

STATE OF SOUTH CAROLINA)
)
 COUNTY OF NEWBERRY)
)
 Susan D. Summer,)
)
 Plaintiff,)
)
 v.)
)
 Alan Wilson, in his capacity as)
 Attorney General of South Carolina,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-688

ORDER

RECEIVED
 SEP 29 2014
 SC Court of Appeals

FILED
 NEWBERRY COUNTY
 2014 SEP 19 PM 12 56
 JACKIE S. BOWERS
 CLERK OF COURT

This Court previously issued an order on July 8, 2014 directing the Defendant to produce documents referenced therein and denying the Motion to Intervene of Russell L. Bauknight, as personal representative of the Estate of James Brown and trustee of the James Brown 2000 Trust. Both the Attorney General and Bauknight filed motions to alter or amend that order. After carefully considering memoranda and letter briefs regarding those motions and arguments at a hearing on July 23, this Court denies the motions except that it rules that the Tommie Rae Hynie Brown diaries are not public records, allows 30 days for production, makes modifications in the process for considering documents alleged to be exempt and makes a few other modifications consistent with this ruling. The contents of the July 8 Order are set forth below with these changes, and this Order shall be substituted for the July 8 Order.

BACKGROUND

Plaintiff, a citizen of South Carolina residing in Newberry County, initiated the with-in captioned action on December 18, 2012, pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. §§30-4-10 et seq. (Rev. 2007, Supp. 2013), hereinafter (FOIA), seeking

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declaratory and injunctive relief. Defendant Alan Wilson is sued in his official capacity as Attorney General of South Carolina.

In her Complaint, plaintiff alleged that defendant had withheld public records to which plaintiff had requested access under FOIA in violation of the FOIA. Plaintiff alleged requests under the FOIA on January 29, 2012, March 1, 2012, June 10, 2012 and September 6, 2012.

On February 13, 2013, defendant moved to dismiss the Complaint or change venue.

On February 15, subject to the above motions, defendant answered denying that he had violated the FOIA. He asserted plaintiff cannot obtain under FOIA documents as to which disclosure or release is under the review or order of a court pending in another legal proceeding, including but not limited to Bauknight v. Pope, Case No. 2010-40-CP-4900 ("Case 4900").

The Answer asserts that defendant has responded to all requests and has supplied any document it has except that it asserts that the Tommie Ray Hynie diaries and Wingate Contract are barred from release by pending motions or court order.

Attached to the Answer were certain documents, including what defendant described as the public portion of the Wingate Contract. Article III F. of the Wingate Agreement states in relevant part:

Any material, data, files, discs, or documents created, produced or gathered by the Special Counsel, or in special counsel's possession in furtherance of this litigation...shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§30-40-10, et. seq....

On February 27, 2013, plaintiff moved for summary judgment.

That same day, the South Carolina Supreme Court issued its first decision in Wilson v. Dallas, 2013WL697042, February 27, 2013 (No. 27227). Footnote 29 directed that case 4900 and certain FOIA cases should be "considered by the circuit court in the first instance."

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In March 2013, defendant filed a Petition for Rehearing with the Supreme Court addressing footnote 29. He advised the Court that he would shortly move to have the Attorney General removed as a party to Case 4900. He also advised that he had no objection to the release of the Wingate Contract and hoped "to have resolution of this matter in the near future."

On April 16, 2013, Russell L. Bauknight, etc., moved to intervene. Bauknight asserted that this case is an extension of the parties and issues involved in Case 4900, and an improper attempt to gain through FOIA matter which is subject to discovery motions in that case. Bauknight asserted that plaintiff's FOIA requests should be denied and the case consolidated with Case 4900.¹

At the hearing on April 26, 2013, this Court orally denied the Attorney General's requests to transfer this case to Richland County. Without ruling on Bauknight's motion to intervene, the Court allowed his counsel to participate in the hearing.

At a status conference held on May 7, 2014, this Court invited the parties to make submissions. In subsequent filings, the Court was asked to take judicial notice that the FOIA matters transferred to Richland County, one of which was consolidated with Case 4900, had not been concluded. Discovery motions filed in 2010 related to some of the FOIA requests had also not been heard, and Bauknight is currently seeking a delay of both Case 4900 and the related FOIA suits until all James Brown matters are concluded in Aiken County.

At the heart of this dispute is whether the Attorney General should delay or deny FOIA compliance where the public documents sought are the subject of a pending discovery motion in

¹ On November 14, 2013, United States Magistrate Judge J. Gregory Wehrman ruled in a federal case captioned Brown v. Pope (Case No. 3:08-cv-14-WOB) that the retention agreement between Brown trustee Bauknight and the Attorney General "is a public document due to the involvement of the South Carolina Attorney General." This agreement is one of the public records sought by plaintiff in this case. It should be produced to plaintiff by the Attorney General although Plaintiff has had the document since shortly after the November 14 ruling.

Case 4900; or a discovery order in that (Case 4900) or any other case. Related to that is whether the James Brown Estate and Trust may intervene in FOIA suits to prevent release under FOIA of public documents they are seeking to protect in discovery in a civil suit in which this plaintiff is not a party.

