FOIA, the Federal Records Act "require[ed] an agency to actually create records" ²¹

¹⁹ The County Respondents completely ignore the provisions and requirements of the Public Records Act.

²⁰ Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, 152 (Emphasis added). The Circuit Court's order does not specifically address whether the County Respondents' had actual possession and/or control of the requested documents at the time Mr. Trask made his FOIA requests. In Office of Governor v. Washington Post Co., 360 Md. 520, 759 A.2d 249 (2000), the Maryland Supreme Court distinguished Kissinger v. Reporters Committee for Freedom of the Press on the basis that Supreme Court's interpretation of the federal FOIA statute referred to "agency records", while the Maryland FOIA statute, like South Carolina's FOIA, deals with "public records", noting "the cases interpreting the Maryland Act have broadly construed the terms "public record" and "instrumentality of the State government." Office of Governor v. Washington Post Co., 360 Md. 520, 536, 759 A.2d 249, 258. In any

The same situation exists in South Carolina. While FOIA may not require the County Respondents to maintain created documents, the Public Records Act required the County Respondents to create, retain, maintain, and preserve its public records. Contrary to their arguments, the County Respondents failed to comply with the law.

(c) Ignored FOIA Requests

Mr. Trask made numerous FOIA requests to one or more of the County Respondents. Unfortunately, the County Respondents, clearly contrary to both their appellate arguments (*County Respondents' Brief*, pp.12-17) and the FOIA's mandatory nature and directives, unilaterally chose **not to make any response** to many of those requests in any manner whatsoever. For example:

- Mr. Trask's 11 December 2006, FOIA request to **Coroner Copeland's office** for all official records, including e-mail records and the hard drive from Deputy Coroner Herman's personal and business computers along with all backup files. (R.p.25, para. 35; R.p.47, para. 35; R.p.108, para. 4; R.p.138, line 24 – R.p.142, line 6; R.p.146; R.p.719, para. 12(c));

case, the Circuit Court **did not** conclude the County Respondents' intentional destruction of public documents was a valid and legal action or, more importantly, a defense to FOIA violations.

21 Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, 152 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-162 (1975); Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 192, (1975)). The Supreme Court recognized an "agency's failure to [create and maintain public records] deprives the public of information which might have otherwise been available to it." Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, 152. See also generally State of Hawai'i Organization of Police Officers (SHOPO) v. Soc. of Professional Journalists – University of Hawai'i Chapter, 83 Hawai'i 378, 402, 927 P.2d 386, 393 (1996) (Finding Hawai'i's FOIA "requires agencies to provide access to those records that are actually maintained, but nowhere imposes an affirmative obligation to [initially] maintain records.").

- Mr. Trask's 13 December 2006, and 7 January 2007, FOIA requests to **Sheriff Tanner's office** for Captain Bromage's e-mail records generated during the course of Captain Bromage's investigation on behalf of Coroner Copeland's office. (R.p.27, para. 49; R.p.49, para. 49; R.pp.109-110, para. 3; R.p.147; R.p.181, line 2 – R.p.182, line 3, R.p.184, lines 10-24; R.pp.185-186; R.p.722, para. 15(c));
- Mr. Trask's 23 January 2006, FOIA request to the **Coroner Copeland's office** requesting a copy of any statement concerning Coroner Copeland's conversation with Mr. Irby of Fripp Island Security. (R.p.108, para. 1; R.p.125; R.p.719, para. 13(a));
- Mr. Trask's 2 February 2007, FOIA request to **BCEM** for a copy of the inter-governmental agreements required under S. C. Code Ann. § 23-47-20(A) pertaining to the use of the Beaufort County 911 system. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.p.220; R.pp.221-223; R.p.319, para. 8; R.p.720, para. 13(d));
- Mr. Trask's 2 February 2007, and 25 February 2007, FOIA requests to **BCEM** for the written operational procedures for the Beaufort County 911 system required under S. C. Code Ann. § 23-47-20(C)(9) and copies of all inter-governmental agreements pertaining to the use of the Beaufort County 911 system. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.p.220; R.pp.221-223; R.p.319, para. 8; R.p.720, para. 13(d));
- Mr. Trask's 3 February 2007, FOIA request to **Sheriff Tanner's office** for a copy of written e-mail policy for Beaufort County Sheriff's Office. (R.p.27, para. 52; R.p.110, para. 4; R.p.198);
- Mr. Trask's 5 February 2007, and 25 February 2007, FOIA requests to **BCEM** and to **Coroner Copeland's office** for Coroner Copeland's complete radio log (Call Sign 601) for November 22, 2005. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.225, lines 22-25; R.p.231, line 6 – R.p.232, line 23; R.p.233, line 2 – R.p.234, line 15; R.p.235, lines 14-23; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.246, line 23; R.p.247; R.p.252; R.p.319, paras. 7-8; R.p.720, para. 13(f));

- Mr. Trask's 5 February 2007, *FOIA* request to **Coroner Copeland and Deputy Coroner Herman** for toxicology reports and related documentation from Coroner Copeland's office for the time period of 1 June 2005, through 31 December 2005. (R.p.25, para. 36; R.pp.47-48, para. 36; R.p.108, para. 4; R.p.111, para. 3; R.p.138, line 24 – R.p.142, line 6; R.p.149; R.pp.719-720, paras. 12(c); 13(b)); and
- Mr. Trask's 16 May 2007, *FOIA* request to **Attorney Kelly Golden** for a copy of the handbook entitled "*Freedom of Information Act Handbook for County Government*" she authored in 1999, while a registered lobbyist for the South Carolina Association of Counties. (R.pp.111-112, paras. 2-6, 9-10; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.p.246, line 23).

Moreover, Mr. Trask made another *FOIA* request to Coroner Copeland's office on 20 July 2006, seeking a list of all Beaufort County Deputy Coroners serving from 1 January 2000, forward, including certificates of appointment and the names of individuals who administered the statutorily required oaths of office.²² (R.p.25, para. 34; R.p.108, para. 5; R.p.148; R.p.137, lines 8-15; R.p.720, para. 13(c)). Coroner Copeland again failed to respond. (R.p.25, para. 34; R.p.108, para. 5; R.p.148; R.p.137, lines 8-15; R.p.720, para. 13(c)). Even though Mr. Trask ultimately received many of the *FOIA* requested records through discovery in this lawsuit, Coroner Copeland's failure to provide the records prior to Mr. Trask having to bring this action directly violated *FOIA* and cannot logically be seen to have been legally sufficient. Most importantly, this should have precluded summary judgment.

²² 39 South Carolina Jurisprudence, *Coroners*, § 7 (S.C. Bar CLE Division 1992) (citing S.C. Code Ann. § 17-5-70 (Thomson West 2007)).

The County Respondents argue Mr. Trask has not "contend[ed] that there are records [which were] improperly withheld on grounds of privilege or exemption[or that] the search for the requested records was inadequate." (*County Respondents Brief*, p.17). While Mr. Trask did not specifically state those complaints, they are inherent aspects of his argument because when the County Respondents **did not respond whatsoever** to his FOIA requests Mr. Trask could not reasonably have known the specific reasons for the production denial or know if the County Respondents had conducted a proper records search or if the County Respondents considered any type of privilege in failing to respond.

The County Respondents simply "stonewalled" Mr. Trask and, in some instances, "sandbagged" him either by implying a response would be forthcoming or by improperly asserting FOIA did not apply to the request. (R.p.108, para. 3; R.p.109, paras. 6, 1-2; R.pp.109-111, para. 3; R.p.110, paras. 4-5; R.p.111, para. 3-5; R.p.112, para. 1). The County Respondents failed to uphold their statutorily mandated duty to produce the requested public documents upon Mr. Trask's various proper FOIA requests. The Circuit Court should not have denied the County Respondents summary judgment. This Court of Appeals must reverse the Circuit Court's decision in all respects and remand this case for a merits trial.

(d) Public Records Destroyed Or Wrongfully Claimed As Exempt

Even in the limited situations where one or more of the County Respondents did respond to one of Mr. Trask's FOIA requests, the County Respondents still violated FOIA and/or the Public Records Act by improperly

claiming either (1) the requested records were exempt from disclosure under FOIA or (2) by destroying public records and/or failing to preserve records subject to public disclosure.

For example, on 2 February 2007, Mr. Trask requested the BCMIS/BCEM to provide copies of the 911 computer printout identifying the land-line/mobile telephone numbers which called the Beaufort County dispatch system from 12:00 am to 6:00 am on 22 November 2005, as well as the print-out report of all Beaufort County computer aided dispatch (CAD) entries made during the same time period. (R.p.30, para. 64; R.pp.110-111, para. 1; R.pp.111-112, paras. 2-6, 9-10; R.p.220; R.pp.221-223; R.p.319, para. 8; R.p.720, para. 13(d)). Attorney Golden submitted a very limited response on 23 February 2007 (R.pp.110-111, para. 1; R.p.687), but failed to provide the requested records due to privacy concerns. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.226, line 2 – R.p.228, line 25; R.p.229, line 9 – R.p.230, line 16; R.p.240, line 11 – R.p.243, line 4; R.p.244, line 3 – R.p.246, line 23; R.pp.248-249; R.pp.250-251; R.pp.719-721, paras. 12(c), 13(f), 14(a)-(c)).

On 20 May 2007, Mr. Trask requested BCMIS/BCEM to provide certain records including the operation manual and written operating procedures pertaining to Beaufort County's 800mhz radio system and the Beaufort County 911 center's ComLog digital recording device. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.225, lines 22–25; R.p.231, line 6 – R.p.232, line 23; R.p.233, line 2 – R.p.234, line 15; R.p.235, lines 14–23; R.p.240, line 11 – R.p.243, line 4; R.p.244, line 3 – R.p.246, line 23; R.p.247; R.p.252; R.p.319, paras. 7-8; R.p.720,

para. 13(f)). Beaufort County simply produced nothing - asserting the records were allegedly exempt from inspection/copying pursuant to state and federal "homeland security" laws. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.226, line 2 – R.p.228, line 25; R.p.229, line 9 – R.p.230, line 16; R.p.240, line 11 – R.p.243, line 4; R.244, line 3 – R.p.246, line 23; R.pp.248-249; R.pp.250-251; R.pp.719-721, paras. 12(c), 13(f), 14(a)-(c)).

On 24 March 2007, 6 April 2007, and 16 April 2007, Mr. Trask asked Chief Hatfield for copies of all audio and video recordings generated by Deputies Eckard, Garst, or Arbello's equipment at the Accident scene, as well as policies concerning the retention and management of this audio/video equipment. (R.p.110, para. 5; R.p.205, line 1 – R.p.207, line 10; R.p.722, para. 15(d)). The BCSO did not produce any video recordings and Chief Hatfield stated there was no policy for preservation of video recordings on 22 November 2005. (R.p.207, line 11 – R.212, line 16; R.pp.213-219).

Moreover, the BCSO, Attorney Golden, and Frank Guth all advised Mr. Trask any e-mails and/or other forms of electronic media pertaining to and/or related to the Accident had previously been deleted and, in particular, the deleted e-mail records could not be regenerated and/or restored. (R.pp.107-113; R.pp.717-732). These deletions violated FOIA and the Public Records Act.²³

²³ See Electronic Records Management Guidelines - E-Mail Management issued by the South Carolina Department of Archives (March 2005) (last viewed on 30 November 2010 and found at <http://arm.scdah.sc.gov/NR/rdonlyres/1897C686-501E-4A35-A5E3-B64CD77BB264/0/ermEMM.pdf>). This publication notes the Public Records Act and FOIA, among other statutes, comprise the legal framework for managing e-mail in this State. Moreover, the publication sets forth guidelines for a

The County Respondents did not prove the validity of the FOIA exemptions used to thwart Mr. Trask's requests. There were serious questions of fact as to whether the County Respondents could show any of the statutory FOIA exemptions applied to justify the withheld public documents. Summary judgment was inappropriate and should never have been granted.

