

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Appeal from Richland County
Court of Common Pleas

APR 27 2017

The Honorable Doyet A. Early, III, Circuit Judge

SC Court of Appeals

Appellate Case No. 2016-001708

Adele J. Pope..... Appellant,

v.

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

BRIEF OF APPELLANT

Adam T. Silvernail (Bar No. 80219)
Law Office of Adam T. Silvernail, LLC
1905 Marion Street (29201)
Post Office Box 7995
Columbia, South Carolina 29202-7995
(803) 779-1770
adam@silvernaillawfirm.com

Counsel for Appellant

Table of Contents

Table of Authorities	iii
Statement of Issues on Appeal	iv
Statement of the Case	1
Statement of Facts	5
Argument	
I. DISMISSAL WAS ERROR AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.	9
II. THE LOWER COURT ERRED IN RULING THAT APPELLANT'S FOIA REQUEST ISSUBORDINATE TO DISCOVERY IN CIVIL CASES IN TWO COUNTIES	14
III. THE LOWER COURTS' TRANSFER, CONSOLIDATION AND DISMISSAL OF A 2011 FOIA SUIT WHERE SUMMARY JUDGMENT WAS APPROPRIATE DENIED APPELLANT'S FOIA, DUE PROCESS AND EQUAL PROTECTION RIGHTS.	16
IV. APPELLANT IS ENTITLED TO ATTORNEY'S FEES UNDER FOIA BECAUSE THE AG DID NOT COMPLY WITH HER FOIA REQUEST.	17
Conclusion	18

Table of Authorities

Cases

<i>Brazell v. Windsor</i> , 384 S.C. 512, 682 S.E.2d 824 (2009)	9
<i>Hoover v. U.S. Dept. of the Interior</i> , 611 F.2d 1132 (5 th Cir. 1980)	15
<i>Lominack v. Myers</i> , Case No. 2002-CP-32-1890	14
<i>Morrow Crane Co. v. T.R. Tucker Constr. Co.</i> , 296 S.C. 427, 373 S.E.2d 701 (Ct.App. 1988)	10
<i>North v. Walsh</i> , 881 F.2d 1088 (D.C. Cir. 1989)	15
<i>Russell v. City of Columbia</i> , 305 S.C. 86, 406 S.E.2d 338 (1991)	10
<i>Sloan v. Friends of Hunley, Inc.</i> , 393 S.C. 152, 711 S.E.2d 895 (2011)	18
<i>Village of Westbrook v. Olech</i> , 528 U.S. 564 (2000)	17
<i>Wilson v. Dallas</i> , 403 S.C. 411, 743 S.E.2d 746 (2013)	<i>passim</i>

Statutes

S.C. Code Ann. § 30-4-10, et seq.	1
S.C. Code Ann. § 30-4-15	11
S.C. Code Ann. § 30-4-30	11
S.C. Code Ann. § 30-4-40	11
S.C. Code Ann. § 30-4-100	12,18

Rules

Rule 56, <i>South Carolina Rules of Civil Procedure</i>	12,13
Rule 12, <i>South Carolina Rules of Civil Procedure</i>	8, 9

Statement of Issues on Appeal

- I. DISMISSAL WAS ERROR AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.
- II. THE LOWER COURT ERRED IN RULING THAT FOIA IS SUBORDINATE TO DISCOVERY IN CIVIL CASES IN COUNTIES OTHER THAN WHERE THE FOIA REQUEST WAS MADE.
- III. THE LOWER COURT ERRED IN RULING THAT APPELLANT'S FOIA REQUEST IS SUBORDINATE TO DISCOVERY IN CIVIL CASES IN TWO COUNTIES.
- IV. APPELLANT IS ENTITLED TO ATTORNEY'S FEES UNDER FOIA BECAUSE THE AG DID NOT COMPLY WITH HER FOIA REQUEST.

Statement of the Case

This action, brought by Appellant under the South Carolina Freedom of Information Act, S. C. Code Ann. § 30-4-10, et seq. ("FOIA"), was filed in Newberry County on August 10, 2011. [R. 16]

Appellant is a citizen and resident of Newberry. [R. 16]

Respondent Alan Wilson ("AG Wilson") is the Attorney General of South Carolina.

The complaint asserts that Respondent is a public body under FOIA and failed to comply with a proper FOIA request made on June 30, 2011. [R. 19, 20, 22]

The complaint seeks declaratory and injunctive relief under FOIA, including a declaration that the documents sought are public; a direction that Respondent must release the requested documents; and a finding that Appellant is entitled to attorney's fees and costs. [R. 21, 22]

The documents sought under FOIA from the AG are:

- a. The published policies and/or rules and regulations of the Office of the Attorney General of South Carolina ("AG") with respect to the engagement of private attorneys, including contingency-fee attorneys, by the AG in effect in May 2010.
- b. The published policies and/or rules and regulations of the Office of the AG with respect to the engagement of private attorneys, including contingency-fee attorneys, by the AG currently in effect.
- c. The contract of the then-AG [Henry D. McMaster] and/or the State of South Carolina engaging Kenneth B. Wingate and Everett Kendall, II to commence Civil Action No. 2010-GC-40-0073 on behalf of the AG.¹

¹ Civil Action No. 2010-GC-40-0073 was removed to the Richland County Circuit Court and given Case No. 2010-CP-40-4900. It is referred to herein as the "Wingate Suit."

d. Any contract and/or other document authorizing Russell L. Bauknight to commence Civil Action No. 2010-GC-40-00073 on behalf of the AG and/or the State of South Carolina. [R. 18, 19]

The complaint alleges that the AG's office declined to provide the requested documents but did not allege that any document was exempt from being disclosed under FOIA. The complaint was filed as a result of the failure to produce the requested documents under FOIA. Plaintiff asserted she met all of the statutory requirements for relief under FOIA. [R. 19-22]

On September 1, 2011 Appellant filed a Motion for Expedited Hearing. [R. 70] With the motions she served an affidavit supporting the expedited hearing and *in camera* review by the circuit court of the documents sought under FOIA. [R. 266].

Appellant also filed a motion for summary judgment. [R. 94]

On September 14, 2011 Respondent filed a motion to dismiss Appellant's complaint or strike Appellant's affidavit. The motion was supported on October 25, 2011 by a Memorandum of AG in Support of Motion to Strike and in Opposition to Summary Judgment. [R. 73; R. 346-348]

The AG agreed that the complaint set forth the relationship of the parties in the Wingate Suit. He asked the court to consider that Appellant acknowledged that she is a defendant in the Wingate Suit brought by the AG and others. [R. 347] The AG asserted the FOIA case should be dismissed and summary judgment denied based in part on discovery motions pending in the Wingate Suit. The AG also asserted that the FOIA Case, if not dismissed, should be transferred to Richland County. [R. 237]

On October 26, 2016 the Honorable Frank R. Addy, Jr., conducted a hearing on Appellant's motion for summary judgment. [R. 9] The AG's Wingate Suit counsel appeared and orally moved on behalf of the AG's Co-Plaintiffs to intervene in the FOIA suit.

On November 22, 2011 Judge Addy issued an Order declining to dismiss the case. He ruled that the Newberry County Court had jurisdiction to hear the case because the FOIA case and discovery in the Wingate civil proceeding are different proceedings. The circuit court order directed the AG to answer the complaint. Based on Rules 1 and 42(a) SCRCF, however, he ruled that at the conclusion of the pleadings phase the case should be consolidated with the Wingate Suit. [R. 13-15]

On October 28, 2011 the AG's Wingate Suit co-Plaintiffs reduced their oral motion to intervene to writing. [R. 121] Appellant opposed the intervention. [R. 123]

On November 29, 2011 Appellant filed a Motion to Partially Alter or Amend and/or Reconsider and Vacate the Order dated November 22, 2011. [R. Supp. 1] Appellant supported the circuit court's ruling that it had jurisdiction to hear and decide her FOIA case and direction to the AG to answer. [R. Supp. 1-3] Appellant asserted, however, that transfer to Richland County and consolidation were improper. Appellant filed the Wingate Suit complaint and answer and counterclaim to illustrate the differences between the FOIA suit and the Wingate Suit. [R. Supp. 8, 21]

The AG did not seek reconsideration of the November 22 order.

On December 6, 2011 the AG served his answer. [R. 126] The AG asserted that withholding his contract with the Wingate Firm was proper because of pending discovery motions in the Wingate Suit.

On December 9, 2011 the proposed intervenors sought sanctions against Appellant. By return and affidavit dated December 12, 2011, Appellant opposed the sanctions.

Appellant's position was supported by numerous affidavits. [R. 349-391]

On January 11, 2012 a hearing was held on Appellant's motion to alter or amend the November 22 order. [R. 230-243]

By Form 4 Order dated January 11, 2012 Judge Addy denied Appellant's motion for partial reconsideration of the November 22 order. This case was transferred to Richland County and consolidated with the Wingate Suit.

Between 2012 and 2016 Appellant's counsel made numerous requests for a hearing on the pending motions, including the motion for summary judgment. No hearing was held. [R. 417]

On March 27, 2013 Appellant filed a status report and memorandum of law asking the lower court to proceed with the FOIA action. [R. 166]

On May 17, 2016 a hearing was held before the Honorable Doyet A. Early, III. [R. 244-246] Between the 2012 and the 2016 hearings, Appellant and Respondents filed various documents in support of their respective positions. [R. 171]

On June 14, 2016 Judge Early issued an order dismissing Appellant's FOIA complaint. [R. 3]

On June 27, 2016, Plaintiff timely served and filed a motion to alter, amend or vacate the dismissal orders. [R. 208]

By Form 4 Order dated August 10, 2016, the motion to alter, amend or vacate the June 14 order was denied. [R. 1]

This appeal followed.

Statement of the Facts

At his death on December 25, 2006 entertainer James Brown left the bulk of his fortune to his "I Feel Good" Trust. As a 501(c)(3) private charitable foundation, the "I Feel Good" Trust promised to provide millions of dollars in scholarships for needy students. [R. 37-39; R. 360; R. 365] Brown gave the "I Feel Good" Trust more than eight hundred fifty copyrights and the right to exploit Brown's famous persona.

James Brown's home estate was in Beech Island, Aiken County, South Carolina. His will was probated in Aiken County. *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).

In the fall of 2007 AG McMaster entered the James Brown proceedings to protect the interest of the needy student beneficiaries of the "I Feel Good" Foundation. [R. 368]

In 2008 the AG brokered a settlement which gave more than half of the "I Feel Good" Foundation's assets to claimed heirs challenging his estate plan. Brown's

fiduciaries, Robert Buchanan and Appellant, opposed the settlement. *Wilson* at 445, 746 S.E.2d at 764.

In May 2009 a circuit court approved the AG's settlement and replaced Brown's fiduciaries with a fiduciary who would serve at the pleasure of the AG. Buchanan and Appellant appealed. *Id.*

In May 2010 the AG sued Buchanan and Appellant in the Wingate Suit. In the Wingate Suit the AG made false claims against Buchanan and Appellant that could subject them to both civil and criminal penalties. [R. 17; R. 38-39]

The AG's trustee, Russell L. Bauknight, asserting that he was acting on behalf of the AG, was also a plaintiff in the Wingate Suit. [R. 17]

In May 2011 Bauknight filed documents asserting Brown's worldwide music empire was worth less than \$4.7 million, making the AG's allegations in the Wingate Suit that Buchanan and Appellant had caused tens of millions of dollars of damage virtually impossible. [R. 44]

On July 19, 2011 Appellant made a proper FOIA request for certain policies of the AG with respect to the engagement of outside contingency-fee counsel. She also requested a copy of the AG's special counsel litigation retention agreement with his Wingate suit counsel (the "Wingate Agreement") and a copy of any document which authorized Bauknight to act on behalf of the AG in the Wingate Suit. [R. 18-19]

On August 5, 2011, based on the existence of the Wingate Suit filed by the AG, the AG's office declined to comply with the FOIA request. Senior Assistant AG Tracy A. Meyers said "...I would propose to put your requests on hold pending the outcome of your current litigation." [R. 32]

On August 7, 2011, Appellant urged the assistant AG to produce the Wingate Agreement, citing her understanding that all of the AG's special counsel agreements with outside counsel were public. [R. 34-36]

When her second attempt to secure FOIA compliance failed, Appellant filed this suit in Newberry County, where she made the FOIA request.²

On September 22, 2011, the AG, through a senior assistant, wrote the judge presiding over the Wingate Suit asserting that the AG was ready and more than willing to release the Wingate Agreement. [R. 292-293] The AG's lawyer of record in this FOIA suit, however, took a different position.

By the end of 2011 the AG, working with his Wingate Suit co-Plaintiffs, had delayed FOIA compliance for months; had this FOIA case transferred to Richland County; and had had it consolidated with the Wingate tort Suit.