DISCUSSION

In adopting the FOIA, the General Assembly found "that it is vital in a democratic society that public business be performed in an open manner." S.C. Code Ann. §30-4-15 (Rev. 2007). The General Assembly also adopted definitions to be applied in interpreting the FOIA.

For purposes of this litigation, the definitions of "public body" and "public record" are most relevant. As a constitutional officer, the Attorney General and his office are "Public Bodies," and this status subjects both to the full reach of the FOIA. S.C. Code Ann. §30-4-15 (Rev. 2007); Burton v. York Sheriff s Dept., 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004). Since plaintiff s requests were for access to public records, the statutory definition of "public record" in S.C. Code §30-4-20 includes all "books, papers, maps, photographs, cards, tapes, records or other documentary materials...prepared, owned, used, or in the possession of the public body" as public records. It is clear that defendant has prepared, used or been in possession of all documents requested by plaintiff. It is further clear from the Attorney General's own standard litigation retention agreement that the documents in Wingate's possession belong to the State, are public records, and are subject to the FOIA.

Defendants claim that FOIA requests must be delayed or denied if there is a pending discovery motion in an unrelated case is inconsistent with both the letter and spirit of the FOIA. As the U.S. Circuit Court for the D.C. Circuit has held with respect to federal FOIA matters in

North v. Walsh, 881 F.2d 1088 (D.C. Cir. 1989), the FOIA and discovery are parallel courses.²

Each must be considered separately.

The fact that Bauknight's discovery motion has not been resolved since 2010 makes it clear that the FOIA would be crippled if a public body could refuse to release documents based on discovery disputes or orders in other cases. The purpose of the FOIA is set out as follows in §30-4-15: "...it is vital in a democratic society that...it is possible for citizens...at a minimum cost or delay [get]...access to public documents...."

The facts are clear: plaintiff is a South Carolina citizen. She is a journalist. She made proper FOIA requests to the Attorney General, who is subject to the FOIA. Intervention by plaintiffs in Case 4900, or any other suit where the same documents are at issue, is not authorized by the FOIA. To allow such intervention would defeat the purpose of FOIA. The motion to intervene is denied. The defendant's motion for judgment on the pleadings is denied, and plaintiff's motion for summary judgment is granted. The documents should be forthwith produced by defendant for inspection and copying except for the Tommie Rae Hynie Brown diaries because they are barred from disclosure by the Orders of the Honorable Doyet A. Early, In re: The Estate of James Brown, Aiken County, 2007-ES-02-0056 / 2007-CP-02-0122).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that

1. The motion of Bauknight to intervene is hereby denied.
2. Defendant shall, within 30 days, produce to plaintiff all documents responsive to all FOIA requests of plaintiff (from the date of the respective requests to the date of this Order).

² Then Circuit Judge Ruth Bader Ginsburg wrote this decision in which the Court found that Oliver North was entitled to public documents under the FOIA, even if those documents were not discoverable in non-FOIA litigation. Id. at 1099.

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which are under the custody or control of the Attorney General, or which the Attorney General has prepared, owned or used.

3. To the extent defendant asserts that it should not be required to produce any document which his office has prepared, owned, or used, the document shall be marked as exempt and be produced to this Court under seal for review. The sealed documents shall be accompanied by a list of the documents containing a description consistent with the description of privileged documents under Rule 26(B)(5)A), SCRCPP and the reasons why Defendant believes they are exempt.

4. The list of exempt documents shall be provided to Counsel for the Plaintiff and Bauknight and shall be the subject of a hearing to be held within thirty days of the production of the list.

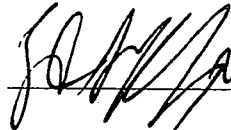
5. Documents in the Wingate firm's possession that were prepared, owned used, possessed or retained in whole or in part for the Attorney General are subject to this Order and must be produced. Any documents that the Defendant contends are exempt shall be treated in the same manner as other exempt documents under paragraphs numbered 3 and 4 above.

6. Plaintiff's counsel shall, within thirty days, submit a statement of fees and costs requested by plaintiff pursuant to S.C. Code Ann. §30-4- 100(b) (Rev. 2007). At the same time as the hearing to consider exempt documents, this Court shall also issue a ruling as to whether Plaintiff is entitled to attorney's fees and costs for any documents produced which were not previously supplied to her.

7. This Court shall issue a final judgment after consideration of the above matters.

AND IT IS SO ORDERED.

Sept 19, 2014



EUGENE C. GRIFFITH, JR.
JUDGE, EIGHTH JUDICIAL CIRCUIT

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STATE OF SOUTH CAROLINA
 COUNTY OF NEWBERRY
 IN THE COURT OF COMMON PLEAS
 Susan D. Summer

JUDGMENT IN A CIVIL CASE
 CASE NO. 2012 CP 36-00688
 Alan Wilson, Attorney General of SC

PLAINTIFF(S)	DEFENDANT(S)
Submitted by: Defendant	Attorney for : <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order		

FILED
 NEWBERRY COUNTY
 19 SEP 19 PM 12:50
 JACKIE S. BOWERS
 CLERK OF COURT

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2154 Judge Code	09/19/2014 Date
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For Clerk of Court Office Use Only

This judgment was entered on the 19th day of Sept, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 19th day of Sept, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

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CLERK OF COURT

Court Reporter: