

ORIGINAL

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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JAN 19 2016

APPEAL FROM RICHLAND COUNTY

SC Court of Appeals

Court of Common Pleas

William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2015-001760

South Carolina Public Interest Foundation and Edward D. Sloan, individually,
and on behalf of all others similarly situated, ... Appellants,

v.

South Carolina Department of Transportation, and Robert J. St. Onge, Jr.,
Secretary of Transportation, ... Respondents.

RECORD ON APPEAL

January 12, 2016

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No.: 2013-CP-40-3908

South Carolina Public Interest Foundation and
Edward D. Sloan, individually, and on behalf
of all others similarly situated,

Plaintiffs,

v.

South Carolina Department of Transportation,
and Robert J. St. Onge, Jr., Secretary of
Transportation,

Defendants.

Order

RICHLAND COUNTY
FILED
2015 JUL 15 AM 11:31
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

This matter came before me in open Court in Columbia on March 19, 2015, on Plaintiffs' motion for attorneys' fees and costs. Plaintiffs filed a memorandum and an affidavit in support of their motion and Defendants filed a return opposing the award of fees. In addition, the Court had the benefit of oral argument by James C. Carpenter, Esquire, for Plaintiffs and Beacham O. Brooker, Jr., Esquire, for Defendants.

Plaintiffs claim entitlement to fees under the Freedom of Information Act's fee shifting provisions, S.C. Code Ann. §34-4-100(b), by virtue of prevailing on a motion to compel production of a certain internal investigation report in possession of the Department of Transportation in a separate case pending before this Court, South Carolina Public Interest Foundation and Edward D. Sloan, individually, and on behalf of all others similarly situated, v. South Carolina Department of Transportation, and Jane Doe, a DOT employee, No. 2013-CP-40-3677. Neither that case nor this one have yet proceeded to judgment. Plaintiffs cite the recent decision of our Supreme Court, Sloan and South Carolina Public Interest Foundation v. S.C.

Department of Revenue, 409 S.C. 551, 762 S.E.2d 687 (2014), as supporting their argument that final judgment in a suit to enforce FOIA is not necessary for a finding that a party has substantially prevailed, and they succeeded in obtaining a copy of the investigation report they sought in their parallel lawsuit for a declaratory judgment against the Department and its employee. Thus, they are entitled to costs

Defendants argue that Sloan v. Department of Revenue, *supra*, is distinguishable since that suit was brought solely under the FOIA statute whereas, here, two separate suits pertaining to the same underlying facts were brought—the first for declaratory judgment regarding the constitutionality of certain activities of employees of its Chester Maintenance section, and the second under FOIA for disclosure of the investigation report of that incident. According to Defendants, the reason this distinction is important is that the provisions for attorneys' fees under Rule 37 (a)(4), SCRCPP, and under Code section 34-4-100(b) differ in their language--the former containing certain protections to the losing party on a fee petition that are not included in the latter. Specifically, Rule 37 (a)(4) permits the trial judge to award fees unless he finds that the opposition to the motion was substantially justified or that other circumstances make an award unjust.¹ Defendants argue that being prohibited from making the arguments on those grounds deprives them of a substantial right available to all litigants. If a party to a lawsuit against the government were able to submit a FOIA request for every document or thing requested in request for production in civil litigation then be permitted to recover fees under the more liberal FOIA provisions, State government parties in court would never be able avail themselves of the protections in the Civil Rules to argue justification to avoid an unwarranted award against them.

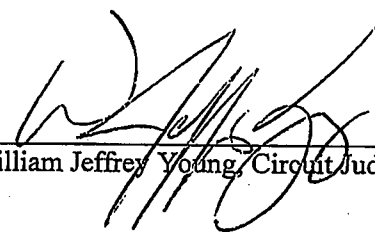
¹ The Department argues that it was substantially justified in withholding the names of its employees in that they had already been disciplined for their actions and public disclosure would constitute an additional penalty. South Carolina has recognized the Constitutional right of privacy as being the right to be left alone; the right of a person to be free of unwarranted publicity. Sloan v. S.C. Department of Public Safety, 355 S.C. 321, 327, 586 S.E.2d 108, 110 (2003) (quoting Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 458, 7 S.E.2d 169, 171 (1940)).

Finally, as Defendants note, the main case involving the constitutional issue has not concluded. The defense in that suit involves the lack of standing of Plaintiffs as strangers to the underlying activities. If the defense prevails on the standing issue, the Plaintiffs would not have had standing to bring their suit or conduct discovery. This would be a circumstance that would make an award of fees unjust under the provisions of Rule 37 (a)(4), SCRCP.

Having considered the arguments and submissions of the parties herein, I determine that the motion for fees should be denied. This result is fair to the Defendants in that it preserves their opportunity to make their arguments against an award under the Rules of Civil Procedure. Moreover, it is not unjust to Plaintiffs in that they have the opportunity to pursue their claim for costs and fees under the remedy they elected--an order compelling production under Rule 37 in case number 2013-CP-40-3677.

For the foregoing reasons, I find that Plaintiffs' motion should be and hereby is DENIED.

AND IT IS SO ORDERED.



William Jeffrey Young, Circuit Judge

Sumter, S.C.

19 June, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No.: 2013-CP-40-3908

South Carolina Public Interest Foundation and
Edward D. Sloan, individually, and on behalf
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v.

South Carolina Department of Transportation,
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Defendants.

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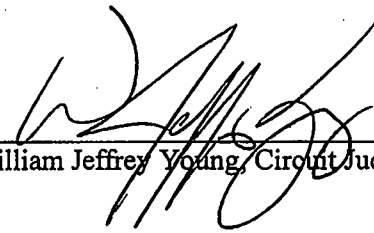
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For the foregoing reasons, I find that Plaintiffs' motion should be and hereby is DENIED.

AND IT IS SO ORDERED.



William Jeffrey Young, Circuit Judge

Sumter, S.C.

19 June, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation
and Edward D. Sloan, Jr., individually,
and on behalf of all others similarly situated,

Plaintiffs,

v.

South Carolina Department of Transportation
and Jane Doe, a DOT employee,
Defendants.

IN THE CIRCUIT COURT

C.A. No. 2013-CP-40-3677

**ORDER GRANTING
PLAINTIFFS'
MOTION TO COMPEL**

2014 JUL -2 PM 3:12
RICHLAND COUNTY
CLERK OF COURT

This matter came before the Court on October 24, 2013 at a hearing on Plaintiff's Motion to Compel. Present at the hearing were James Carpenter, Esquire, counsel for the Plaintiff, and Natalie Moore, Esquire, counsel for the Defendant. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, Plaintiff's Motion to Compel is **GRANTED**.

BACKGROUND

Plaintiff alleges that South Carolina Department of Transportation (hereinafter "DOT") employees performed work on a privately owned driveway in the fall of 2012. Plaintiff further alleges that the use of public funds, specifically DOT personnel, equipment and materials, for the primary benefit of a private party is a violation of the South Carolina Constitution. Complaint p. 3.

Plaintiff seeks to compel information in the form of interrogatories and requests for production on the following issues: (1) names and addresses of witnesses; (2) a list of photographs, plats and sketches that relate to any claim in the case; (3) a summary of facts from each person known to have knowledge of the case; (4) names and job titles of any

person involved in any way in the driveway operation described in the Complaint; (5) information relating to any disciplinary action taken by the DOT against any employees involved in the driveway operation; (6) a complete and unredacted copy of the Chief Internal Auditor's January 2013 e-mail to Patrick Malay; (7) a complete and unredacted copy of the January 2013 letter from the Inspector General to the Chief of Staff of the DOT; (8) a complete and unredacted copy of the report of the January 2013 DOT investigation of the driveway operation; (9) a complete and unredacted copy of all documents related to any employee discipline to any employee involved in the driveway operation; (10) any written or recorded statements of persons known to the Defendants to have knowledge concerning the driveway operation; and (11) all photographs, plats, or sketches that relate to this case.

On or about August 20, 2013, the Defendants responded to the Plaintiffs' Interrogatories and Requests for Production and asserted privileges. Defendants maintained that the withheld documents are protected by the doctrine of attorney work product and/or the attorney-client privilege, and submitted redacted versions of the documents to the Plaintiff. Defendants later submitted the unredacted documents to this Court for an *in camera* review.

DISCUSSION

The information sought by the Plaintiff and listed above includes the names of witnesses, photographs, and statements of witnesses. Defendant asserts that this information was discovered through a January 2013 DOT investigation of the driveway operation and is protected by attorney-client privilege.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or

defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." SCRCP 26(b)(1). While the rule provides for broad discovery, there are limits, and the South Carolina Supreme Court has warned against trial courts allowing "overly broad discovery." *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 925 (2010).

"The attorney-client privilege has long been recognized in this State. The privilege is based upon public policy that the best interest of society is served by promoting a relationship between the attorney and client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *State v. Doster*, 276 S.C. 647, 650-51, 284 S.E.2d 218, 219-20 (1981). The privilege extends to communications from the client to his attorney and the attorney to his client:

In order to establish the attorney-client privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature. The communication involved must relate to a fact of which the attorney was informed by his client without the presence of strangers for the purpose of securing primarily either a legal opinion on law or legal services or assistance in some legal proceeding. The attorney-client privilege also applies to communications originating from the lawyer rather than from the client. When the attorney communicates to the client, the privilege applies only if communication is based on confidential information provided by the client.

Marshall v. Marshall, 282 S.C. 534, 538-39, 320 S.E.2d 44, 47 (Ct. App. 1984); see also *Crawford v. Henderson*, 356 S.C. 389, 395 S.E.2d 204, 207 (Ct. App. 2003) ("To establish an attorney-client privilege, the person asserting the privilege must show that

the relationship between the parties was that of attorney and client and that the communications were confidential in nature."). The following elements must be proven by the party seeking to assert the privilege: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981) (quoting 8 Wigmore, *Evidence* § 2292 (McNaughton rev. 1961)). The South Carolina Supreme Court has noted that the privilege is often strictly construed so as not to exclude otherwise relevant evidence. "Not every communication within the attorney-client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice." *Id.*

Based upon this precedent, this Court finds that the Defendant has not proven that the privilege applies to the discovery sought by the Plaintiff. This Court will address each of the issues Plaintiffs presented in turn:

Interrogatory One

Plaintiffs' first interrogatory is standard interrogatory 1 under SCRCP 33(b):

(1) Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

Defendants answered providing names of three witnesses, but the Defendants withheld the names of other employee witnesses numbered 1 through 4, who were interviewed for a report, which was based in part on the statements of these witnesses. The

Defendants assert that the identity of these witnesses is protected by the attorney-client privilege.

The identity of witnesses is a basic fact required to be disclosed in the course of discovery; identity of witnesses is not subject to the attorney-client privilege. *See* S.R.C.P. 33(b). Plaintiffs' motion to compel as to Interrogatory 1 is **GRANTED**.

Interrogatory Two

Plaintiffs' second interrogatory is standard interrogatory 2 under Rule 33(b) of the South Carolina Rules of Civil Procedure, with slight variations:

- (2) Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Defendant or counsel that relate to any claim, defense, or counterclaim in this case.

In response to this interrogatory, Defendants assert: "Photographs are attached to the investigative report being withheld on grounds of attorney-client privilege. Additional photographs were provided in the Departments' response to defendants' [sic] FOIA request dated June 20, 2013."

The identification of photographs or other relevant evidentiary documents is not a matter of attorney-client privilege. The Defendants do not assert that the photographs they have withheld are irrelevant or beyond the scope of Rule 26; they simply assert that they were attached to an investigative report which is being withheld on grounds of attorney-client privilege. Attachments to the report, which are of an evidentiary nature, are not privileged simply by virtue of their attachment to a report. Photographs are not ordinarily confidential communications from the client to an attorney, and the Defendants have articulated no extraordinary circumstances that would take this case out of the ordinary application of the rule. Plaintiffs' Motion to Compel as to Interrogatory number 2 is **GRANTED**.

Interrogatory Four

Plaintiffs' fourth interrogatory is a slight variation of standard interrogatory 7 from SCRCF 33(b):

For each person known to Defendant or counsel to have knowledge concerning the facts of the case, set forth either a summary sufficient to inform the Plaintiffs of the important facts known or observed by such witnesses, and provide a copy of any written or recorded statements taken from such witnesses.

Defendants responded:

The investigative report transmitted to the Chief Counsel on February 15, 2013, summarizes the facts known to the individuals listed in our response to interrogatory #1. It is withheld on grounds of attorney client privilege. The report was for the purpose of employee discipline and appropriate discipline was imposed. The facts involved an internal personnel matter that are [sic] not disclosed outside the Department.

Id. (emphasis added).

The Defendant clearly stated that the purpose of the investigative report was for employee discipline, not for the purpose of legal advice. The report, conducted by Mr. John Walsh, Deputy Secretary of Engineering, listed a summary of the incident, the personnel involved, and recommended personnel disciplinary action. This report is not covered by attorney-client privilege.

Defendants' assertion of the attorney-client privilege under the fact that certain factual matters were included in a report does not make the facts or the statements exempt from the discovery process. The facts observed by a witness, and the knowledge of the witness is discoverable under Rule 26, as relevant information. In the standard interrogatory, the Plaintiffs did not specifically request materials which were included in the investigative report, but rather they requested information known to witnesses with

knowledge concerning the facts of the case, a standard interrogatory, which is not subject to objection. Plaintiffs' Motion to Compel as to response to Interrogatory 4 is GRANTED.

Interrogatory Nine

Plaintiffs' ninth interrogatory reads: "Please list the names and job titles of any person involved in any way in the driveway operation described in the Complaint." Defendants responded: "The job titles of Employees #1-#4 are listed in response to Interrogatory 1 above. Individual names are redacted for the reasons set forth in our response to plaintiffs' request to produce."

In accordance with the analysis relating to Interrogatory 1, the identity of such witnesses is not subject to privilege. Plaintiffs' Motion to Compel as to Interrogatory 9 is GRANTED.

Interrogatory Twelve

Plaintiffs' Interrogatory 12 reads as follows: "Describe any disciplinary action taken by the DOT against any employees involved in the driveway operation described in the Complaint." The Defendants responded: "The disciplinary action is described in the investigative report and is withheld for the reasons stated in our general objections contained in our responses to Plaintiffs' Request to Produce as well as on grounds of attorney-client privilege."

The inclusion of particular information in a report does not protect it from disclosure under the rules of discovery. Plaintiffs are entitled to discovery:

"[r]egarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, . . . and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information

sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

SCRCP 26 (b)(1).

The rules of discovery favor broad disclosure, and information sought in interrogatory 12 is within the confines of the rules of discovery. Plaintiffs' Motion to Compel as to Interrogatory 12 is **GRANTED**.

Request for Production One

In request number 1, the Plaintiffs requested "A complete and unredacted copy of the Chief Internal Auditor's January 2, 2013 e-mail to Patrick Malay." Defendants objected for reasons stated in their General Objection, which reads as follows:

Defendant objects to all requests for employee names involved in the actions that are the subject of this lawsuit on the grounds of improper invasion of privacy, and relevance. The employees involved were disciplined under SCDOT personnel policies and provisions of the State Ethics law. Naming them would improperly add public reprimand penalties to that discipline. Plaintiffs' [sic] may receive the relief they have requested in their complaint without regard to the names of these individuals.

In addition to the reasons stated in the General Objection, the Defendants asserted, "A copy of the redacted e-mail was forward [sic] to plaintiffs' counsel on June 20, 2013, in response to a FOIA request." As discussed in the analysis addressing Plaintiffs' first interrogatory, above, the identity of witnesses is not subject to a privilege, nor does the identity of a witness constitute an improper invasion of privacy. The Defendants' objections are overruled, and the Plaintiffs' Motion to Compel a complete response to Request for Production number 1 is **GRANTED**.

Request for Production Two

Request for Production number 2 asks for "A complete and unredacted copy of the January 8, 2013 letter from the Inspector General to the Chief of Staff of the DOT." The

Defendants again raised their General Objection and added, "A copy of the redacted letter was forward [sic] to plaintiffs' counsel on June 20, 2013, in response to a FOIA request." The Court has dealt above with the General Objection as it relates to the identity of witnesses. For the reasons stated above, Defendants' objection is overruled, and the Plaintiffs' Motion to Compel as to Request for Production number 2 is **GRANTED**.

Request for Production Three

Request for Production number 3 reads as follows:

A complete and unredacted copy of the report of the DOT investigation in or around January, 2013 that related to the approximately November, 2012 use of DOT resources to rebuild a private driveway, with all appendices or other attachments and all documents related thereto, including documents related to the initiation of the investigation and any communications to or from the person who conduct the investigation, and any documents used by the investigator that are not included in or appended to the report of the investigation.

Defendants asserted: "A copy of an investigative report prepared by David Cook, John McCarter, and Todd Cook for the Deputy Secretary of Engineering for transmission to the Chief Counsel prepared on or about February 15, 2013 is withheld on grounds of attorney-client privilege." Defendant explained this assertion in response to Interrogatory 4 above: "It is withheld on grounds of attorney client privilege. **The report was for the purpose of employee discipline** and appropriate discipline was imposed. The facts involved an internal personnel matter that are [sic] not disclosed outside the Department" (emphasis added).

A report that was compiled "for the purpose of employee discipline" is not a matter of attorney-client privilege. There is no indication that private facts were communicated to counsel for the purpose of obtaining legal advice, as is required for a proper assertion of the attorney-client privilege. Plaintiffs' Motion to Compel as to Request for Production number 3 is **GRANTED**.

Request for Production Four

Request for Production number 4 asks for

A complete and unredacted copy of all documents related to any employee suspension, admonition, reprimand, counseling, retraining, or other disciplinary action to any employee involved in the matter described in the Complaint.

Again, the Defendants objected:

The investigation report prepared by David Cook, John McCarter, and Todd Cook for the Deputy Secretary of Engineering, the Deputy Secretary's transmittal of that report to the Chief Counsel, and the Chief Counsel's transmission of that correspondence to the Secretary of Transportation all on or about February 15, 2013 are withheld on grounds of attorney-client privilege.

The mere assertion of attorney-client privilege without the facts to establish that it was communicated to a lawyer in confidence for the purpose of obtaining legal advice is insufficient for a valid claim of the attorney-client privilege. The Plaintiffs' Motion to Compel as to Request for Production number 4 is GRANTED.