Under FOIA and the Public Records Act, the legal custodian of public records for every public body is held responsible for protecting and restoring records against loss, destruction, deletion, etc.²⁴ Clearly, the County Respondents must be held accountable for the intentional destruction of electronic records (i.e.; e-mails, notes, etc.) expressly covered by either the FOIA, the Public Records Act, or their implementing administrative regulations. The County Respondents' (a) persistent practice of deleting public records at the end of some arbitrarily-established time period or (b) their failure to adopt mandatory record retention schedules for such records has clearly deprived not only Mr. Trask, but also the public at large, of significant access to information about the activities of Beaufort County's public officials in direct violation of FOIA.

When public bodies, like the County Respondents, have intentionally destroyed (beyond recognition and/or restoration) e-mails and other electronic and/or documentary public records subject to FOIA disclosure²⁵ a requestor,

governmental entity to use when managing e-mail and other electronically dispensed information and/or documentation.

²⁴ See e.g., S.C. Code Ann. § 30-1-70.

²⁵ The record shows the County Respondents intentionally destroyed public documents and information with no ability to recover or regenerate that documentation/information. Thereafter, having done so, the County Respondents argued they have given Mr. Trask all of the documents/information they had in their

such as Mr. Trask, is entitled to compensation. Mr. Trask requested the County Respondents to restore the electronic records which they had either "lost" or unlawfully deleted. The County Respondents, however, did nothing.²⁶

Numerous disputed issues of material fact existed as to whether the County Respondents complied with (a) FOIA's and the Public Records Act's statutory requirements to create, retain, protect, and maintain such documentary and/or electronic information, as well as, (b) FOIA's statutory requirements to restore and/or produce such information when a legitimate FOIA request has been made such as those made by Mr. Trask.

The County Respondents admittedly kept and maintained a myriad of documents and electronic information associated with the Accident.²⁷ Mr. Trask was vociferous in his attempts to have the County Respondents preserve all

possession. While that statement may be "true" in the strictest sense, the very reason the County Respondents were unable to produce any more documents or electronic information was that they had destroyed the documents. A public body cannot, on the one hand, intentionally (or otherwise) destroy FOIA documents and information and then, on the other hand, use the non-existence of the documents/information as a complete defense to producing the very same documents and information or of suffering the monetary or other consequences under either FOIA or the Public Records Act for not maintaining the documents and/or information. This proposition neither complies with either the letter or the spirit of FOIA or the Public Records Act.

26 Given the technology then-existing, the e-mail data should still have existed on the relevant computer hard-drives and, at a minimum, the County Respondents should have taken steps to have the computer hard-drives examined and the records repaired in accordance with FOIA and the Public Records Act.

27 While FOIA does not require a public body to preserve, retain, and/or maintain public documents and/or records as a general course, FOIA does compel a public body to preserve, retain, and maintain those public documents/records which the public body has actually kept. The Public Records Act is the means to compel a public body to retain its public records.

documentary and electronic information. He notified each of the County Respondents in writing and via certified U.S. Mail. Mr. Trask clearly placed the County Respondents on preservation notice early on after 22 November 2005.

Unfortunately, even in the face of the statutory mandates of FOIA and the Public Records Act, many of Mr. Trask's FOIA requests were either completely ignored or given very short shrift. Consequently, much of the relevant documentary and electronic information was intentionally destroyed and lost forever. This Court of Appeals should ensure that does not happen again and that the County Respondents are compelled to comply with FOIA and the Public Records Act.

B. FOIA And The Public Records Act Jointly Required The County Respondents' To Create, Preserve, And Produce Public Records And The County Respondents' Failure To Do So Breached Their Duty To Mr. Trask And The Public

Given the statutory schemes and purposes of both FOIA and the Public Records Act, it is axiomatic that the County Respondents were obligated to create, maintain, and preserve Beaufort County's public records and, in appropriate circumstances, to produce copies of those very same public records pursuant to the public's FOIA requests, such as those made by Mr. Trask. The County Respondents' failure to create, maintain, and/or preserve Beaufort County's public records, or to appropriately produce them violated the County Respondents' duty to do so, both to the general public at large and to Mr. Trask in particular.

The County Respondents assert, albeit wrongly, that they cannot be held liable to Mr. Trask for their failures to create, maintain, and/or preserve Beaufort County's public records because there is no actual or implied right of action against them. (*County Respondents Brief*, p.18). In essence, the County Respondents assert that, regardless of their admitted FOIA and Public Records Act violations, they simply cannot be held liable to Mr. Trask regardless of the damage done, the pain caused, or the misery inflicted.

The County Respondents, as before, rely principally on Kissinger v. Reporters' Committee for Freedom of the Press,²⁸ for the proposition that there is no "private cause of action under . . . FOIA for the wrongful removal of documents" and, in addition, that a Public "Records Act cannot be 'bootstrapped' to [a FOIA's] requirements . . . in order to create a cause of action." (*County Respondents Brief*, p.18). Again, the County Respondents read much too much into the case.

²⁸ Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136. The Supreme Court's principal and paramount holding in the case addressed whether a governmental agency could be deemed to have improperly withheld documents under the Federal FOIA when the agency no longer had possession of the documents at the time the FOIA request was made. See Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, 151-154. The majority of the cases subsequently interpreting and/or addressing Kissinger v. Reporters' Committee for Freedom of the Press, have dealt with whether the documents were "public documents" and/or were "improperly withheld", not the creation of a public right of action under FOIA and some State Records Act. See generally United States Department of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989); GTE Sylvania, Inc. v. Consumers Union of United States, Inc.; 445 U.S. 375, 384 (1980); Forsham v. Harris, 445 U.S. 169, 177 (1980); Consumer Federation of America v. Department of Agriculture, 455 F.3d 283, 287 (D.C. Cir. 2006); Affiliated Construction Trades Foundation v. Regional Jail and Correctional Facility Authority, 200 W.Va. 612, 626-627, 490 S.E.2d 708, 713-714 (1997); Workmann v. Illinois State Board of Education, 229 Ill.App.3d 459, 462, 593 N.E.2d 141, 144 (App. 2d Dist. 1992).

Even though the County Respondents correctly note the Supreme Court's holding in *Kissinger v. Reporters' Committee for Freedom of the Press*,²⁹ they ignore the important factual differences between that matter and this case. The Supreme Court was addressing the **federal FOIA** law, a statute significantly different than the various States' FOIAs, including our State's version.

For example, the Maryland Supreme Court, in *Office of Governor v. Washington Post Co.*,³⁰ distinguished *Kissinger v. Reporters Committee for Freedom of the Press* on the basis that the Supreme Court's interpretation of the federal FOIA statute referred to "agency records", while the Maryland FOIA statute, like South Carolina's FOIA, deals with "public records", noting "the cases interpreting the *Maryland Act* have broadly construed the terms "public record" and "instrumentality of the State government."³¹ Moreover, the Maryland Supreme Court noted:

The coverage of the [*Maryland FOIA*] Act is ***dependent upon*** the scope of the term 'public records', and ***not upon*** whether the governmental entity holding the records is an 'agency' rather than some other type of governmental entity. Although this Court has examined the status of particular entities in order to determine if their records were covered by the [*Maryland FOIA*] Act, such ***examinations were for the purpose of deciding whether the entities were private or governmental***. In each of these cases, the entities argued that they were private and that, for this reason, their records were not "public records" subject to disclosure under the [*Maryland FOIA*] Act.³²

²⁹ *Kissinger v. Reporters' Committee for Freedom of the Press*, 445 U.S. 136.

³⁰ *Office of Governor v. Washington Post Co.*, 360 Md. 520, 759 A.2d 249.

³¹ *Office of Governor v. Washington Post Co.*, 360 Md. 520, 536, 759 A.2d 249, 258.

³² *Office of Governor v. Washington Post Co.*, 360 Md. 520, 534-535, 759 A.2d 249, 257.

This judicial interpretative scheme is very similar to or the same as that employed in South Carolina.³³

Furthermore, the Maryland Court distinguished Kissinger v. Reporters Committee for Freedom of the Press by recognizing that "[u]nlike the Federal [FOIA] Act, there [wa]s no statutory language or legislative history suggesting that any unit of the Maryland Government [wa]s exempt from the Public Information Act's coverage."³⁴ Similarly, South Carolina's FOIA broadly defines both the terms "public record" and "public body" and does not appear to exempt any governmental unit, either state, county, municipal, and/or local, from being subjected to FOIA's coverage.³⁵

This Court of Appeals should not permit the County Respondents to intentionally and clearly violate the FOIA and the Public Records Act and then suffer no consequences whatsoever. The County Respondents owed a duty to the public at-large and to Mr. Trask in particular to comply with the laws of this State. The County Respondents, especially Coroner Copeland, repeatedly admitted the laws were not followed. Moreover, the County Respondents intentionally destroyed public records which admittedly should have been preserved. Now the County Respondents assert Mr. Trask, nor anyone for that

³³ See generally Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474. The case was little concerned whether the documents Sloan sought from the Friends of Hunley were appropriately characterized as "public documents", but directly addressed the "public vs. private" nature of the Friends of Hunley entity itself.

³⁴ Office of Governor v. Washington Post Co., 360 Md. 520, 536, 759 A.2d 249, 258.

³⁵ See generally S.C. Code Ann. §§ 30-40-20(a), (c), 30-40-50(a) (Thomson Reuters West 2008).

matter, has a remedy against them. The County Respondents seek this Court of Appeals' approval for their actions and inactions. Condemnation should be the only response.

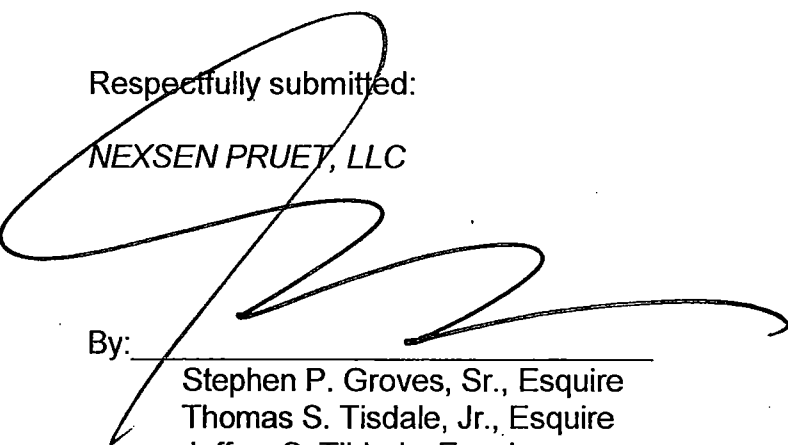
This Court of Appeals should and must reverse the Circuit Court's decision and remand this matter back for a trial on the merits.

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Appellant, 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, respectfully requests this Court of Appeals to reverse the decision of the Circuit Court in all respects and remand this matter back to the Circuit Court for a jury trial on the merits.

Respectfully submitted:

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