Request for Production Seven

In Request for Production number 7, the Plaintiffs requested, "Any written or recorded statements of persons known to the Defendants or counsel to have knowledge concerning the facts of the case." The Defendants responded, "The investigative report is withheld on the grounds of attorney-client privilege." As with the other assertions of the attorney-client privilege, the Defendants failed to establish that the investigative report was communicated in confidence to an attorney for the purposes of seeking legal advice. Furthermore, if there are written or recorded statements of persons or witnesses which are attached to or included within the report, such factual statements, having been adopted by the witness, are not covered under the attorney-client privilege. Plaintiffs' Motion to Compel as to Request for Production number 7 is GRANTED.

Request for Production Eight

Request for Production number 8 asks for, "All photographs, plats, sketches, or other prepared documents in the possession of the Defendant or counsel that relate to any claim, defense, or counterclaim in this case."

In response, the Defendants assert, "Photographs were produced in response to Plaintiffs' counsel's FOIA request. Additional photographs are attached to the investigative report withheld as stated above."

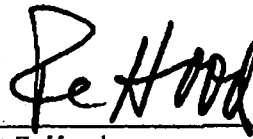
The Plaintiff's request is proper, and the Defendants are not entitled to withhold such photographs on the grounds of attorney-client privilege. Plaintiffs' Motion to Compel is **GRANTED** as to Request for Production number 8.

ORDER

For the foregoing reasons, Plaintiffs' Motion to Compel is **GRANTED**. Defendants are directed to produce the responsive information within fifteen (15) days of the date of this Order.

AND IT IS SO ORDERED.

AND IT SO ORDERED, this 2nd day of July, 2014.



Robert E. Hood
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD
IN THE COURT OF COMMON PLEAS
South Carolina Public Interest Foundation

Edward D Sloan Jr
PLAINTIFF(S)

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-3677
South Carolina Department of Transportation

John Doe
DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ 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 (Ver. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other Dismissed without prejudice
- ☐ 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: Plaintiff's Motion to Compel is GRANTED. See attached order.

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
		\$
		\$
		\$

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 Re Hood

Judge Code 2164

Date July 2, 2014

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of July, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of July, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter (Greenville, SC)

Beacham Brooker

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation
and Edward D. Sloan, Jr., individually,
and on behalf of all others similarly
situated,
Plaintiffs,

v.

South Carolina Department of
Transportation, and Robert J. St. Onge, Jr.,
Secretary of Transportation,
Defendants.

IN THE CIRCUIT COURT

C.A. No. 2013-CP-40-_____

**COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

2013 JUL -5 AM 10:49
JULIETTE W. MCGRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

NOW COME the Plaintiffs, by their undersigned attorney, and as a cause of action against the Defendants, would show unto the Court:

1. Plaintiff South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.* ("FOIA").
2. Plaintiff Edward D. Sloan, Jr. ("Sloan") is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina.
3. Defendant South Carolina Department of Transportation is a Department of the State and is a "public body" under FOIA.
4. Defendant Robert J. St. Onge, Jr., is the Secretary of Transportation and manages the SCDOT. He is named in his official capacity.
5. This Court has jurisdiction under FOIA.
6. Venue is properly placed in Richland County.

7. Plaintiffs served a FOIA request on the Defendants on June 10, 2013 (**Exhibit A**).
8. Plaintiffs sought a copy of public records regarding DOT's expenditure of public funds for a private purpose.
9. Counsel for Defendants responded on June 20, 2013 (**Exhibit B**).
10. Defendants redacted information from the requested public records and withheld other public records, asserting that the requested public records were exempt from production under S.C. Code Ann. § 30-4-40(2) (sic) and § 30-4-40(7) (sic), probably meaning § 30-4-40(a)(2) and § 30-4-40(a)(7).
11. Defendants have wrongly claimed that the public records are exempt from production.
12. S.C. Code Ann. § 30-4-40(a)(2) states the following:

(2) Information of a *personal nature* where the public disclosure thereof would constitute *unreasonable invasion of personal privacy*. Information of a personal nature shall include, but not be limited to, information as to *gross receipts* contained in applications for business licenses and information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are *handicapped or disabled* when the information is requested *for person-to-person commercial solicitation* of handicapped persons solely by virtue of their handicap. *This provision must not be interpreted to restrict access by the public and press to information contained in public records.*

(Emphasis added).

13. Defendants do not assert that the requested public records would disclose gross receipts of a private business, nor involve the commercial solicitation of handicapped persons. Instead, Defendants are using this exemption "*to restrict access by the public . . . to information contained in public records*" (*Id.*).

14. FOIA requires public bodies to produce public records about its alleged illegal conduct. *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004).
15. Plaintiffs have a right to hold to account those in public service. *Id.*
16. A public body or its employee does not have a right of privacy to expend public funds for a private purpose, nor to be free from public scrutiny in how it expended public funds.
17. Defendants have failed to produce documents related to the incident in question, the rebuilding of a private driveway, using public funds, equipment, supplies, materials, and personnel, a violation of the Constitution, Art. X, § 5 and 11.
18. Defendants have violated FOIA by withholding non-exempt documents that were subject to a legitimate FOIA request and failing to segregate exempt from non-exempt materials for disclosure.
19. Upon information and belief, Defendants possess additional documents related to the incident, which they are wrongfully withholding under the guise of the attorney client relationship. Defendants are not legally entitled to shelter such documents from production, even though they may have been generated or discovered in the course of an investigation. A public body may not insulate a matter from the application of FOIA, simply by involving an attorney.
20. Upon information and belief, Defendants failed to separate documents from any legal memorandum prepared by their attorney, and produce the documents as public records. *Evening Post Pub. Co. v. Berkeley Co. Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011).

21. Upon information and belief, the investigation into the rebuilding of a private driveway was in the normal course of events for the Defendants, and the involvement of an attorney was not necessary to the process.
22. Therefore, Defendants have failed to:
 - a. Comply with Plaintiffs' request;
 - b. Make a proper response to Plaintiffs' request;
 - c. Respond timely that the requested public records would be made available;
 - d. Actually make the requested public records available for copying, or
 - e. Furnish the public records;all in violation of § 30-4-30(c).
23. As a result the foregoing failures, Defendants have violated S.C. Code Ann. § 30-4-30(c), and Plaintiff's "request must be considered approved." *Id.*

WHEREFORE, Plaintiffs pray the Court for *in camera* review of the allegedly exempt public records, and for an Order:

1. Declaring that Defendants have violated FOIA;
2. Declaring that the request is deemed approved;
3. Enjoining Defendants from wrongfully withholding public documents under FOIA;
4. Enjoining Defendants to provide Plaintiff a copy of all requested documents;

5. Awarding the Plaintiff attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b); and
6. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136

819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 242-5500
Attorneys for Plaintiff

July 1, 2013



ATTORNEYS AND COUNSELORS AT LAW

June 10, 2013

*JAMES G. CARPENTER
james.carpenter@carpenterlawfirm.net

JENNIFER J. MILLER
jennifer.miller@carpenterlawfirm.net

L. WARREN CLAYTON, III
warren.clayton@carpenterlawfirm.net

*LICENSED IN S.C. & N.C.

The Hon. Robert J. St. Onge
Secretary of Transportation
Box 191
Columbia, SC 29201-0191

CERTIFIED MAIL

RE: FOIA Request

7192 7965 1290 0000 0257

Re: FOIA Request

Dear Mr. St. Onge:

Pursuant to the South Carolina and Federal Freedom of Information Acts, S.C. CODE ANN. § 30-4-10, et seq., and 5 U.S.C. § 552 et seq., I respectfully request that you mail me complete copies of the following public records, with all attachments and enclosures:

1. All public records relating or referring to a request by a DOT employee that a maintenance supervisor or similar personnel to rebuild or work on the employee's residential driveway in the Fall of 2012.
2. All public records, including time records and work reports relating or referring to any DOT employee or supervisor using a grader, backhoe, dump truck, or any other DOT equipment or materials or personnel to work on or rebuild the driveway at the residence of a DOT employee in the Fall of 2012.
3. All public records relating or referring to a DOT employee directing traffic, while any work referenced in 1 and 2 above was being performed.
4. All public records relating or referring to any investigation or report of the incidents referenced in 1-3 above.
5. All public records relating or referring to any written or oral reprimands or counseling related to the incidents referenced in 1-3 above.

THE CARPENTER LAW FIRM, P.C. • 819 EAST NORTH STREET • GREENVILLE, SC 29601
TELEPHONE (864) 235-1269 • FACSIMILE (864) 331-3083 • WWW.CARPENTERLAWFIRM.NET



In the event you determine that a requested document contains material or information within the statutory exemptions to mandatory disclosure, I request you review such material for discretionary disclosure. Similarly, in the event you determine a document contains material or information within the statutory exemptions to mandatory disclosure, I request, in accordance with the provisions of S.C. CODE ANN. § 30-4-40(b), you produce any and all reasonably segregable portions of such document.

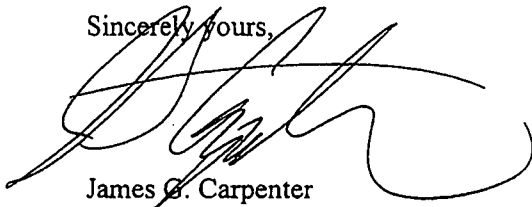
If you determine that all documents responsive to any individual requested item (or portion thereof) have been disclosed or specifically identified and withheld under the claim of authority, I request specific written confirmation of such fact. In the event you determine you have no document responsive to an individual request item (or portion thereof), I request specific written confirmation of that fact.

This request constitutes notice of demand for production of all described documents. If, for any reason, you determine that you will not send us any document (or portion thereof), or that this request will not, in whole or in part, be complied with, I request prompt notice of any action taken. In addition, I request such notice include complete identification of the withheld documents (or portions thereof) by title, author, date, nature of such material, and a thorough explanation of all legal and factual bases for your determination to deny disclosure. I request that in responding to this request you adhere to the time limitations set forth in S.C. CODE ANN. § 30-4-30(c).

I will pay the reasonable and direct costs of locating and reproducing the requested documents to the extent required by S.C. CODE ANN. § 30-4-30(b). However, I request prior notice should you determine that such costs will exceed \$200.00.

Thank you for your assistance. Should you have any questions, please do not hesitate to call my office at (864) 235-1269.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'James G. Carpenter', with a large, sweeping flourish extending from the end of the signature.

James G. Carpenter



South Carolina
Department of Transportation
Office of Chief Counsel

June 20, 2013

Linda C. McDonald
Chief Counsel

Assistant Chief Counsel
Natalie J. Moore
Barbara M. Wessinger
Beacham O. Brooker, Jr.
Amanda T. Taylor, Claims
Glennith C. Johnson

Claims Office
737-1260

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 East North Street
Greenville, SC 29601

RE: FOIA # 13-3601

Dear Mr. Carpenter:

The South Carolina Department of Transportation is in receipt of your correspondence dated June 10, 2013, requesting information under the S.C. Freedom of Information Act (FOIA). Each numbered item of your request is addressed as follows:

1. Enclosed is a redacted copy of a January 8, 2013 letter, with enclosures from State Inspector General Patrick J. Maley to SCDOT Chief of Staff Wendy Nicholas, referring a complaint regarding the refurbishing of an employee driveway to SCDOT for action as SCDOT deems appropriate. The names and personally identifying information has been redacted pursuant to S. C. Code § 30-4-40(2).
2. There are no time records or work reports relating or referring to the work.
3. There are no records relating or referring to an SCDOT employee directing traffic for this work.
4. An investigation of this matter was conducted as requested by SCDOT's Chief Counsel and appropriate disciplinary action was taken. The report of the investigation and disciplinary action taken is protected from disclosure pursuant to S. C. Code § 30-4-40(7) and S. C. Code § 30-4-40(2).
5. The disciplinary actions that were taken are protected from disclosure pursuant to S. C. Code § 30-4-40(2) and as personnel records.

This concludes the formal response of SCDOT to your request for information, and we will be closing our file regarding this matter.

Sincerely,

Janet Tucker
Freedom of Information Officer

Enclosures
File: Legal #F13-3601



From: Townes, Paul B. [mailto:TownesPB@dot.state.sc.us]
Sent: Wednesday, January 02, 2013 4:13 PM
To: Maley, Patrick
Cc: Parker, G Clifton; Nicholas, Wendy
Subject: Allegation of Fraud

This is to notify you that I have received a complaint about possible fraudulent use of SCDOT personnel and equipment concerning the refurbishing of a driveway of a SCDOT employee

The location of the driveway is believed to be .
The work is believed to have been done on November 2, 2012 but could have been November 9, 2012. It was done on a Friday

They were ordered to do the work by
An additional allegation is that the time may have been fraudulently miscoded.

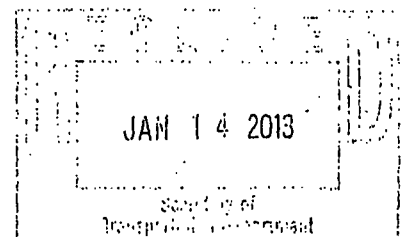
I have attached photos taken of the work. You can contact me if needed at 803-737-1151. Thank you for your expected cooperation in resolving this complaint.

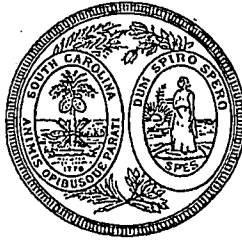
Sincerely,

Paul Townes, CPA

Chief Internal Auditor

SCDOT





State of South Carolina
Office of the Inspector General

January 8, 2013

Wendy Nicholas
Chief of Staff
SC Department of Transportation
955 Park Street
Columbia, SC 29202-0191

Dear Chief of Staff Nicholas:

The Office of the Inspector General for South Carolina (OIG) operates a fraud, waste, and abuse hotline. Many calls, emails, and letters to the OIG through hotline mechanisms are unrelated to matters of investigative interest to the OIG, but are provided to the logical state agency.

Attached to this letter is an email sent to this office on January 2, 2013 from Paul Townes, SCDOT internal auditor. The complaint alleges possible fraudulent use of SCDOT personnel and equipment concerning the refurbishing of a driveway of SCDOT employee, ... The OIG will not conduct any inquiry into this matter. This matter is being forwarded to the SC Department of Transportation for whatever action it deems appropriate. Paul Townes also sent photographs taken of the work on the driveway. The photographs will be sent to you via email.

If additional assistance is needed, please contact Patty Wentworth at (803) 896-4927.

Thank you.

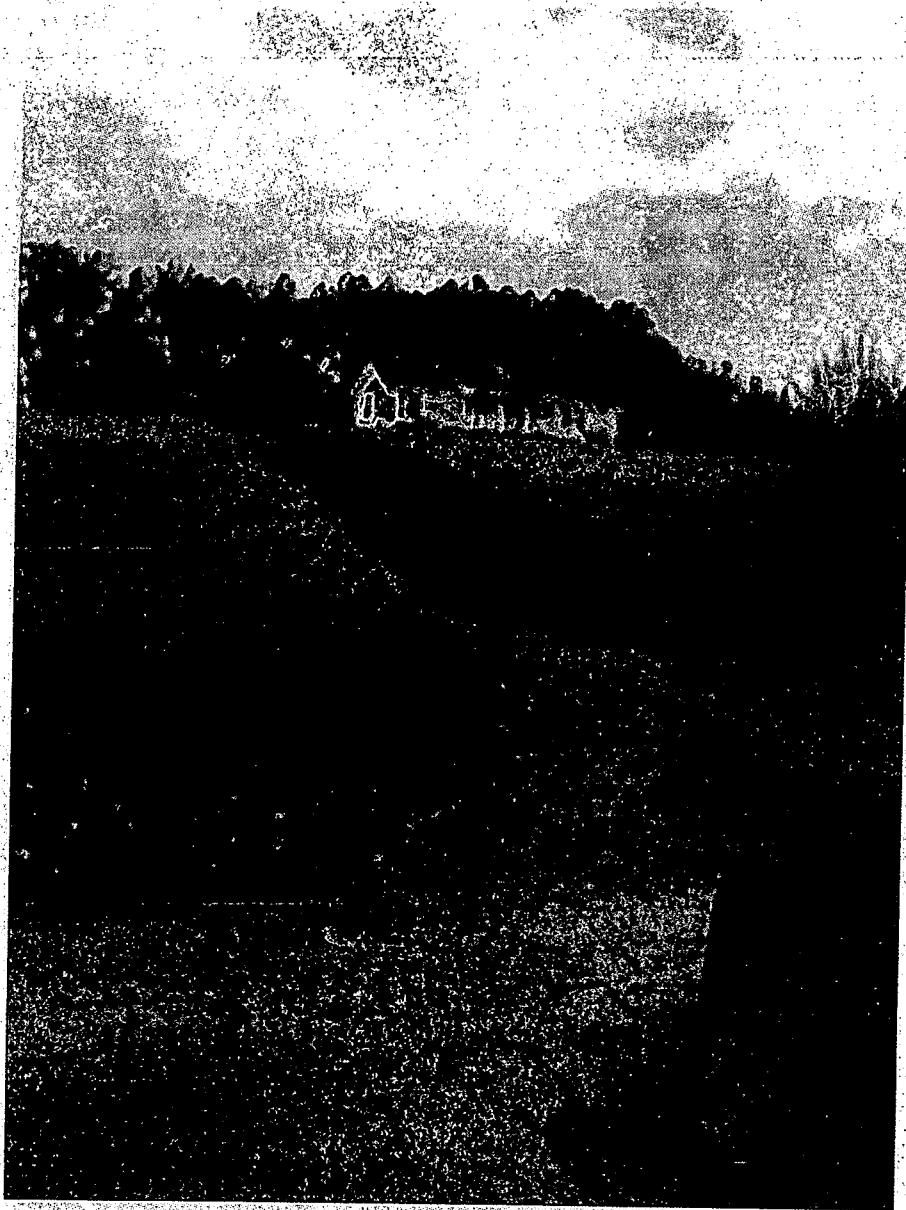
Sincerely,

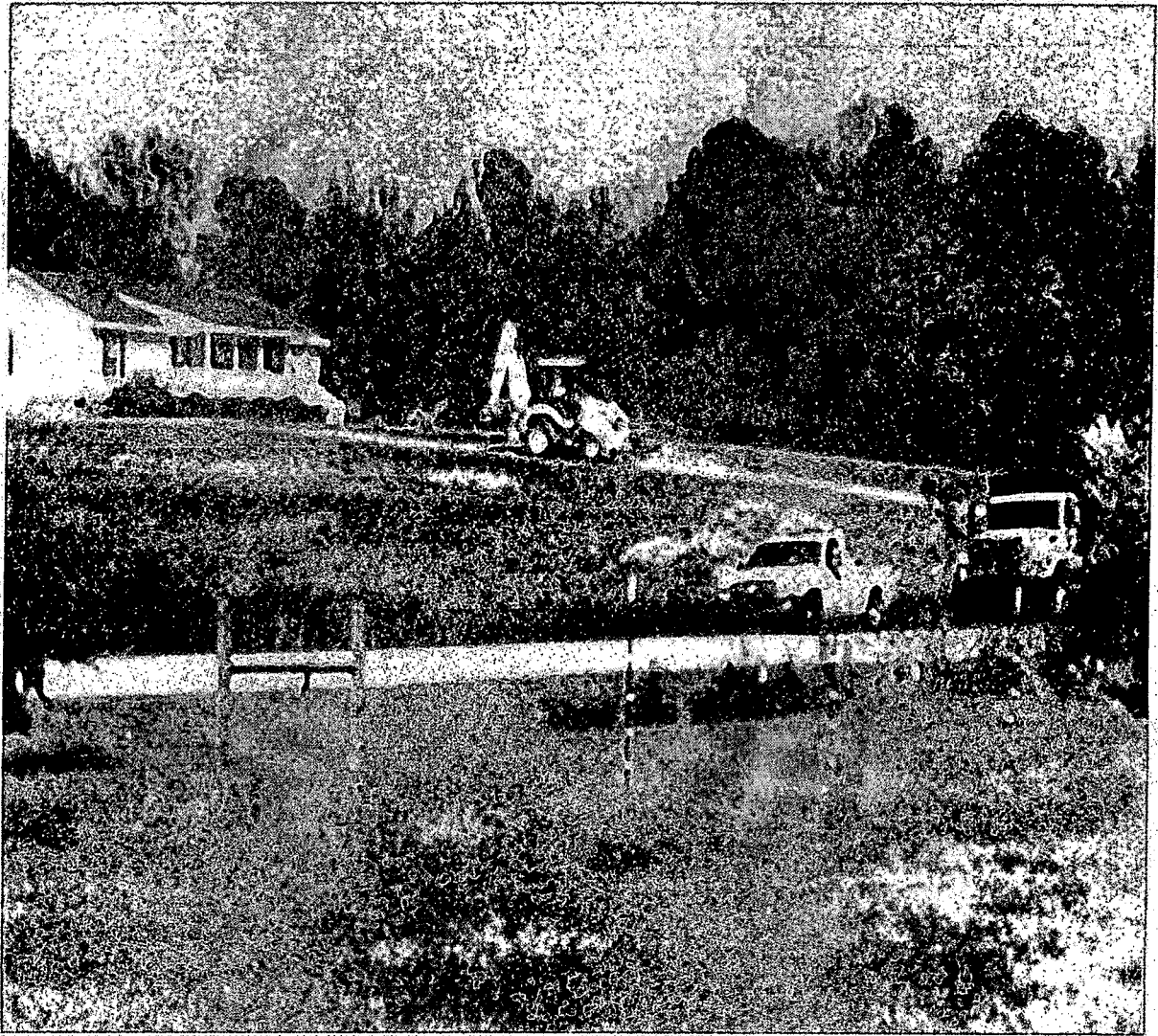
Patrick J. Maley
Inspector General

PJM/pw

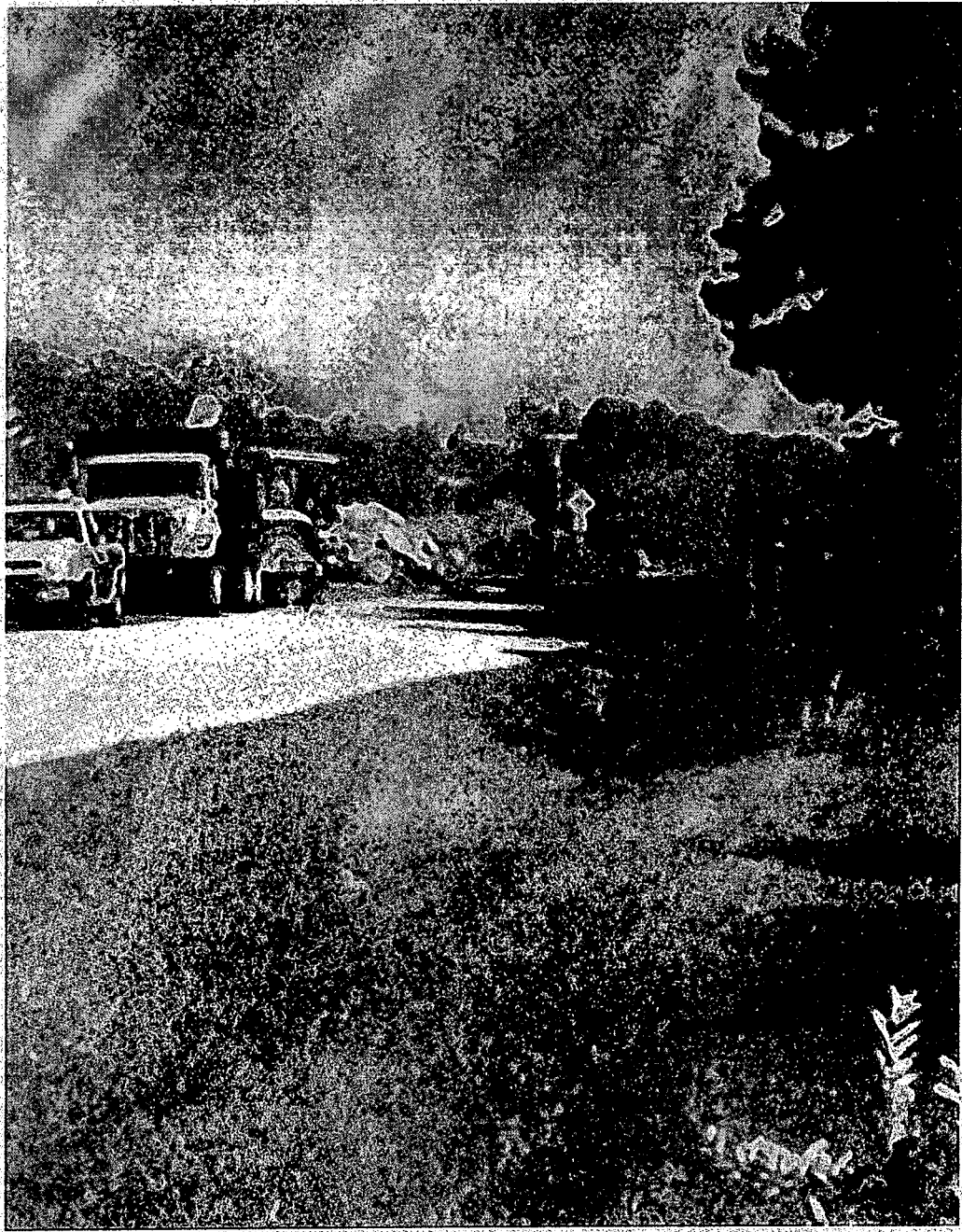
Enclosure: email complaint

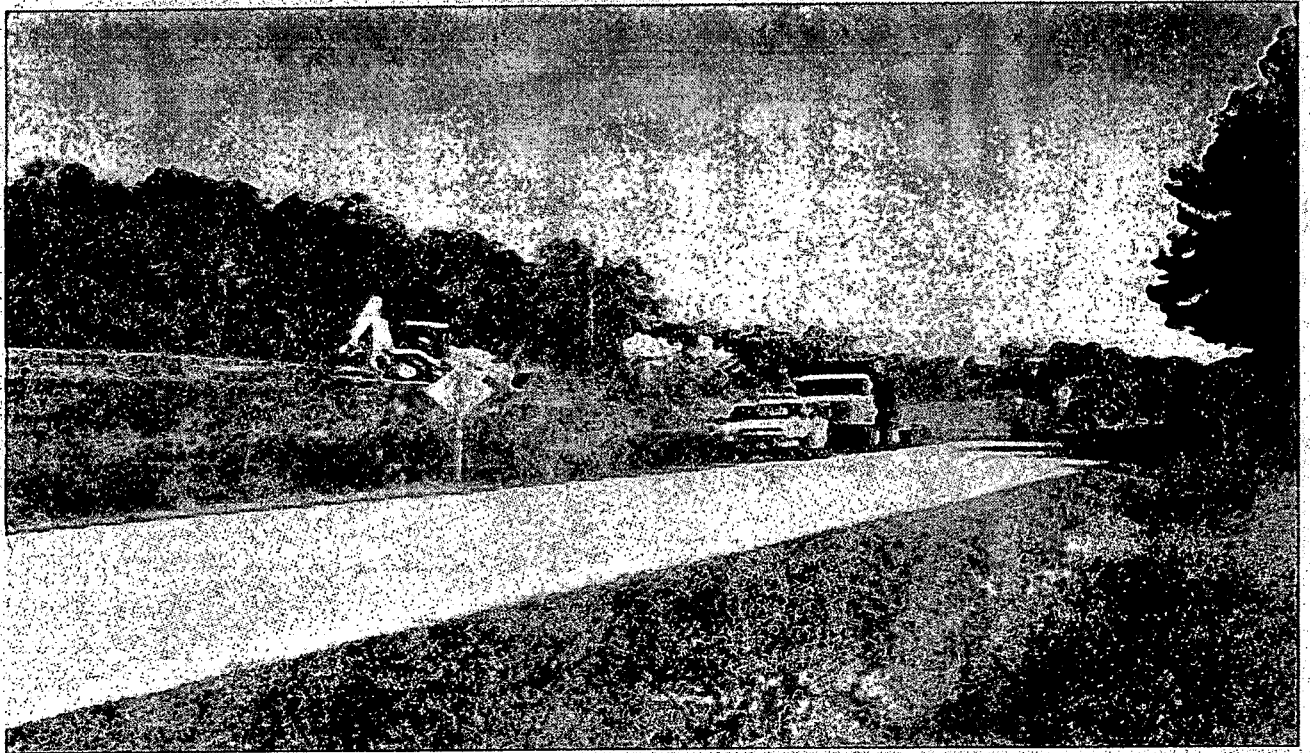
JAN 14 2013



















STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE CIRCUIT COURT
C.A. NO. 2013-CP-40-3908

South Carolina Public Interest Foundation
and Edward D. Sloan, Jr., individually,
and on behalf of all others similarly
situated,

Plaintiffs,

v.

South Carolina Department of
Transportation and Robert J. St. Onge, Jr.,
Secretary of Transportation,

Defendants.

ANSWER OF
SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION and
ROBERT J. ST. ONGE, JR.,
SECRETARY OF TRANSPORTATION

COME NOW, the Defendants, South Carolina Department of Transportation
("SCDOT") and Robert J. St. Onge, Jr., Secretary of Transportation, by and through
their undersigned attorneys, and answer the Complaint as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of Plaintiff's Complaint which is not
hereinafter specifically admitted, modified or explained is denied and strict
proof is demanded thereof.
2. Defendants lack sufficient information or knowledge to form a belief
concerning the allegations contained in paragraphs 1 and 2, and therefore,
would deny the same and demand strict proof thereof.
3. Defendants admit the allegations of Paragraphs 3 and 4.

4. Defendants deny the allegations of paragraph 5 and demand strict proof thereof.

5. Defendants admit the allegations of paragraph 6.

6. Defendants deny so much of the allegations of paragraph 7 as allege Plaintiffs served a Freedom of Information Act (FOIA) request on them on June 10, 2013, since the FOIA request that is the subject of this action (Exhibit A to the Complaint) was received on June 12, 2013.

7. Defendants lack sufficient information or knowledge to form a belief concerning the allegations contained in paragraph 8, and therefore, would deny the same and demand strict proof thereof.

8. Defendants admit so much of the allegations contained in paragraph 9 as allege its response to Plaintiffs' FOIA request is set forth in its Exhibit B, but denies this was a response of "Counsel for Defendants."

9. Defendants admit so much of paragraph 10 as alleges its response redacted certain information of a personal nature under S.C. Code Ann. §30-4-40(a)(2) and (7), but deny that they withheld other public records, and demand strict proof thereof.

10. Defendants deny the allegations of paragraph 11 and demand strict proof thereof.

11. Defendants admit the allegations of paragraph 12.

12. Defendants admit so much of paragraph 13 as alleges that the that they did not assert the requested public records would disclose gross receipts of a private business, nor involve a commercial solicitation of handicapped persons, but deny the remaining allegations and demand strict proof thereof.

13. Defendants deny the allegations contained in paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22(a) through (e), and 23, and demand strict proof thereof.

FOR A SECOND DEFENSE

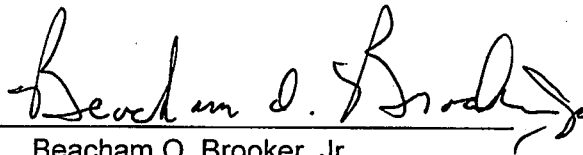
14. Further answering the Complaint herein and as a second defense thereto, Defendants reiterate all of the allegations contained in the First Defense above, as fully as if repeated herein.

15. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action.

WHEREFORE, having fully answered the Complaint, Defendants pray this
Court :

- (1) dismiss this action with prejudice;
- (2) deny Plaintiff's request for attorney's fees; and
- (3) grant such other and further relief as may be just and proper.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION

By: 

Beacham O. Brooker, Jr.

Natalie J. Moore

Assistant Chief Counsel

Post Office Box 191

Columbia, SC 29202

SCBar No. 909 (Brooker)

SC Bar No. 4058 (Moore)

803.737.1347

brookerbo@scdot.org

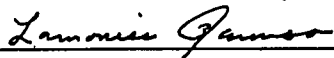
moorenj@scdot.org

August 5, 2013
Columbia, South Carolina

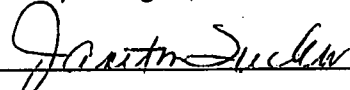
STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT
	)	
COUNTY OF RICHLAND	)	C.A. NO. 2013-CP-40-3908
	)	
South Carolina Public Interest Foundation	)	
and Edward D. Sloan, Jr., individually,	)	
and on behalf of all others similarly	)	
situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
South Carolina Department of	)	
Transportation and Robert J. St. Onge, Jr.,	)	
Secretary of Transportation,	)	
	)	
Defendants.	)	

I, Lamonica Jamison, an employee of the South Carolina Department of Transportation, hereby certify that I have this 5th day of August, 2013, served a copy of the **Answer of South Carolina Department of Transportation and Certificate of Service**, upon the party named below by mailing a copy of same, in the United States mail, first-class postage prepaid, addressed as shown below:

James G. Carpenter, Esquire
Carpenter Law Firm
819 East North Street
Greenville, South Carolina 29601


Lamonica Jamison,
Administrative Coordinator

SWORN to before me this
5th day of August, 2013


Notary Public for South Carolina
My Commission Expires: 11/15/2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation
and Edward D. Sloan, Jr., individually,
and on behalf of all others similarly
situated,

Plaintiffs,

v.

South Carolina Department of
Transportation, and Robert J. St. Onge, Jr.,
Secretary of Transportation,
Defendants.

IN THE CIRCUIT COURT

C.A. No. 2013-CP-40-3908

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

(FOIA ENFORCEMENT)

2014 SEP -9 PM 2:32
CLERK J. W. McBRIDE
C.J.P. & G.S.

RICHLAND COUNTY
FILED

NOW COME the Plaintiffs, by their undersigned attorney, and move the Court, pursuant to SCRCP 56 for Summary Judgment. In support of the motion, plaintiffs would show to the court that there is no genuine issue of material fact and that plaintiffs are entitled to judgment as a matter of law. In further support of the motion, plaintiff would show to the court the following:

1. Plaintiff South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.* ("FOIA").
2. Plaintiff Edward D. Sloan, Jr, ("Sloan") is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina.
3. Defendant South Carolina Department of Transportation is a Department of the State and is a "public body" under FOIA.
4. Defendant Robert J. St. Onge, Jr., is the Secretary of Transportation and manages

the SCDOT.

5. This Court has jurisdiction under FOIA.
6. Venue is properly placed in Richland County.
7. Plaintiffs served a FOIA request on the Defendants on June 10, 2013 (**Exhibit A**).
8. Plaintiffs sought a copy of public records regarding DOT's expenditure of public funds for a private purpose.
9. Counsel for Defendants responded on June 20, 2013 (**Exhibit B**).
10. Defendants redacted information from the requested public records delivered and withheld other public records, asserting that the requested public records were exempt from production under S.C. Code Ann. § 30-4-40(2) (sic) and § 30-4-40(7) (sic), (probably meaning § 30-4-40(a)(2) and § 30-4-40(a)(7)).
11. Defendants have wrongly claimed that the public records are exempt from disclosure as required by FOIA.
12. S.C. Code Ann. § 30-4-40(a)(2) and (7) states the following:

(2) Information of a *personal nature* where the public disclosure thereof would constitute *unreasonable invasion of personal privacy*. Information of a personal nature shall include, but not be limited to, information as to *gross receipts* contained in applications for business licenses and information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are *handicapped or disabled* when the information is requested *for person-to-person commercial solicitation* of handicapped persons solely by virtue of their handicap. *This provision must not be interpreted to restrict access by the public and press to information contained in public records.*

* * *

(7) Correspondence or *work products of legal counsel* for a public body and any other material that would *violate attorney-client relationships*.

(Emphasis added).

13. Defendants do not assert that the requested public records would disclose gross receipts of a private business, nor involve the commercial solicitation of handicapped persons. Instead, Defendants are using this exemption “*to restrict access by the public . . . to information contained in public records*” (*Id.*).
14. FOIA requires public bodies to produce public records about its alleged illegal conduct. *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004).
15. Plaintiffs have a right to hold to account those in public service. *Id.*
16. A public body or its employee does not have a right of privacy to expend public funds for a private purpose, nor to be free from public scrutiny in how it expended public funds.
17. Defendants have failed to produce documents related to the incident in question, the rebuilding of a private driveway, using public funds, equipment, supplies, materials, and personnel, a violation of the Constitution, Art. X, § 5 and 11.
18. Defendants have violated FOIA by withholding non-exempt documents that were subject to a legitimate FOIA request and failing to segregate exempt from non-exempt materials for disclosure.
19. Upon information and belief, Defendants possess additional documents related to the incident, which they are wrongfully withholding under the guise of the attorney client relationship. Defendants are not legally entitled to shelter such documents from production, even though they may have been generated or

discovered in the course of an investigation. A public body may not insulate a matter from the application of FOIA, simply by involving an attorney.

20. Upon information and belief, Defendants failed to separate documents from any legal memorandum prepared by their attorney, and produce the documents as public records. *Evening Post Pub. Co. v. Berkeley Co. Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011).
21. Upon information and belief, the investigation into the rebuilding of a private driveway was in the normal course of events for the Defendants, and the involvement of an attorney was not necessary to the process.
22. Therefore, Defendants have failed to:
 - a. Comply with Plaintiffs' request;
 - b. Make a proper response to Plaintiffs' request;
 - c. Respond that the requested public records would be made available;
 - d. Actually make the requested public records available for copying, or
 - e. Furnish the public records;all in violation of § 30-4-30(c).

23. As a result the foregoing failures, Defendants have violated S.C. Code Ann. § 30-4-30(c), and Plaintiff's "request must be considered approved." *Id.*

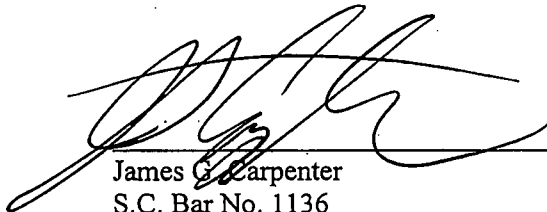
WHEREFORE, Plaintiffs pray the Court for *in camera* review of the allegedly exempt public records, and for summary judgment:

1. Declaring that Defendants have violated FOIA;
2. Declaring that the request is deemed approved;
3. Enjoining Defendants from wrongfully withholding public documents

under FOIA;

4. Enjoining Defendants to provide Plaintiff a copy of all requested documents;
5. Awarding the Plaintiff attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b); and
6. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136

819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 242-5500
Attorneys for Plaintiff

September 3, 2013



ATTORNEYS AND COUNSELORS AT LAW

June 10, 2013

*JAMES G. CARPENTER
james.carpenter@carpenterlawfirm.net

JENNIFER J. MILLER
jennifer.miller@carpenterlawfirm.net

L. WARREN CLAYTON, III
warren.clayton@carpenterlawfirm.net

*LICENSED IN S.C. & N.C.

The Hon. Robert J. St. Onge
Secretary of Transportation
Box 191
Columbia, SC 29201-0191

CERTIFIED MAIL

RE: FOIA Request

7152 7965 1290 0000 0257

Re: FOIA Request

Dear Mr. St. Onge:

Pursuant to the South Carolina and Federal Freedom of Information Acts, S.C. CODE ANN. § 30-4-10; et seq., and 5 U.S.C. § 552 et seq., I respectfully request that you mail me complete copies of the following public records, with all attachments and enclosures:

1. All public records relating or referring to a request by a DOT employee that a maintenance supervisor or similar personnel to rebuild or work on the employee's residential driveway in the Fall of 2012.
2. All public records, including time records and work reports relating or referring to any DOT employee or supervisor using a grader, backhoe, dump truck, or any other DOT equipment or materials or personnel to work on or rebuild the driveway at the residence of a DOT employee in the Fall of 2012.
3. All public records relating or referring to a DOT employee directing traffic, while any work referenced in 1 and 2 above was being performed.
4. All public records relating or referring to any investigation or report of the incidents referenced in 1-3 above.
5. All public records relating or referring to any written or oral reprimands or counseling related to the incidents referenced in 1-3 above.

THE CARPENTER LAW FIRM, P.C. • 819 EAST NORTH STREET • GREENVILLE, SC 29601
TELEPHONE (864) 235-1269 • FACSIMILE (864) 331-3083 • WWW.CARPENTERLAWFIRM.NET



In the event you determine that a requested document contains material or information within the statutory exemptions to mandatory disclosure, I request you review such material for discretionary disclosure. Similarly, in the event you determine a document contains material or information within the statutory exemptions to mandatory disclosure, I request, in accordance with the provisions of S.C. CODE ANN. § 30-4-40(b), you produce any and all reasonably segregable portions of such document.

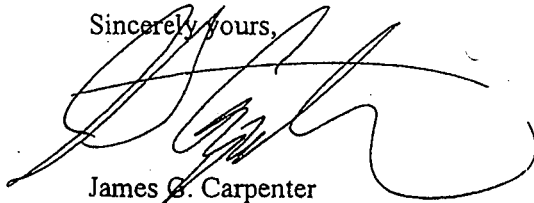
If you determine that all documents responsive to any individual requested item (or portion thereof) have been disclosed or specifically identified and withheld under the claim of authority, I request specific written confirmation of such fact. In the event you determine you have no document responsive to an individual request item (or portion thereof), I request specific written confirmation of that fact.

This request constitutes notice of demand for production of all described documents. If, for any reason, you determine that you will not send us any document (or portion thereof), or that this request will not, in whole or in part, be complied with, I request prompt notice of any action taken. In addition, I request such notice include complete identification of the withheld documents (or portions thereof) by title, author, date, nature of such material, and a thorough explanation of all legal and factual bases for your determination to deny disclosure. I request that in responding to this request you adhere to the time limitations set forth in S.C. CODE ANN. § 30-4-30(c).

I will pay the reasonable and direct costs of locating and reproducing the requested documents to the extent required by S.C. CODE ANN. § 30-4-30(b). However, I request prior notice should you determine that such costs will exceed \$200.00.

Thank you for your assistance. Should you have any questions, please do not hesitate to call my office at (864) 235-1269.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'J. Carpenter', with a large, sweeping flourish extending from the end of the signature.

James G. Carpenter



South Carolina
Department of Transportation
Office of Chief Counsel

June 20, 2013

Linda C. McDonald
Chief Counsel

Assistant Chief Counsel
Natalie J. Moore
Barbara M. Wessinger
Beacham O. Brooker, Jr.
Amanda T. Taylor, Claims
Glennith C. Johnson

Claims Office
737-1260

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 East North Street
Greenville, SC 29601

RE: FOIA # 13-3601

Dear Mr. Carpenter:

The South Carolina Department of Transportation is in receipt of your correspondence dated June 10, 2013, requesting information under the S.C. Freedom of Information Act (FOIA). Each numbered item of your request is addressed as follows:

1. Enclosed is a redacted copy of a January 8, 2013 letter, with enclosures from State Inspector General Patrick J. Maley to SCDOT Chief of Staff Wendy Nicholas, referring a complaint regarding the refurbishing of an employee driveway to SCDOT for action as SCDOT deems appropriate. The names and personally identifying information has been redacted pursuant to S. C. Code § 30-4-40(2).
2. There are no time records or work reports relating or referring to the work.
3. There are no records relating or referring to an SCDOT employee directing traffic for this work.
4. An investigation of this matter was conducted as requested by SCDOT's Chief Counsel and appropriate disciplinary action was taken. The report of the investigation and disciplinary action taken is protected from disclosure pursuant to S. C. Code § 30-4-40(7) and S. C. Code § 30-4-40(2).
5. The disciplinary actions that were taken are protected from disclosure pursuant to S. C. Code § 30-4-40(2) and as personnel records.

This concludes the formal response of SCDOT to your request for information, and we will be closing our file regarding this matter.

Sincerely,

Janet Tucker
Freedom of Information Officer

Enclosures
File: Legal #F13-3601



From: Townes, Paul B. [mailto:TownesPB@dot.state.sc.us]
Sent: Wednesday, January 02, 2013 4:13 PM
To: Maley, Patrick
Cc: Parker, G Clifton; Nicholas, Wendy
Subject: Allegation of Fraud

This is to notify you that I have received a complaint about possible fraudulent use of SCDOT personnel and equipment concerning the refurbishing of a driveway of a SCDOT employee

The location of the driveway is believed to be . . .
The work is believed to have been done on November 2, 2012 but could have been November 9, 2012. It was done on a Friday

They were ordered to do the work by . . .
An additional allegation is that the time may have been fraudulently miscoded.

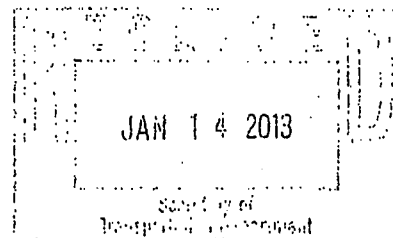
I have attached photos taken of the work. You can contact me if needed at 803-737-1151. Thank you for your expected cooperation in resolving this complaint.

Sincerely,

Paul Townes, CPA

Chief Internal Auditor

SCDOT





State of South Carolina
Office of the Inspector General

January 8, 2013

Wendy Nicholas
Chief of Staff
SC Department of Transportation
955 Park Street
Columbia, SC 29202-0191

Dear Chief of Staff Nicholas:

The Office of the Inspector General for South Carolina (OIG) operates a fraud, waste, and abuse hotline. Many calls, emails, and letters to the OIG through hotline mechanisms are unrelated to matters of investigative interest to the OIG, but are provided to the logical state agency.

Attached to this letter is an email sent to this office on January 2, 2013 from Paul Townes, SCDOT internal auditor. The complaint alleges possible fraudulent use of SCDOT personnel and equipment concerning the refurbishing of a driveway of SCDOT employee, . The OIG will not conduct any inquiry into this matter. This matter is being forwarded to the SC Department of Transportation for whatever action it deems appropriate. Paul Townes also sent photographs taken of the work on the driveway. The photographs will be sent to you via email.

If additional assistance is needed, please contact Patty Wentworth at (803) 896-4927.

Thank you.

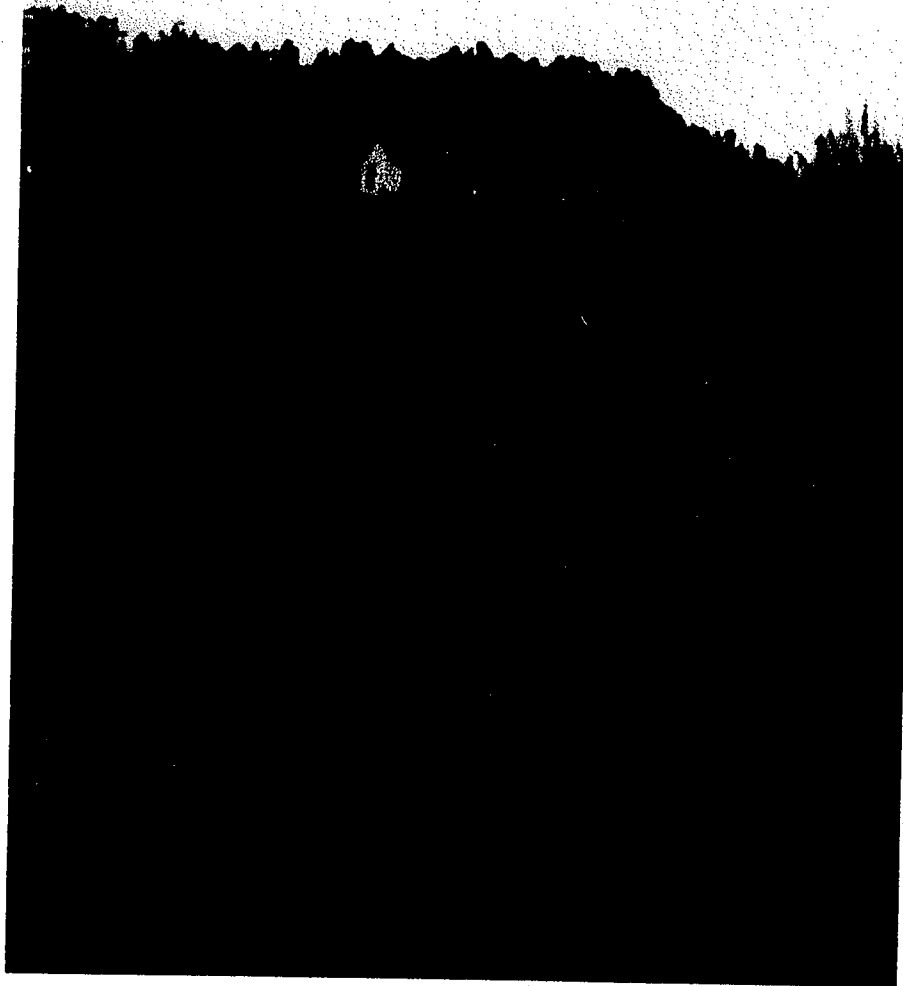
Sincerely,

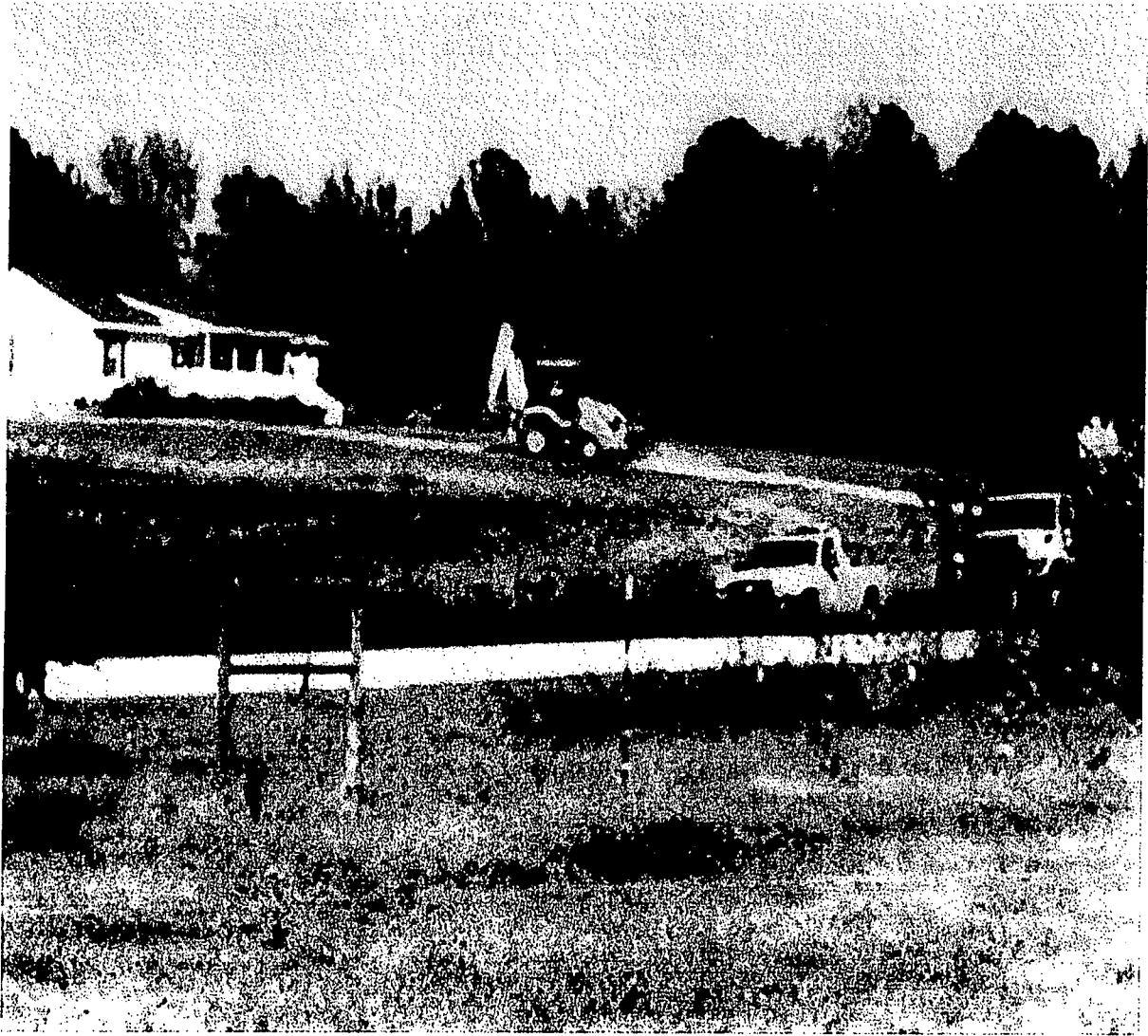
Patrick J. Maley
Inspector General

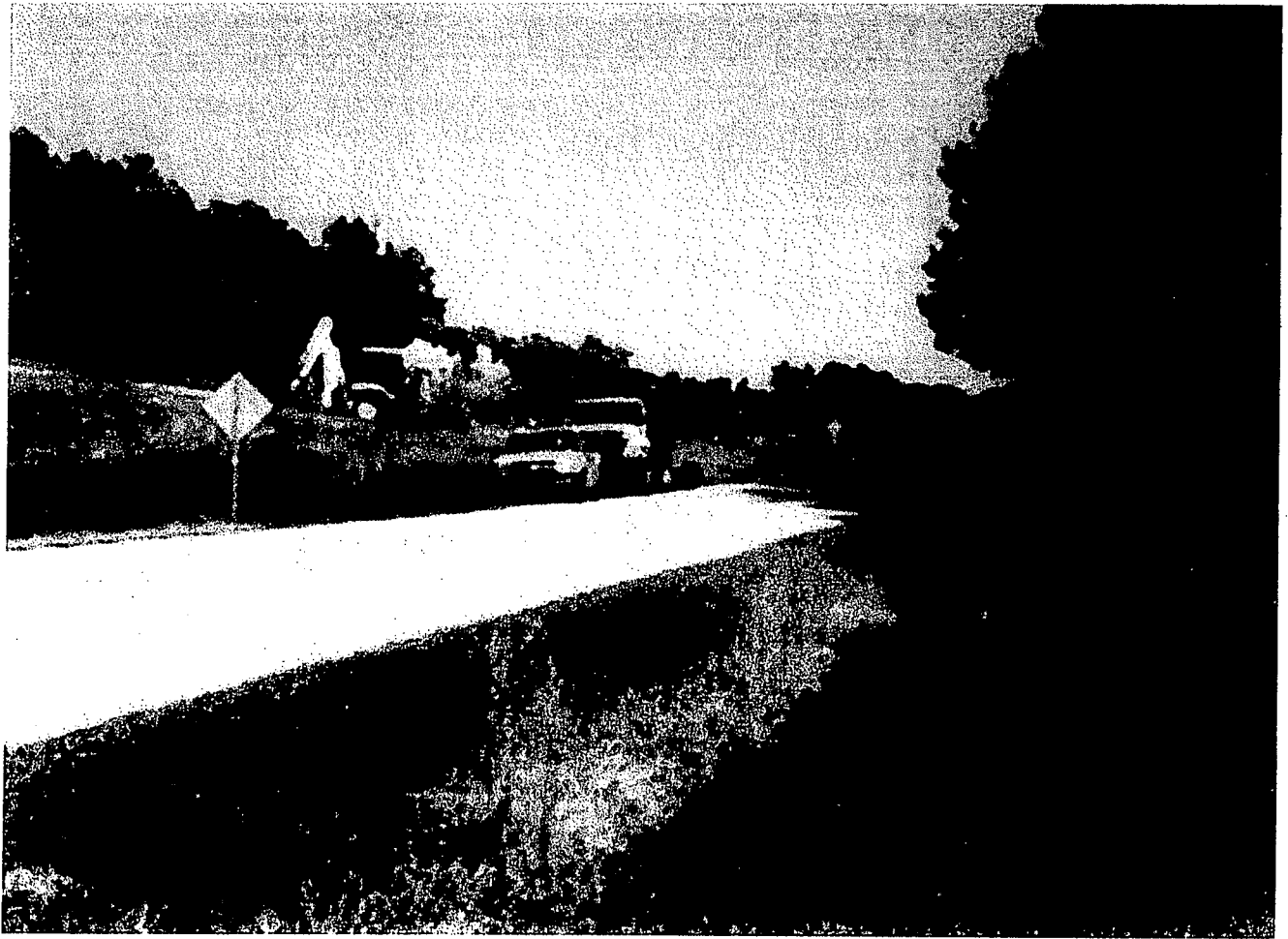
PJM/pw

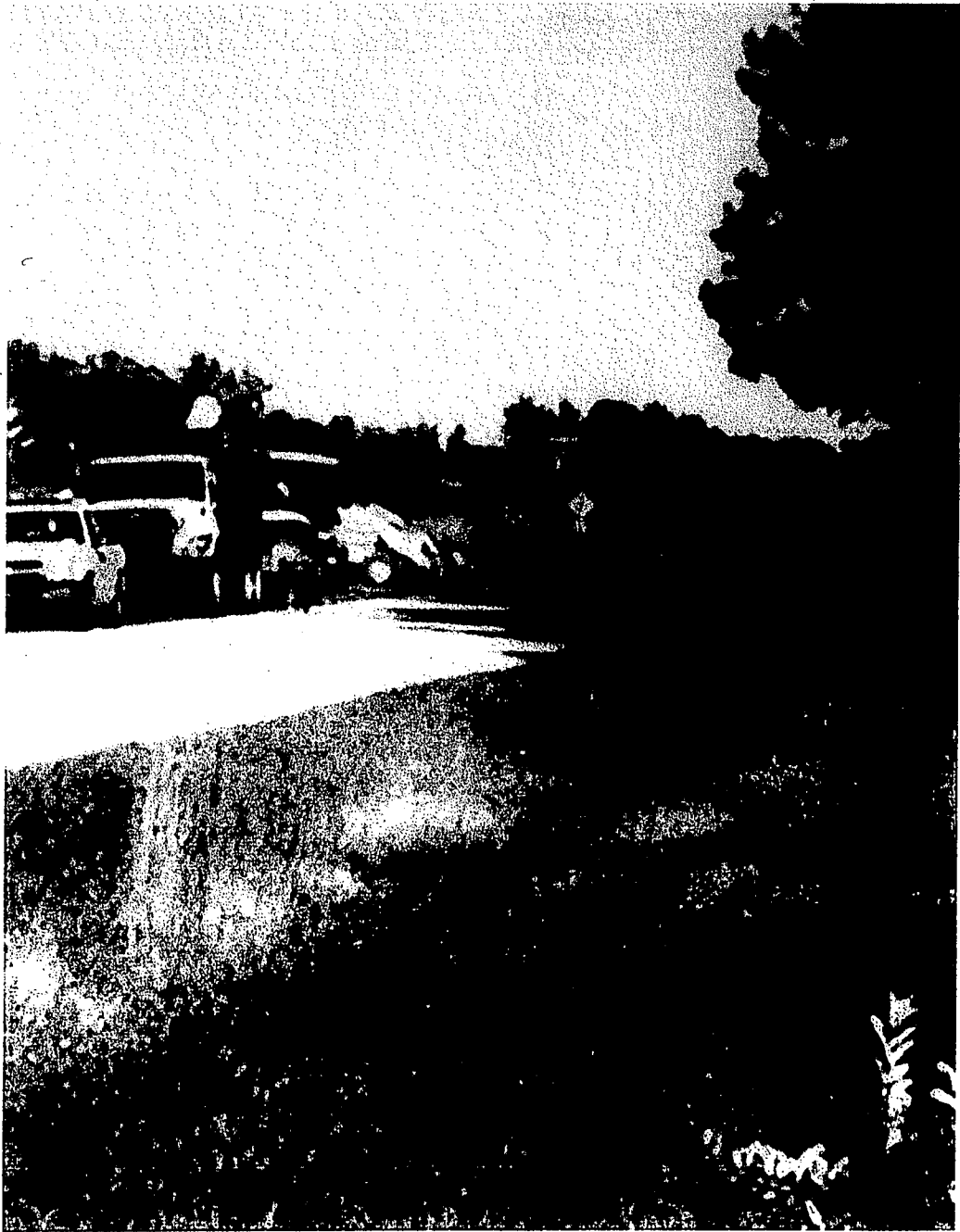
Enclosure: email complaint

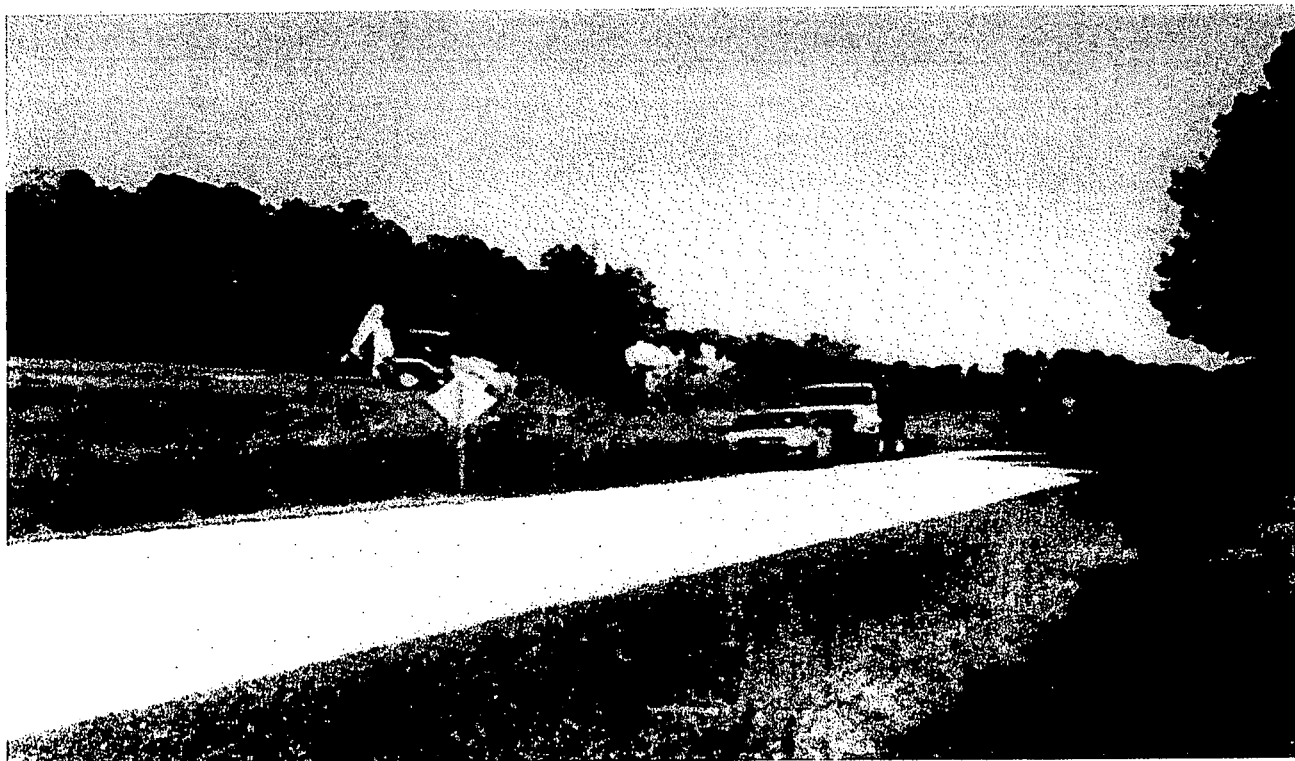
JAN 14 2013

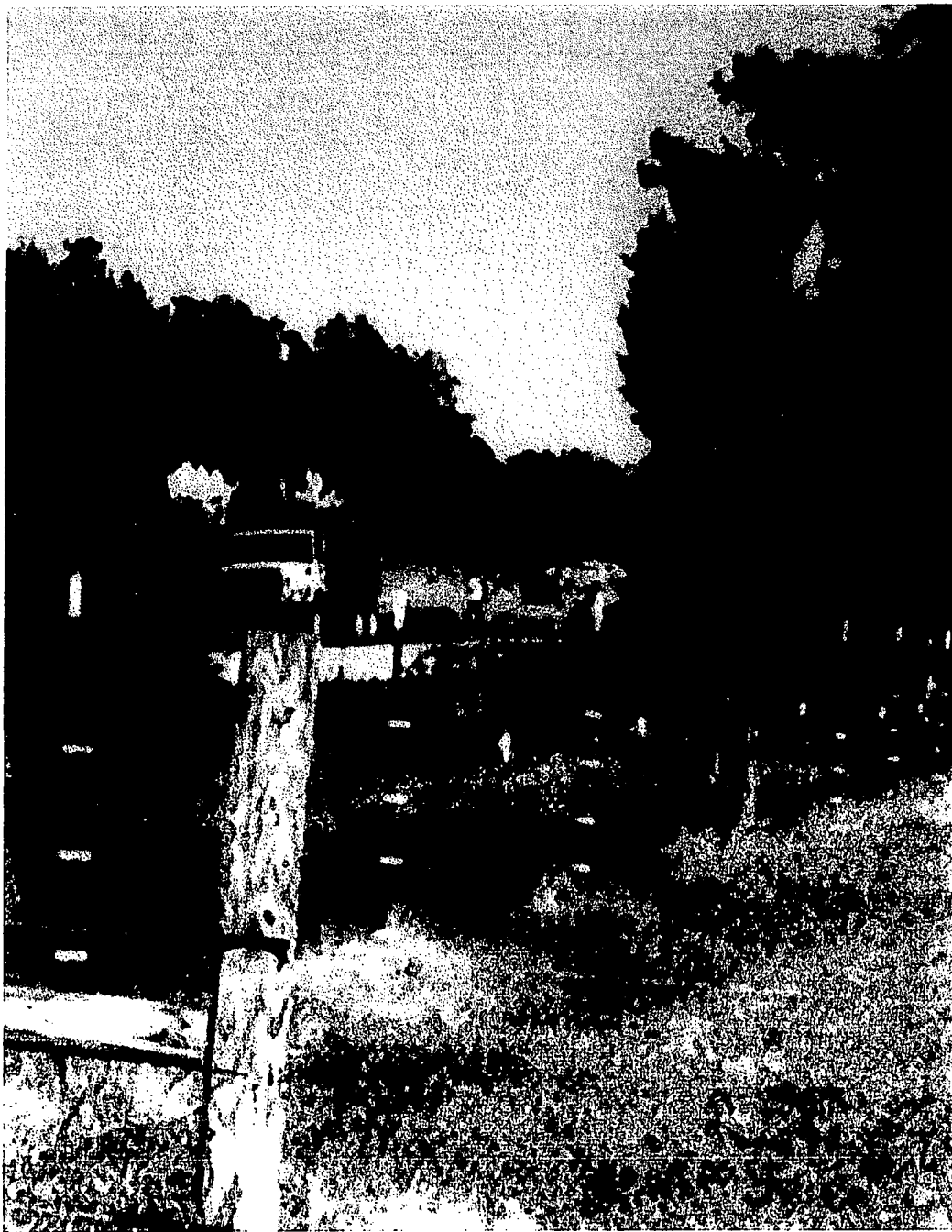


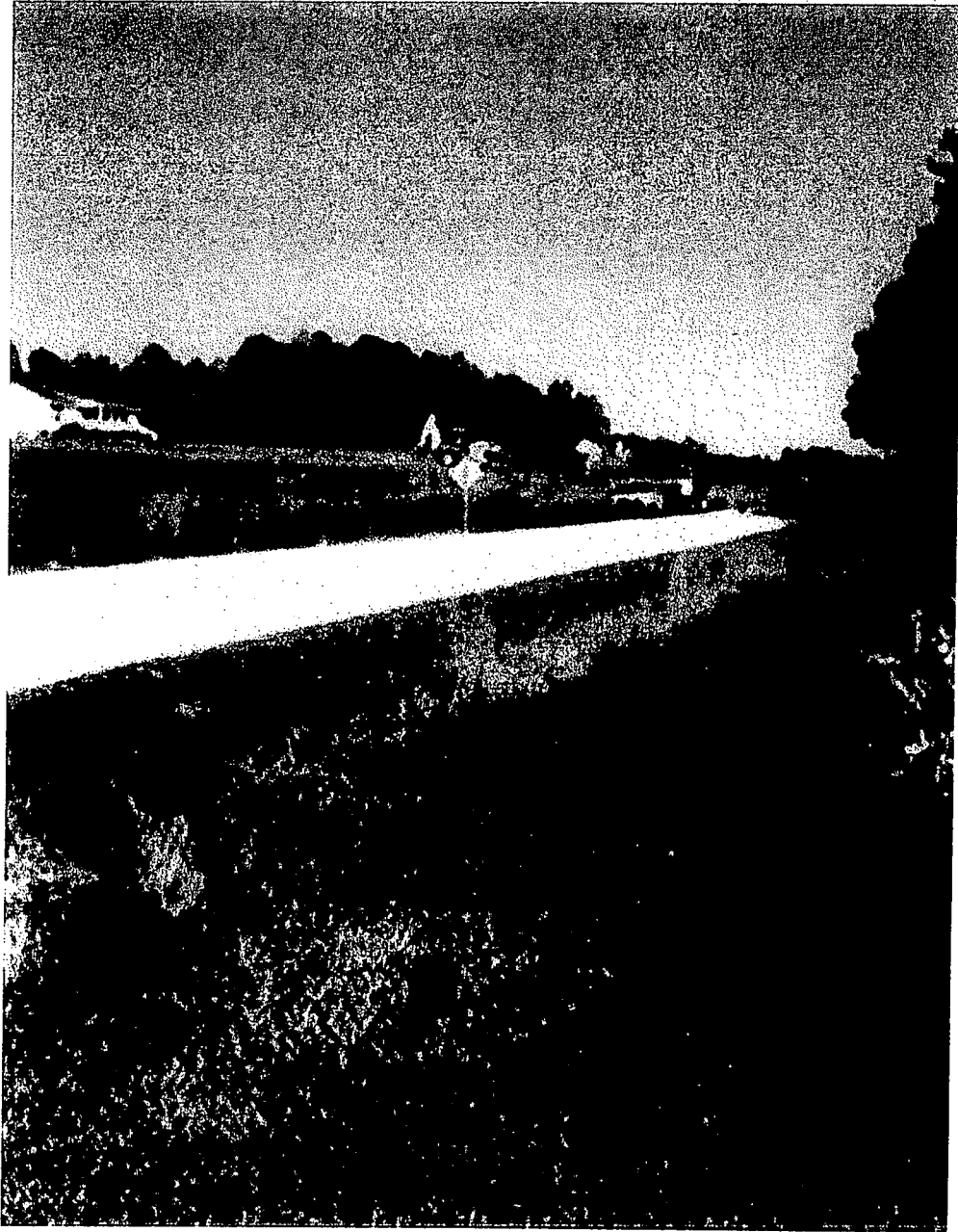
















STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation
and Edward D. Sloan, Jr., individually,
and on behalf of all others similarly
situated,
Plaintiffs,

v.

South Carolina Department of
Transportation, and Robert J. St. Onge, Jr.,
Secretary of Transportation,
Defendants.

IN THE CIRCUIT COURT

C.A. No. 2013-CP-40-3908

**PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT
(FOIA ENFORCEMENT)**

RICHLAND COUNTY
FILED
SEP 30 PM 12:09
JAMES A. MCBRIDE
CLERK, P. J. G.S.

NOW COME the Plaintiffs, by their undersigned attorney, and submit this Memorandum of Law in Support of their Motion for Summary Judgment. Plaintiffs served a FOIA request on the Defendants on June 10, 2013. Plaintiffs requested documents related to the rebuilding of a private driveway using public funds, equipment, supplies, materials, and personnel, a violation of the Constitution, Art. X, § 5 and 11. Counsel for Defendants responded on June 20, 2013, but failed to produce many of the requested documents. In those they did produce, Defendants redacted information.

Defendants asserted that the requested public records were exempt from production under S.C. Code Ann. § 30-4-40(2) (sic) and § 30-4-40(7) (sic). Defendants probably meant § 30-4-40(a)(2) (personal information that would cause an unreasonable invasion of personal privacy) and § 30-4-40(a)(7) (records protected by the attorney-client and attorney work product privileges). The statute granting the exemptions from production under FOIA states the following:

(2) Information of a *personal nature* where the public disclosure thereof would constitute *unreasonable invasion of personal privacy*. Information of a personal nature shall include, but not be limited to, information as to *gross receipts* contained in applications for business licenses and

information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are *handicapped or disabled* when the information is requested *for person-to-person commercial solicitation* of handicapped persons solely by virtue of their handicap. *This provision must not be interpreted to restrict access by the public and press to information contained in public records.*

* * *

(7) Correspondence or *work products of legal counsel* for a public body and any other material that would *violate attorney-client relationships*.

S.C. Code Ann. § 30-4-40(a)(2) and (7) (Emphasis added). Plaintiffs contend that neither exemption protects the requested documents from disclosure under FOIA.

I. PRODUCING THE REQUESTED PUBLIC RECORDS WILL NOT CONSTITUTE AN UNREASONABLE INVASION OF PRIVACY.

First, Plaintiffs respectfully suggest that the disclosure of the documents in question would not cause an unreasonable invasion of personal privacy. FOIA requires public bodies to produce public records about its alleged illegal conduct. *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004). In *Burton*, a newspaper sought reports related to the Sheriff Department's investigation into the off-duty sexually-related conduct of its officers. The Sheriff asserted that disclosure of the report would cause an unreasonable invasion of personal privacy. The Court of Appeals rejected the Sheriff's suggestion: "[T]he Sheriff's Department urge[d] this Court to add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of *an individual's performance of his public duties to be free from public scrutiny*. We find this would be *ill-advised*." *Id.* 358 S.C. 339, 354, 594 S.E.2d 888, 896 (emphasis added).

Plaintiffs have a right to require those in public service to account for their actions, at least to the point of producing public records. *Id.* In interpreting this exemption, the South Carolina Supreme Court ruled, “One of the primary limitations placed on the right of privacy is that *it does not prohibit the publication of matter which is of legitimate public or general interest.*” *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 566, 566, 324 S.E.2d 313, 315 (1984), citing *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606, 609 (1956) (emphasis added). A constitutional violation by the Department of Transportation and its employees is a matter of “legitimate public or general interest.” *Id.*

Similarly, the Supreme Court ruled that a detainee might be entitled to a copy of a police department's internal investigation report that cleared the actions of several police officers. *City of Columbia v. ACLU of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996). The city asserted that the internal report contained information of a personal nature, and was therefore exempt under S.C. Code Ann. § 30-4-40(a)(2). The Circuit Court ruled that the report was exempt as a matter of law, and granted summary judgment to the city, but it was not clear that the Circuit Court had reviewed the report. The Supreme Court reversed the award of summary judgment and remanded the case for a determination by the court, under the particular facts of the case, and for consideration of the exemptions as they applied to the particular report in question.

Defendants have not demonstrated that a public body or its employees possess a right of privacy to expend *public* funds for a *private* purpose, without being called to account for it; nor have they demonstrated a right to be free from public scrutiny in expending public funds in any manner. Accordingly, the disclosure of the requested

public documents related to allegedly unconstitutional expenditures will not "constitute *unreasonable invasion of personal privacy*." S.C. Code Ann. § 30-4-40(a)(2) (emphasis added).

II. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT PROTECT THE REQUESTED PUBLIC RECORDS.

Upon information and belief, Defendants possess additional documents related to the incident, which they are wrongfully withholding under the guise of the attorney-client privilege. Plaintiffs respectfully suggest that the attorney-client privilege does not protect the documents in question from disclosure under FOIA. Defendants are not legally entitled to shield such documents from production, even though they may have been discovered in an investigation supervised by in-house counsel. A public body may not insulate a matter from the application of FOIA, simply by involving an attorney.

The Supreme Court explained the rationale for the attorney-client privilege:

We agree that the privilege must be tailored to protect only confidences disclosed within the relationship. The essential elements giving rise to the privilege were stated by Wigmore to be:

"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961)

Not every communication within the attorney and client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice. *N. L. R. B. v. Harvey*, 349 F.2d 900 (4th Cir. 1965); *Sepler v. State*, 191 So.2d 588 (Fla.App.1966). This is exemplified by the widely recognized rule that the privilege does not extend to communications in furtherance of criminal, tortious or fraudulent conduct. *United States v. United Shoe Machinery Corporation*, 89 F.Supp. 357 (D.Mass.1950); 125 A.L.R. 508; 16 A.L.R.2d 1029.

We recently stated in *State v. Love, supra*, that:

Whether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all of the facts and circumstances; and this determination by the trial judge is conclusive in the absence of an abuse of discretion. 81 Am.Jur.2d Witnesses, Section 222.

The court must determine the question of privilege without first requiring disclosure of the substance of the communication. *Steiner v. United States*, 134 F.2d 931 (5th Cir.), cert. denied, 319 U.S. 774, 63 S.Ct. 1439, 87 L.Ed. 1721 (1943); *Miller v. Anderson*, 30 Conn.Sup. 501, 294 A.2d 344 (1972); *Harrison v. State*, 276 Md. 122, 345 A.2d 830 (1975); 97 C.J.S., Witnesses § 305, at 848.

State v. Doster, 276 S.C. 647, 651-52, 284 S.E.2d 218, 219-220 (1981).

The South Carolina Court of Appeals has adopted the following criteria for the attorney-client privilege:

The attorney-client privilege protects against disclosure of confidential communications by a client to his or her attorney. *State v. Owens*, 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992). "***The privilege is strictly construed to protect only confidences disclosed within the relationship.***" *Id.* at 407, 424 S.E.2d at 477. To establish an attorney-client privilege, the person asserting the privilege must show that the relationship between the parties was that of attorney and client and that the communications were confidential in nature. *Marshall v. Marshall*, 282 S.C. 534, 538-39, 320 S.E.2d 44, 47 (Ct.App.1984). ***In order to obtain the status of a client, the person must communicate in confidence with an attorney for the purpose of obtaining legal advice.*** *Id.* at 539, 320 S.E.2d at 47. The advice or assistance must be sought ***with a view to employing the attorney*** professionally whether or not actual employment occurs. *Id.*

Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204, 207-08 (2003).

The requested public records do not meet the foregoing criteria. The attorney-client privilege does not protect documents that are evidence of the illegal conduct merely because they have been surrendered to an attorney. The witness statements were not made in confidence to an attorney to seek legal advice.

Upon information and belief, the investigation into the rebuilding of a private driveway was in the normal course of events for the Defendants, and the involvement of an attorney was not necessary to the process. Plaintiffs are informed and believe that the purpose of the investigation was for employee discipline or personnel issues. This information is not protected by the attorney-client privilege and should be disclosed under FOIA.

III. THE ATTORNEY WORK PRODUCT PRIVILEGE DOES NOT PROTECT THE REQUESTED PUBLIC RECORDS.

Plaintiffs also respectfully suggest that the attorney work-product privilege does not protect the business records and evidentiary documents, including witness statements from disclosure under FOIA. They reflect no attorney input, such as discussion of litigation strategies. The documents are unlikely to reveal the mental impressions and strategies of the defendants' counsel, and are not protected by the attorney work product privilege. *Duplan Corporation v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (1973). Wright & Miller § 2024 on "Matters Protected by the Work-Product Rule," states:

In order to come within the qualified immunity from discovery created by Rule 26(b)(3) three tests must be satisfied. The material must be: 1. 'documents and tangible things;' 2. '*prepared in anticipation of litigation or for trial*;' and 3. 'by or for another party or by or for that other party's representative' [...] Under Rule 26(b)(3), it is clear that all documents and tangible things prepared by or for the attorney of the party from whom discovery is sought are within the qualified immunity given to work product, so long as they were prepared in anticipation of litigation or preparation for trial. [...] The 1970 amendment also extended the work product protection to documents and things prepared for litigation or trial by or for the adverse party itself or its agent.

Id. at pp. 336, 359, and 364. In the case at bar, the report was not prepared in anticipation

of the Department's litigation. It was prepared in order to allow the executive officers of the department to make appropriate employee disciplinary decisions. The investigation was not directed toward litigation, and is not exempt from disclosure under FOIA.

IV. ANY APPLICABLE EXEMPTION WOULD PROTECT ONLY PARTS OF CERTAIN DOCUMENTS.

Even if the Court determines that an exemption applies to certain documents, Defendants may not invoke an exemption to hide large volumes of unprivileged information. A South Carolina newspaper sought disclosure of a criminal investigative report prepared by the South Carolina Law Enforcement Division (SLED). *Newberry Publishing Company, Inc. v. Newberry County Commission on Alcohol and Drug Abuse*, 308 S.C. 352, 417 S.E.2d 870 (1992). SLED refused to produce any information from an investigative report in response to a FOIA request. The Supreme Court found that this policy violated FOIA. The Court narrowly construed the exemption that applied to law enforcement investigative information under S.C. Code Ann. § 30-4-40(b) and ordered production of a majority of the investigative report.

We find that *SLED's policy* of denying all FOIA requests for criminal investigative reports, without determining whether portions of the report are subject to disclosure, *is in direct contravention of the clear language of the FOIA*.

If the legislature had wanted to create a blanket exemption for all criminal investigative reports, regardless of content, it clearly could have done so. Instead, the legislature determined that such reports would be exempt from disclosure *only if the disclosure of the information would harm the agency in one of four enumerated ways*. Even then, the report may not be entirely exempt from disclosure; the statute goes on to state that a public record containing both nonexempt and exempt material must be segregated so that *the nonexempt material is made available to the public*. As a result, we reject SLED's contention that this, or any, criminal investigative report is *per se* exempt from disclosure.

Id. 308 S.C. at 354-55, 417 S.E.2d at 872 (footnotes omitted) (emphasis added).

The Supreme Court was clear. If any of the requested material qualifies for exemption under the Freedom of Information Act, that narrow portion of the requested documents may be exempted from production. However, the burden is on the public body to establish an exemption. Under the Freedom of Information Act, those concerns should be addressed through selective and judicious redactions, not by wholesale failure to produce public records. In *Newberry Observer*, the Court endorsed the process of submitting the allegedly exempt documents to the Court for an *in camera* review. *Id.*, 308 S.C. 352, 354-55, 417 S.E.2d 870, 872 (1992).

The courts of this state have ruled similarly in other cases.

FOIA's basic premise is to give "any person has a right to inspect or copy any public record of a public body." *Id.* § 30-4-30(a). This right is not without some exceptions, enumerated under section 30-4-40, the following being the one at issue in this case: "Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." *Id.* § 30-4-40(a)(7). The determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis, **and the exempt and non-exempt material shall be separated and the nonexempt material disclosed.** *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996); *see also Beattie v. Aiken County Dep't of Social Servs.*, 319 S.C. 449, 453, 462 S.E.2d 276, 279 (1995); *Newberry Publ'g Co., Inc. v. Newberry County Comm'n on Alcohol & Drug Abuse*, 308 S.C. 352, 354, 417 S.E.2d 870, 872 (1992). However, **the exemptions should be narrowly construed** to not provide a blanket prohibition of disclosure in order to "guarantee the public reasonable access to certain activities of the government." *See Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996); *see also S.C. Code Ann. § 30-4-15* (2007). The burden of proving that an exemption exists lies with the government. *Evening Post Publ'g Co. v. City of North Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005).

Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 82-83, 708 S.E.2d 745, 748 (2011) (emphasis added).

Under FOIA, “[a]ny person has a right to inspect or copy any public record of a public body,” unless that record is exempt from disclosure. S.C. Code Ann. 30-4-30(a) (1991). Whether a record is exempt depends on the particular facts of the case. *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996). Underlying each case, however, is the principle that *the exemptions in section 30-4-40 are to be narrowly construed so as to fulfill the purpose of FOIA* ... “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, 633 (1996); S.C. Code Ann. 30-4-15 (1991); *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001). To further advance this purpose, the government has the burden of proving that an exemption applies.

Evening Post Publishing Co. v. City of North Charleston, 363 S.C. 452, 456-57, 611 S.E.2d 496, 499 (2005) (footnote omitted) (emphasis added).

[A] trial court should not require the disclosure of attorney-client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication. [*State v. Doster*, 276 S.C. 647, 650-51, 284 S.E.2d 218, 219 (1981).] Further, if necessary to determine the application of the privilege, the trial judge may consider, *in camera*, the questions sought to be asked and the responses which are contended to be subject to the privilege.

Tucker v. Honda of South Carolina Mfg., Inc., 354 S.C. 574, 578, 582 S.E.2d 405, 407 (2003).

Defendants should have sought an *in camera* review of the public records to substantiate their alleged exemptions, but they failed to do so. The Freedom of Information Act requires a responding government body to segregate the exempt from not exempt, and to produce the documents that are not exempt. Upon information and belief, Defendants failed to separate documents from any legal memorandum prepared by their attorney, and produce the documents as public records. *Evening Post Pub. Co. v. Berkeley Co. Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011). Defendants have violated FOIA by withholding non-exempt documents that were subject to a legitimate FOIA

request and failing to segregate exempt from non-exempt materials for disclosure.

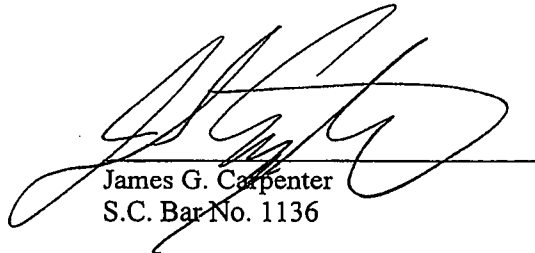
CONCLUSION

WHEREFORE, Plaintiffs pray the Court an order granting summary judgment:

1. Declaring that Defendants have violated FOIA;
2. Declaring that the request is deemed approved;
3. Enjoining Defendants from wrongfully withholding public documents under FOIA;
4. Enjoining Defendants to provide Plaintiff a copy of all requested documents;
5. Awarding the Plaintiff attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b); and
6. Granting Plaintiffs such other and further relief as the Court deems just and proper.

September 25, 2013

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136

819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation
and Edward D. Sloan, Jr., individually,
and on behalf of all others similarly
situated,

Plaintiffs,

v.

South Carolina Department of
Transportation, and Robert J. St. Onge, Jr.,
Secretary of Transportation,
Defendants.

IN THE CIRCUIT COURT

C.A. No. 2013-CP-40-3908

**PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES AND COSTS**

(FOIA ENFORCEMENT)

RICHLAND COUNTY
FILED
JAN 20 PM 1:33
NEANE W. MCBRIDE
C.P. & G.S.

Plaintiffs, by their undersigned attorneys, move the Court pursuant to S.C. Code Ann. § 30-4-100(b) for costs and attorneys' fees incurred in this case from the Defendants. This Motion incorporates a memorandum of law, and an affidavit of counsel supports it.

STATEMENT OF THE CASE

Defendants failed to produce requested public records related to the rebuilding of a private driveway, using public funds, equipment, supplies, materials, and personnel, a violation of the Constitution, Art. X, § 5 and 11. Defendants violated FOIA by withholding non-exempt documents that were subject to a legitimate FOIA request and failing to segregate exempt from non-exempt materials for disclosure.

Defendants wrongfully withheld documents under the guise of the attorney client relationship. Defendants were not legally entitled to shelter such documents from production, even though they may have been generated or discovered in the course of an investigation. A public body may not insulate a matter from the application of FOIA, simply by involving an attorney.

Defendants failed to separate documents from any legal memorandum prepared by their attorney, and produce the documents as public records. *Evening Post Pub. Co. v. Berkeley Co. Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011). The investigation into the rebuilding of a private driveway was in the normal course of events for the Defendants, and the involvement of an attorney was not necessary to the process. As a result the foregoing failures, Defendants have violated S.C. Code Ann. § 30-4-30(c), and Plaintiff's "request must be considered approved." *Id.* Plaintiff now petitions the Court for costs and attorneys' fees pursuant to S.C. Code Ann. § ~~30~~-4-100(b).

STATEMENT OF FACTS

Plaintiffs served a FOIA request on the Defendants on June 10, 2013. Plaintiffs requested documents related to the rebuilding of a private driveway using public funds, equipment, supplies, materials, and personnel, a violation of the Constitution, Art. X, § 5 and 11. Counsel for Defendants responded on June 20, 2013, but failed to produce many of the requested documents. In those they did produce, Defendants redacted information.

Defendants asserted that the requested public records were exempt from production under S.C. Code Ann. § 30-4-40(2) (sic) and § 30-4-40(7) (sic). Defendants probably meant § 30-4-40(a)(2) (personal information that would cause an unreasonable invasion of personal privacy) and § 30-4-40(a)(7) (records protected by the attorney-client and attorney work product privileges).

Plaintiffs contended that neither exemption protects the requested documents from disclosure under FOIA. Plaintiffs addressed these issues of privilege in memoranda submitted to the Court.

Defendants withheld documents, and failed to “separate the exempt and nonexempt material and make the nonexempt material available,” S.C. Code Ann. § 30-4-40(b).

(b) If any public record contains material which is not exempt under subsection (a) of this section, the public body *shall separate the exempt and nonexempt material and make the nonexempt material available* in accordance with the requirements of this chapter.

S.C. Code Ann. § 30-4-40(b) (emphasis added). Under FOIA, the presumption is that the records will be produced, and the public body has the duty to separate out the materials that are exempt and retain only those specifically exempted materials. The public body must “make the nonexempt material available.” *Id.*

The statute granting the exemptions from production under FOIA states the following:

(2) Information of a *personal nature* where the public disclosure thereof would constitute *unreasonable invasion of personal privacy*. Information of a personal nature shall include, but not be limited to, information as to *gross receipts* contained in applications for business licenses and information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are *handicapped or disabled* when the information is requested *for person-to-person commercial solicitation* of handicapped persons solely by virtue of their handicap. *This provision must not be interpreted to restrict access by the public and press to information contained in public records.*

* * *

(7) Correspondence or *work products of legal counsel* for a public body and any other material that would *violate attorney-client relationships*.

S.C. Code Ann. § 30-4-40(a)(2) and (7) (Emphasis added). Plaintiffs contend that neither exemption protects the requested documents from disclosure under FOIA.

In the parallel case, *South Carolina Public Interest Foundation, et al. the South Carolina Department of Transportation and Jane Doe*, Civil Action No.

2013-CP-40-3677 (“the Driveway Case”), this Court granted Plaintiff’s Motion to Compel production of the documents in question. *See* attached Order entered July 2, 2014. Plaintiffs sought the same documents under both the Freedom of Information Act, and as responses to discovery requests in the parallel case. Defendants asserted similar objections in both cases. Because this Court ordered production of the documents in the Driveway Case, Plaintiffs concede that the case at bar, (“the FOIA case”) was made moot by the Defendants’ production. However, the Defendants’ production of the relevant documents does not moot Plaintiffs’ claim for attorneys’ fees in the FOIA case. Indeed, by recent precedent from the South Carolina Supreme Court, Plaintiffs are entitled to an award of attorney’s fees in the FOIA case the case at bar. (*See* discussion below.)

ARGUMENT

Defendants have violated S.C. Code Ann. § 30-4-30(c). The General Assembly set out the rationale and purposes of FOIA:

The 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 this chapter *must be construed* so as to make it possible for citizens, or 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.

S.C. Code Ann. § 30-4-15 (emphasis added).

In the case before the Court, the Defendants failed to meet this standard.

I. **PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES UNDER FOIA.**

The purpose of FOIA is also to protect the public from secret governmental activity. *Wiedman v. Town of Hilton Head Island*, 330 S.C. 532, 500 S.E.2d 783 (1998). *See also Seago v. Horry County* (S.C. 2008) 378 S.C. 414, 663 S.E.2d 38. Furthermore, if a person seeking public records prevails under FOIA, he is entitled to an award of attorneys' fees and costs.

(b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

S.C. Code Ann. § 30-4-100(b) (emphasis added). The Defendants production of the documents did not moot the claim for an award of attorneys' fees.

The Supreme Court of South Carolina addressed this issue in *Sloan v. South Carolina Department of Revenue*.

"[T]he information Sloan sought has been disclosed, [and] there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." [*Sloan v. Friends of the Hunley, Inc.*] (*Friends I*), 369 S.C. [20,] 26, 630 S.E.2d [474,] 478 [(2006)]. This, however, does not end the case, for Sloan further sought to recover his attorney's fees and costs as provided in section 30-4-100(b).

Sloan is the prevailing party. *See Sloan v. Friends of the Hunley, Inc. (Friends II)*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011) ("When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, **the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed.**" (citations omitted)). As the prevailing party under these circumstances, the trial court erred in not awarding Sloan his reasonable attorney's fees and costs. **Sloan is entitled to recover his reasonable attorney's fees and costs in this action.** *See Litchfield Plantation Co. v. Georgetown Cnty. Water & Sewer Dist.*, 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994) (Toal, J., concurring in part, dissenting in part) ("**A governmental agency should not be allowed to stonewall an FOIA request without some penalty for its actions.**"). We reverse the trial court and remand to the trial court for an award of

reasonable attorney's fees and costs to Sloan.

Id. 409 S.C. 551, 555-56, 762 S.E.2d 687, 689 (S.C. 2014) (footnotes omitted, emphasis added).

Accordingly, in this case, Sloan and the South Carolina Public Interest Foundation are prevailing parties, and are entitled to recover attorneys' fees and costs under S.C. Code Ann. § 30-4-100(b).

III. PLAINTIFFS' ACTUAL ATTORNEYS' FEES AND COSTS ARE REASONABLE.

As to the amount, this case presented a financial risk for Plaintiffs. The public benefited from this litigation. Plaintiffs' counsel attaches an affidavit and statements documenting attorneys' fees and costs (Affidavit and Exhibits to Affidavit). Through December 31, 2013, Plaintiffs incurred \$6,137.50 in attorneys' fees and \$200.00 in costs pursuing this matter, for a total of \$6,337.50.

"There are six factors for the trial court to consider when determining an award of attorneys fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) citing *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). "Upon request for attorneys fees that are authorized by contract or statute, the trial court should make specific findings of fact on the record for each of these factors." *Id.* citing *Jackson*, 326 S.C. at 308, 486 S.E.2d at 760 and *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427.

First, as to the nature, extent and difficulty of the case, Plaintiffs brought this action and spent significant time, effort and money compelling these Defendants to honor the Freedom of Information Act.

Second, as to the time necessarily devoted to the case, as shown by the affidavit of Plaintiffs' counsel, Plaintiffs spent significant time in compelling these Defendants to honor the Freedom of Information Act.

Third, Plaintiffs' counsel are experienced attorneys of high professional standing and well known to the courts of this State. *See, inter alia, South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005), *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004), *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

Fourth, counsel did not work on a contingency fee, but rather Plaintiffs paid these fees as they accrued. They should be reimbursed for their fees and expenses.

Fifth, Plaintiffs obtained beneficial results. Upholding the Freedom of Information Act was the Plaintiffs' objective. Furthermore, Plaintiffs' litigation benefits every citizen by requiring the Defendants to follow the Freedom of Information Act.

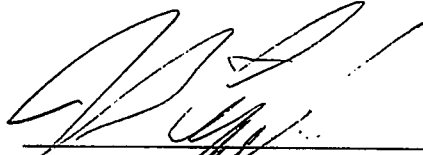
Sixth, as to the customary legal fees for similar services, Plaintiffs have presented Counsel's affidavit supported by detailed time records showing that Plaintiff incurred attorneys' fees and costs. Plaintiffs respectfully suggest that based upon counsel's

affidavit and the Court's familiarity with attorney fees customarily charged in this legal community, the time spent and the hourly rates requested by Counsel are reasonable. In fact, Plaintiff's Counsel have discounted their normal rates due to the public interest nature of this litigation. Accordingly, Plaintiffs' actual attorneys' fees and costs were reasonable, and The Court should award Plaintiffs their attorneys' fees and costs.

CONCLUSION

In the case at bar, Plaintiffs prevailed under FOIA. Plaintiffs' are entitled to attorneys' fees under FOIA, and Plaintiff's fees are reasonable. Wherefore, Plaintiffs pray the Court for an award of actual attorneys' fees and costs from the Defendants.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

January 13, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

South Carolina Public Interest Foundation
and Edward D. Sloan, Jr., individually,
and on behalf of all others similarly situated,

Plaintiffs,

v.

South Carolina Department of Transportation
and Jane Doe, a DOT employee,
Defendants.

IN THE CIRCUIT COURT

C.A. No. 2013-CP-40-3677

**ORDER GRANTING
PLAINTIFFS'
MOTION TO COMPEL**

2014 JUL -2 PM 3:12
RICHLAND COUNTY
CLERK OF COURT

This matter came before the Court on October 24, 2013 at a hearing on Plaintiff's Motion to Compel. Present at the hearing were James Carpenter, Esquire, counsel for the Plaintiff, and Natalie Moore, Esquire, counsel for the Defendant. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, Plaintiff's Motion to Compel is **GRANTED**.

BACKGROUND

Plaintiff alleges that South Carolina Department of Transportation (hereinafter "DOT") employees performed work on a privately owned driveway in the fall of 2012. Plaintiff further alleges that the use of public funds, specifically DOT personnel, equipment and materials, for the primary benefit of a private party is a violation of the South Carolina Constitution. Complaint p. 3.

Plaintiff seeks to compel information in the form of interrogatories and requests for production on the following issues: (1) names and addresses of witnesses; (2) a list of photographs, plats and sketches that relate to any claim in the case; (3) a summary of facts from each person known to have knowledge of the case; (4) names and job titles of any

person involved in any way in the driveway operation described in the Complaint; (5) information relating to any disciplinary action taken by the DOT against any employees involved in the driveway operation; (6) a complete and unredacted copy of the Chief Internal Auditor's January 2013 e-mail to Patrick Malay; (7) a complete and unredacted copy of the January 2013 letter from the Inspector General to the Chief of Staff of the DOT; (8) a complete and unredacted copy of the report of the January 2013 DOT investigation of the driveway operation; (9) a complete and unredacted copy of all documents related to any employee discipline to any employee involved in the driveway operation; (10) any written or recorded statements of persons known to the Defendants to have knowledge concerning the driveway operation; and (11) all photographs, plats, or sketches that relate to this case.

On or about August 20, 2013, the Defendants responded to the Plaintiffs' Interrogatories and Requests for Production and asserted privileges. Defendants maintained that the withheld documents are protected by the doctrine of attorney work product and/or the attorney-client privilege, and submitted redacted versions of the documents to the Plaintiff. Defendants later submitted the unredacted documents to this Court for an *in camera* review.

DISCUSSION

The information sought by the Plaintiff and listed above includes the names of witnesses, photographs, and statements of witnesses. Defendant asserts that this information was discovered through a January 2013 DOT investigation of the driveway operation and is protected by attorney-client privilege.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or

defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." SCRCP 26(b)(1). While the rule provides for broad discovery, there are limits, and the South Carolina Supreme Court has warned against trial courts allowing "overly broad discovery." *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 925 (2010).

"The attorney-client privilege has long been recognized in this State. The privilege is based upon public policy that the best interest of society is served by promoting a relationship between the attorney and client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *State v. Doster*, 276 S.C. 647, 650-51, 284 S.E.2d 218, 219-20 (1981). The privilege extends to communications from the client to his attorney and the attorney to his client:

In order to establish the attorney-client privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature. The communication involved must relate to a fact of which the attorney was informed by his client without the presence of strangers for the purpose of securing primarily either a legal opinion on law or legal services or assistance in some legal proceeding. The attorney-client privilege also applies to communications originating from the lawyer rather than from the client. When the attorney communicates to the client, the privilege applies only if communication is based on confidential information provided by the client.

Marshall v. Marshall, 282 S.C. 534, 538-39, 320 S.E.2d 44, 47 (Ct. App. 1984); see also *Crawford v. Henderson*, 356 S.C. 389, 395 S.E.2d 204, 207 (Ct. App. 2003) ("To establish an attorney-client privilege, the person asserting the privilege must show that

the relationship between the parties was that of attorney and client and that the communications were confidential in nature." The following elements must be proven by the party seeking to assert the privilege: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981) (quoting 8 Wigmore, *Evidence* § 2292 (McNaughton rev. 1961)). The South Carolina Supreme Court has noted that the privilege is often strictly construed so as not to exclude otherwise relevant evidence. "Not every communication within the attorney-client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice." *Id.*

Based upon this precedent, this Court finds that the Defendant has not proven that the privilege applies to the discovery sought by the Plaintiff. This Court will address each of the issues Plaintiffs presented in turn:

Interrogatory One

Plaintiffs' first interrogatory is standard interrogatory 1 under SCRCP 33(b):

(1) Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

Defendants answered providing names of three witnesses, but the Defendants withheld the names of other employee witnesses numbered 1 through 4, who were interviewed for a report, which was based in part on the statements of these witnesses. The

Defendants assert that the identity of these witnesses is protected by the attorney-client privilege.

The identity of witnesses is a basic fact required to be disclosed in the course of discovery; identity of witnesses is not subject to the attorney-client privilege. *See* S.R.C.P. 33(b). Plaintiffs' motion to compel as to Interrogatory 1 is **GRANTED**.

Interrogatory Two

Plaintiffs' second interrogatory is standard interrogatory 2 under Rule 33(b) of the South Carolina Rules of Civil Procedure, with slight variations:

- (2) Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Defendant or counsel that relate to any claim, defense, or counterclaim in this case.

In response to this interrogatory, Defendants assert: "Photographs are attached to the investigative report being withheld on grounds of attorney-client privilege. Additional photographs were provided in the Departments' response to defendants' [sic] FOIA request dated June 20, 2013."

The identification of photographs or other relevant evidentiary documents is not a matter of attorney-client privilege. The Defendants do not assert that the photographs they have withheld are irrelevant or beyond the scope of Rule 26; they simply assert that they were attached to an investigative report which is being withheld on grounds of attorney-client privilege. Attachments to the report, which are of an evidentiary nature, are not privileged simply by virtue of their attachment to a report. Photographs are not ordinarily confidential communications from the client to an attorney, and the Defendants have articulated no extraordinary circumstances that would take this case out of the ordinary application of the rule. Plaintiffs' Motion to Compel as to Interrogatory number 2 is **GRANTED**.

Interrogatory Four

Plaintiffs' fourth interrogatory is a slight variation of standard interrogatory 7 from SCRCF 33(b):

For each person known to Defendant or counsel to have knowledge concerning the facts of the case, set forth either a summary sufficient to inform the Plaintiffs of the important facts known or observed by such witnesses, and provide a copy of any written or recorded statements taken from such witnesses.

Defendants responded:

The investigative report transmitted to the Chief Counsel on February 15, 2013, summarizes the facts known to the individuals listed in our response to interrogatory #1. It is withheld on grounds of attorney client privilege. The report was for the purpose of employee discipline and appropriate discipline was imposed. The facts involved an internal personnel matter that are [sic] not disclosed outside the Department.

Id. (emphasis added).

The Defendant clearly stated that the purpose of the investigative report was for employee discipline, not for the purpose of legal advice. The report, conducted by Mr. John Walsh, Deputy Secretary of Engineering, listed a summary of the incident, the personnel involved, and recommended personnel disciplinary action. This report is not covered by attorney-client privilege.

Defendants' assertion of the attorney-client privilege under the fact that certain factual matters were included in a report does not make the facts or the statements exempt from the discovery process. The facts observed by a witness, and the knowledge of the witness is discoverable under Rule 26, as relevant information. In the standard interrogatory, the Plaintiffs did not specifically request materials which were included in the investigative report, but rather they requested information known to witnesses with

knowledge concerning the facts of the case, a standard interrogatory, which is not subject to objection. Plaintiffs' Motion to Compel as to response to Interrogatory 4 is GRANTED.

Interrogatory Nine

Plaintiffs' ninth interrogatory reads: "Please list the names and job titles of any person involved in any way in the driveway operation described in the Complaint." Defendants responded: "The job titles of Employees #1-#4 are listed in response to Interrogatory 1 above. Individual names are redacted for the reasons set forth in our response to plaintiffs' request to produce."

In accordance with the analysis relating to Interrogatory 1, the identity of such witnesses is not subject to privilege. Plaintiffs' Motion to Compel as to Interrogatory 9 is GRANTED.

Interrogatory Twelve

Plaintiffs' Interrogatory 12 reads as follows: "Describe any disciplinary action taken by the DOT against any employees involved in the driveway operation described in the Complaint." The Defendants responded: "The disciplinary action is described in the investigative report and is withheld for the reasons stated in our general objections contained in our responses to Plaintiffs' Request to Produce as well as on grounds of attorney-client privilege."

The inclusion of particular information in a report does not protect it from disclosure under the rules of discovery. Plaintiffs are entitled to discovery:

"[r]egarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, . . . and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information

sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

SCRCP 26 (b)(1).

The rules of discovery favor broad disclosure, and information sought in interrogatory 12 is within the confines of the rules of discovery. Plaintiffs' Motion to Compel as to Interrogatory 12 is **GRANTED**.

Request for Production One

In request number 1, the Plaintiffs requested "A complete and unredacted copy of the Chief Internal Auditor's January 2, 2013 e-mail to Patrick Malay." Defendants objected for reasons stated in their General Objection, which reads as follows:

Defendant objects to all requests for employee names involved in the actions that are the subject of this lawsuit on the grounds of improper invasion of privacy, and relevance. The employees involved were disciplined under SCDOT personnel policies and provisions of the State Ethics law. Naming them would improperly add public reprimand penalties to that discipline. Plaintiffs' [sic] may receive the relief they have requested in their complaint without regard to the names of these individuals.

In addition to the reasons stated in the General Objection, the Defendants asserted, "A copy of the redacted e-mail was forward [sic] to plaintiffs' counsel on June 20, 2013, in response to a FOIA request." As discussed in the analysis addressing Plaintiffs' first interrogatory, above, the identity of witnesses is not subject to a privilege, nor does the identity of a witness constitute an improper invasion of privacy. The Defendants' objections are overruled, and the Plaintiffs' Motion to Compel a complete response to Request for Production number 1 is **GRANTED**.

Request for Production Two

Request for Production number 2 asks for "A complete and unredacted copy of the January 8, 2013 letter from the Inspector General to the Chief of Staff of the DOT." The

Defendants again raised their General Objection and added, "A copy of the redacted letter was forward [sic] to plaintiffs' counsel on June 20, 2013, in response to a FOIA request." The Court has dealt above with the General Objection as it relates to the identity of witnesses. For the reasons stated above, Defendants' objection is overruled, and the Plaintiffs' Motion to Compel as to Request for Production number 2 is **GRANTED**.

Request for Production Three

Request for Production number 3 reads as follows:

A complete and unredacted copy of the report of the DOT investigation in or around January, 2013 that related to the approximately November, 2012 use of DOT resources to rebuild a private driveway, with all appendices or other attachments and all documents related thereto, including documents related to the initiation of the investigation and any communications to or from the person who conduct the investigation, and any documents used by the investigator that are not included in or appended to the report of the investigation.

Defendants asserted: "A copy of an investigative report prepared by David Cook, John McCarter, and Todd Cook for the Deputy Secretary of Engineering for transmission to the Chief Counsel prepared on or about February 15, 2013 is withheld on grounds of attorney-client privilege." Defendant explained this assertion in response to Interrogatory 4 above: "It is withheld on grounds of attorney client privilege. **The report was for the purpose of employee discipline** and appropriate discipline was imposed. The facts involved an internal personnel matter that are [sic] not disclosed outside the Department" (emphasis added).

A report that was compiled "for the purpose of employee discipline" is not a matter of attorney-client privilege. There is no indication that private facts were communicated to counsel for the purpose of obtaining legal advice, as is required for a proper assertion of the attorney-client privilege. Plaintiffs' Motion to Compel as to Request for Production number 3 is **GRANTED**.

Request for Production Four

Request for Production number 4 asks for

A complete and unredacted copy of all documents related to any employee suspension, admonition, reprimand, counseling, retraining, or other disciplinary action to any employee involved in the matter described in the Complaint.

Again, the Defendants objected:

The investigation report prepared by David Cook, John McCarter, and Todd Cook for the Deputy Secretary of Engineering, the Deputy Secretary's transmittal of that report to the Chief Counsel, and the Chief Counsel's transmission of that correspondence to the Secretary of Transportation all on or about February 15, 2013 are withheld on grounds of attorney-client privilege.

The mere assertion of attorney-client privilege without the facts to establish that it was communicated to a lawyer in confidence for the purpose of obtaining legal advice is insufficient for a valid claim of the attorney-client privilege. The Plaintiffs' Motion to Compel as to Request for Production number 4 is GRANTED.

Request for Production Seven

In Request for Production number 7, the Plaintiffs requested, "Any written or recorded statements of persons known to the Defendants or counsel to have knowledge concerning the facts of the case." The Defendants responded, "The investigative report is withheld on the grounds of attorney-client privilege." As with the other assertions of the attorney-client privilege, the Defendants failed to establish that the investigative report was communicated in confidence to an attorney for the purposes of seeking legal advice. Furthermore, if there are written or recorded statements of persons or witnesses which are attached to or included within the report, such factual statements, having been adopted by the witness, are not covered under the attorney-client privilege. Plaintiffs' Motion to Compel as to Request for Production number 7 is GRANTED.

Request for Production Eight

Request for Production number 8 asks for, "All photographs, plats, sketches, or other prepared documents in the possession of the Defendant or counsel that relate to any claim, defense, or counterclaim in this case."

In response, the Defendants assert, "Photographs were produced in response to Plaintiffs' counsel's FOIA request. Additional photographs are attached to the investigative report withheld as stated above."

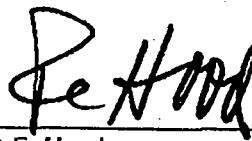
The Plaintiff's request is proper, and the Defendants are not entitled to withhold such photographs on the grounds of attorney-client privilege. Plaintiffs' Motion to Compel is **GRANTED** as to Request for Production number 8.

ORDER

For the foregoing reasons, Plaintiffs' Motion to Compel is **GRANTED**. Defendants are directed to produce the responsive information within fifteen (15) days of the date of this Order.

AND IT IS SO ORDERED.

AND IT SO ORDERED, this 2nd day of July, 2014.



Robert E. Hood
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation
and Edward D. Sloan, Jr., individually,
and on behalf of all others similarly
situated,
Plaintiffs,

v.

South Carolina Department of
Transportation, and Robert J. St. Onge, Jr.,
Secretary of Transportation,
Defendants.

IN THE CIRCUIT COURT

C.A. No. 2013-CP-40-3908

**AFFIDAVIT IN SUPPORT OF
PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES AND COSTS**

(FOIA ENFORCEMENT)

RICHLAND COUNTY
FILED
2015 JAN 20 PM 1:14
JEANETTE W. M. B. S.
C.C.P. & G.S.

I, James G. Carpenter, being first duly sworn, state as follows:

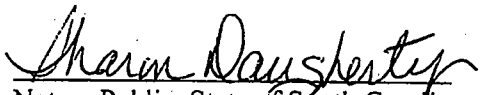
1. I am lead counsel for the Plaintiffs. I graduated from the University of South Carolina School of Law in 1984. I was admitted to the Bar in South Carolina in 1985 and in North Carolina in 1986. I am also admitted to practice before the United States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit.
2. Since 1994, I have been practicing civil litigation in my own firm. My normal billing rate is \$300-\$400 per hour, but because of the public interest nature of this litigation, I agreed with Plaintiffs for rates \$200 per hour. My associate Jennifer Miller also billed her time at a reduced rate: \$150.00 per hour.
3. As far as I know, our firm is the only one in this State with an established taxpayer and public interest litigation practice. For more than seventeen years, this firm has represented Mr. Edward D. Sloan, Jr., the South Carolina Public Interest Foundation, and numerous other taxpayers.
4. We maintain daily detailed time records of our professional services. I attach to this Affidavit monthly invoices with daily work records detailing the hours expended litigating this case.
5. Our records show attorneys' fees for time spent totaled \$6,137.50 through December 31, 2014, plus \$200.00 in costs, as shown by the attached invoices, for a total fees and costs through December 31, 2014, of \$6,337.50.
6. The record and time descriptions in this case demonstrate that Defendants vigorously contested this action, yet Plaintiffs prevailed. Plaintiffs should be granted an award of attorneys' fees under S.C. Code Ann. § 34-4-100(b).

7. The State as a whole and its citizens benefited as a result of this litigation.
8. I believe that our actual requested attorneys' fees and costs were reasonable and that Plaintiffs are entitled to a full award of attorney's fees.

Further the affiant saith naught.


James G. Carpenter
SC Bar No. 1136
819 East North Street
Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3083

Subscribed and sworn to before me
this 13th day of January, 2015


Notary Public, State of South Carolina
My commission expires: 8-11-2020

The Carpenter Law Firm P.C.
Sales by Customer Detail
All Transactions

Date	Memo	Item	Qty	Rate	Amount	Balance
South Carolina Public Interest Foundation						
05/30/2013	Preparation of file, summons and Complaint for FOIA enforcement action;	J.C. Carpenter	0.25	200.00	50.00	50.00
05/30/2013	Call from Mr. Sloan; preparation of file and complaint for enforcement of FOIA; Research on exem...	J.C. Carpenter	2.25	200.00	450.00	500.00
07/31/2013	Call and fax from Mr. Sloan; revisions to draft Complaint; faxes to Mr. Sloan; filing and servic...	J.C. Carpenter	1.75	200.00	350.00	850.00
07/31/2013	Receipt & review of file-stamped Summons and Complaint; scan to file; fax to Mr. Sloan; email to...	J.C. Carpenter	0.50	200.00	100.00	950.00
08/31/2013	Receipt & review of Answer; fax to Mr. Sloan; call from Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	1,000.00
08/31/2013	Tel. conf. with Mr. Sloan, re: attorney-client and attorney work product privileges;	J.C. Carpenter	0.25	200.00	50.00	1,050.00
08/31/2013	Call from Mr. Sloan; drafting Motion for Summary Judgment; fax to Mr. Sloan;	J.C. Carpenter	0.50	200.00	100.00	1,150.00
09/30/2013	Fax from Mr. Sloan; revision, filing, and service of Motion for Summary Judgment; fax to Mr. Slo...	J.C. Carpenter	0.75	200.00	150.00	1,300.00
09/30/2013	research for memorandum of law	Jennifer Miller	1.50	150.00	225.00	1,525.00
09/30/2013	researching foia/attorney client work product	Jennifer Miller	1.25	150.00	187.50	1,712.50
09/30/2013	further research	Jennifer Miller	1.50	150.00	225.00	1,937.50
09/30/2013	Revisions to Memo on Attorney Client privilege and attorney work product privilege; faxes to Mr....	J.C. Carpenter	3.25	200.00	650.00	2,587.50
09/30/2013	Tel. conf. with and fax from Mr. Sloan, Drafting, filing and service of Motion for in camera rev...	J.C. Carpenter	0.75	200.00	150.00	2,737.50
10/31/2013	Memo from Clerk of Court; drafting Motion cover sheet;	J.C. Carpenter	0.25	200.00	50.00	2,787.50
10/31/2013	Notice of Roster Meeting from Court; fax to Mr. Sloan; marking calendar;	J.C. Carpenter	0.25	200.00	50.00	2,837.50
10/31/2013	Email of memos to court, opposing counsel; tel. conf. with Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	2,887.50
10/31/2013	Email from opposing counsel; receipt & review of proposed order; call and fax to Mr. Sloan; Rese...	J.C. Carpenter	0.75	200.00	150.00	3,037.50
10/31/2013	Tel. conf. with Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	3,087.50
10/31/2013	Trip to Columbia for hearing on Motions;	J.C. Carpenter	4.50	200.00	900.00	3,987.50
10/31/2013	Emails from and to Beach Brooker; tel. conf. with Mr. Sloan, re: Emails; Email to Judge Manning,...	J.C. Carpenter	0.50	200.00	100.00	4,087.50
11/30/2013	Calls to and from Clerk of Court; tel. conf. with Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	4,137.50
01/31/2014	Receipt and review of notice of hearing; scheduling on calendar; review of file regarding prior ...	J.C. Carpenter	0.25	200.00	50.00	4,187.50
01/31/2014	E-mail from judge's law clerk; fax to Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	4,237.50
03/31/2014	Review of docket; call to clerk's office; e-mail to opposing counsel; fax to Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	4,287.50
03/31/2014	conf. w/JGC; reviewing and revising Complaint	Jennifer Miller	2.00	150.00	300.00	4,587.50
03/31/2014	conf. w/JGC; proofreading Complaint	Jennifer Miller	1.00	150.00	150.00	4,737.50
04/30/2014	E-mail from Court; fax to Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	4,787.50
04/30/2014	Tel. conf. with opposing counsel; tel. conf. with Mr. Sloan; review of file; preparation of prop...	J.C. Carpenter	0.25	200.00	50.00	4,837.50
04/30/2014	Drafting proposed order granting plaintiffs motion for summary judgment; fax to Mr. Sloan; Tel. ...	J.C. Carpenter	1.25	200.00	250.00	5,087.50
04/30/2014	Revisions to proposed order on motion for summary judgment; E-mail to Court; fax to Mr. Sloan, T...	J.C. Carpenter	0.50	200.00	100.00	5,187.50
05/31/2014	Receipt and review of notice of nonjury roster meeting; fax to Mr. Sloan; letter to the court;	J.C. Carpenter	0.25	200.00	50.00	5,237.50
06/30/2014	E-mail to Mr. Sloan, Tel conf. with Mr. Sloan, re: attorney client privilege;	J.C. Carpenter	0.25	200.00	50.00	5,287.50
07/31/2014	Calls from Mr. Sloan; fax to Mr. Sloan;	J.C. Carpenter	0.50	200.00	100.00	5,387.50
07/31/2014	Receipt and review of notice of roster meeting; fax to Mr. Sloan; notation on calendar;	J.C. Carpenter	0.25	200.00	50.00	5,437.50
08/31/2014	Calls to Linda McDonald, Natalie Moore, Beach Brooker, clerk of court, Mr. Sloan; review of tota...	J.C. Carpenter	2.25	200.00	450.00	5,887.50
08/31/2014	E-mail to opposing counsel with copy of recent Sup. Ct. decision;	J.C. Carpenter	0.25	200.00	50.00	5,937.50
09/30/2014	Receipt and review of notice of roster meeting; fax to Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	5,987.50

6:22 PM
01/12/15
Accrual Basis

The Carpenter Law Firm P.C.
Sales by Customer Detail
All Transactions

Date	Memo	Item	Qty	Rate	Amount	Balance
09/30/2014	Calls from and to the clerk of court in Richland County regarding the roster meeting scheduled f...	J.C. Carpenter	0.25	200.00	50.00	6,037.50
09/30/2014	E-mails from and to the Circuit Court; tel. conf. with Mr. Sloan; fax to Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	6,087.50
11/30/2014	Receipt and review of defendants motion to dismiss; fax to Mr. Sloan;	J.C. Carpenter	0.25	200.00	50.00	6,137.50
			<u>32.50</u>		<u>6,137.50</u>	<u>6,137.50</u>
Total South Carolina Public Interest Foundation			<u>32.50</u>		<u>6,137.50</u>	<u>6,137.50</u>
TOTAL			<u>32.50</u>		<u>6,137.50</u>	<u>6,137.50</u>

3:21 PM

01/07/15

Accrual Basis

The Carpenter Law Firm P.C.
Project Costs Detail
 All Transactions

Source Name	Type	Date	Num	Memo	Account	Class	Amount
South Carolina Public Interest Foundation							
~~DOT FOIA Enforcement~~							
Richland County C...	Check	7/1/2013	5504	SCPIF v. DOT	Filing Fee	James ...	150.00
Richland County C...	Check	9/3/2013	5517		Filing Fee	James ...	25.00
Richland County C...	Check	9/25/2013	5556		Filing Fee	James ...	25.00
Total DOT FOIA Enforcement							200.00
Total South Carolina Public Interest Foundation							200.00
TOTAL							200.00

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

South Carolina Public Interest Foundation
and Edward D. Sloan, Jr., individually,
and on behalf of all others similarly
situated,
Plaintiffs,

v.

South Carolina Department of
Transportation, and Robert J. St. Onge, Jr.,
Secretary of Transportation,
Defendants.

IN THE CIRCUIT COURT
C.A. No. 2013-CP-40-3908

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the foregoing
Plaintiffs' Motion for Attorneys' Fees and Costs and Affidavit upon the Defendants, by
first class mail, postage prepaid, this January 13, 2015, addressed as follows:

Beecham O. Brooker, Jr.
Assistant Chief Counsel
Department of Transportation
Post Office Box 191
Columbia, SC 29202

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.


James G. Carpenter
S.C. Bar No. 1136

819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 242-5500
Attorneys for Plaintiff

RICHLAND COUNTY
FILED
2015 JAN 20 PM 1:34
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No.: 2013-CP-40-3908

South Carolina Public Interest Foundation and
Edward D. Sloan, individually, and on behalf
of all others similarly situated,

Plaintiffs,

v.

South Carolina Department of Transportation,
and Robert J. St. Onge, Jr., Secretary of
Transportation,

Defendants.

**Defendant's Return to Plaintiff's Motion
for Attorneys' Fees and Costs**

Defendant, the South Carolina Department of Transportation, for its return to Plaintiffs' motion for attorneys' fees and costs, opposes that motion on the ground that to award fees under provisions of the Freedom of Information Act, S.C. Code §30-4-100(b), would deprive it of a substantial right being those protections afforded it under Rule 37(a)(4), SCRCP, to argue that its opposition to the motion to compel was substantially justified or that other circumstances make an award unjust.

On July 1, 2013, Plaintiffs filed a Complaint in South Carolina Public Interest Foundation and Edward D. Sloan, individually, and on behalf of all others similarly situated, v. South Carolina Department of Transportation, and Jane Doe, a DOT employee, No. 2013-CP-40-3677. The Complaint seeks an Order under the Uniform Declaratory Judgments Act, S.C. Code Ann. §15-53-10, *et. seq.*, declaring that the use of Department personnel and equipment to repair a private driveway violated article X, section 11, of the South Carolina constitution preventing the

credit of the State from being pledged or loaned for the benefit of private individuals or companies.

The Department responded to plaintiffs' discovery requests on August 20, 2013. In its responses, Defendant withheld a certain internal investigative report prepared by the Department's Director of Maintenance office to and at the request of the Chief Counsel. In its responses, defendant stated its objection to requests for the names of its personnel involved and its internal reports on the incident on grounds of invasion of privacy and relevance. We argued that the report, ordered and issued by the Department's Chief Counsel, was further protected under the attorney-client privilege.

The Plaintiffs filed a separate suit under the caption above seeking the same investigative report. On October 24, 2013, Judge Robert E. Hood of this Court heard counsel on Plaintiffs Motion to Compel in the Declaratory Judgment case, No. 3677, and subsequently ordered that the full investigative report that Defendant had delivered under seal in both un-redacted form and in a version with the employee names excised be disclosed. Defendant complied with that order delivering the full report. The Department has moved that the FOIA suit seeking the same material be dismissed as moot. The instant motion seeks costs and fees under the FOIA statute and complaint and not under the discovery rules.

Subsection (b) of §30-4-100 of FOIA states simply that, "If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation." By contrast, Rule 37(a)(4), SCRCF, allows the party opposing disclosure the opportunity to assert that its position was substantially justified in order to avoid payment of fees. Allowing a party to file a concurrent suit under FOIA would set a precedent that a

government defendant would never be permitted to advance an argument of substantial justification depriving it of a right available to all litigants.

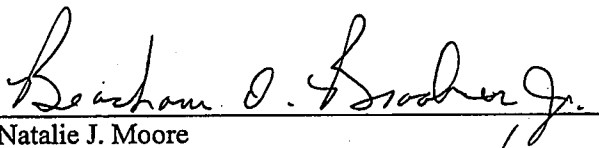
The Department was substantially justified in attempting to protect the information sought in this matter even though it ultimately lost on the issue. The Declaratory Judgment Complaint, Case No. 3677, seeks an order declaring that a highway inspector's direction to a maintenance crew to clean the highway in front of her house and redeposit the dirt and stone back on her driveway violated the State Constitution's prohibition against the use of public resources for private benefit. Although we have a different view of the transgression involved, nevertheless, the employees involved were subjected to an internal investigation and received discipline in varying degrees under the Department's employee disciplinary policy. The inspector was suspended for a week without pay. Having served the time, she is entitled to expect no further penalty. Publishing her name amounts to a public reprimand and additional penalty. Public reprimand is a well-known and frequently utilized sanction or penalty in disciplinary regimes. See, e.g., Rule 413, Rules for Lawyer Disciplinary Enforcement, Rule 7 (b)(3) (Public reprimand as the third most severe sanction for lawyer misconduct.) In the lawyer disciplinary sphere, the complaint and the identity of the lawyer being investigated is confidential until such time as the sanctions of disbarment, suspension, or public reprimand are imposed. Id., Rule 12. The Department was justified in its attempt to protect her even though it lost the motion due to the discovery rules' bias in favor of disclosure.

Our Supreme Court has defined the constitutional right of privacy as the right to be left alone; the right of a person to be free of unwarranted publicity. Sloan v. S.C. Department of Public Safety, 355 S.C. 321, 327, 586 S.E.2d 108, 110 (2003) (quoting Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 458, 7 S.E.2d 169, 171 (1940)). Despite repeatedly printing the name

of the inspector in their court filings, plaintiffs have yet to explain why her identity is relevant to the relief it requests. Moreover, plaintiffs have not served the inspector nor made her a party to these proceedings to afford her the opportunity to defend herself. The Department was substantially justified in trying to protect her and thus is entitled to protection from an attorney fee award under the civil rules.

The Court should deny the application for costs and fees herein.

Respectfully submitted,

A handwritten signature in cursive script, reading "Beacham O. Brooker, Jr.", is written over a horizontal line.

Natalie J. Moore
Beacham O. Brooker, Jr.
South Carolina Department of Transportation
Post Office Box 191
Columbia, South Carolina 29202-0191
(803) 737-1347
brookerbo@scdot.org

Columbia, S.C.
February 11, 2015

CERTIFICATE OF COUNSEL

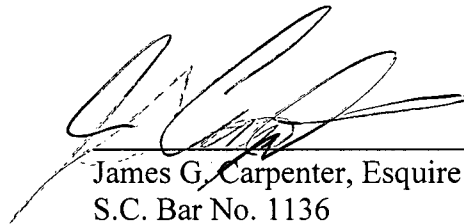
Pursuant to Appellate Rule 210(g), the undersigned hereby certifies that his Record on Appeal for Appellants complies with Rule 210.

RECEIVED

JAN 19 2016

SC Court of Appeals

THE CARPENTER LAW FIRM, P.C



James G. Carpenter, Esquire
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorneys for the Appellants

Greenville, South Carolina
January 13, 2016

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2015-001760

RECEIVED

JAN 19 2016

SC Court of Appeals

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

v.

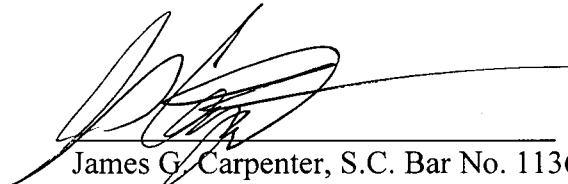
South Carolina Department of Transportation, and Robert J. St. Onge,
Secretary of Transportation, ... Respondents.

Certificate of Service

The undersigned attorney hereby certifies that he has served a copy of the foregoing
Appellants' Record on Appeal on counsel for Defendants by US Mail, postage prepaid on
Wednesday, January 13, 2016 to the following persons:

Beacham O. Brooker, Jr.
Assistant Chief Counsel, SCDOT
P.O. Box 191
Columbia, SC 29202-0191

January 13, 2016


James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, P.C.
819 E. North Street
Greenville, South Carolina 29601
Tel. (864) 235-1269



ATTORNEYS AND COUNSELORS AT LAW

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JENNIFER J. MILLER
jennifer.miller@carpenterlawfirm.net

L. WARREN CLAYTON, III
warren.clayton@carpenterlawfirm.net

*LICENSED IN S.C. & N.C.

January 13, 2016

The Honorable Jenny Abbott Kitchings
Clerk of SC Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED
JAN 19 2016
SC Court of Appeals

Re: Appellate Case No. 2015-001760

Dear Ms. Kitchings:

I enclose an original and 16 copies of the Appellants' Record on Appeal, Certificate of Counsel and Proof of Service in this matter. Please file-stamp the extra copy and return it to me in the enclosed postage paid envelope.

If you need anything else, please telephone me.

Sincerely yours,
THE CARPENTER LAW FIRM, PC

James G. Carpenter

Enclosures
CC w/enclosures: Beacham O. Brooker, Jr.