Also by the end of 2011, a number of journalists, private citizens and attorneys had filed affidavits supporting release of the Wingate Agreement under FOIA. [R. 349-391] The AG opposed the release, saying of the affidavits:

Plaintiff is essentially pursuing through the instant suit the same discovery issues that are pending in [the Wingate Suit]. Therefore, this case is subject to dismissal under Rule 12(b)(8).
[R. 74]

² Appellant incorporates the Statement of the Case in the Statement of the Facts.

The circuit court, however, had rejected the argument in its November 22 ruling, and the AG did not seek reconsideration. Instead, he answered as directed. [R. 126]

By the summer of 2013, two years after the FOIA request, the AG had not released the Wingate Agreement. He was instead asking to stay the Wingate Suit until a number of cases were resolved in Aiken County.

In September 2013, a Federal Court declared the Wingate Agreement to be a public document because of the AG's involvement. Bauknight, who had opposed the Federal Court Order, released the Wingate Agreement. The AG, however, continued to decline to deliver a copy to Appellant under FOIA. Further, he continued to assert that it was subject to discovery in the Wingate Suit. [R. 173]

In 2016 the AG, with others, moved to consolidate discovery in the Wingate Suit with an Aiken County case filed in 2013. Appellant opposed the consolidation, in part because the AG sought to subordinate Appellant's now-five-year-old FOIA request to discovery in two counties.

In June 2016, the circuit court dismissed Appellant's FOIA suit, finding that the documents were subject to discovery in cases in Richland and Aiken counties.

The result of the dismissal is that today the AG has not complied with a valid FOIA request for a public document made on June 30, 2011.

Argument

I. DISMISSAL WAS ERROR AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

a. The Circuit Court's denial of the AG's Motion to Dismiss became final in 2011.

On November 22, 2011 the lower court found that FOIA and civil discovery were separate, and that the AG was required to answer. The AG did not seek reconsideration. He answered as directed.

Because the AG did not seek reconsideration of the circuit court order directing him to answer, the denial of his motion to dismiss became final in 2011. It was error for a second circuit court, almost five years later, to dismiss the FOIA suit.

b. Summary Judgment in favor of Appellant, not dismissal, was appropriate.

The circuit court noted in its Order that the May 17, 2016 hearing was held on various motions of the parties, including Appellant's motion for summary judgment. Then the circuit court proceeded to dismiss the suit.

It is unclear whether the circuit's ruling is based on Rule 12(b)(6) or Rule 12(c). A trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim

for relief. *Id.* "The trial court and [the appellate Court] on appeal must presume all well pled facts to be true." *Morrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct.App. 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

The complaint alleges that Appellant is a citizen of South Carolina. It alleges that the AG is a public body under FOIA. It further alleges that Appellant made a proper request for certain public documents and that the AG did not timely comply. Almost five years after the complaint was filed there is nothing in the record to show that the AG ever produced the Wingate Agreement.

Despite the AG's seeking judgment on the pleadings, substantial evidence was presented to the Circuit Court outside the pleadings, including affidavits.

Under the FOIA, dismissal was inappropriate. Summary judgment with legal fees and costs should have been granted. Further, it should have been granted years ago when first requested.

The FOIA's importance is clear from Section 1 of the Act.

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 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 of cost or delay to the persons seeking access to public documents or meetings. S.C. Code Ann. § 30-4-15.

The AG's own interpretation of FOIA supports the relief sought in the complaint: "when in doubt, release the document." *Public Official's Guide to Compliance with South Carolina's Freedom of Information Act*, S.C. Press Ass'n.

"Public body" under the FOIA includes "... any organization supported in whole or in part by public funds or expecting public funds..." The AG does not deny he is a public body under FOIA. [R. 126-127].

Appellant is clearly a "person" under FOIA. Under FOIA any person has a right to inspect or copy any public record of a public body. S.C. Code Ann. §30-4-30(a). The complaint and attached FOIA request make clear that Appellant properly requested inspection of the public documents at issue.

A public body, upon written request for records made under FOIA shall within fifteen days (excepting Saturdays, Sundays and legal and public holidays) of the receipt of a FOIA request notify the person making such request of its determination and the reasons therefor. S.C. Code Ann. §30-4-30(c).

The AG declined to timely respond to the FOIA request, thereby violating the provisions of FOIA.

Under S.C. Code Ann. §30-4-40, a public body may, but is not required to, exempt from disclosure certain information such as trade secrets, correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.

In this case, there is no evidence in the complaint or the record that either the AG took appropriate action to assert such exemptions. On the contrary, the AG continues to be a Plaintiff in the Wingate Suit with parties seeking to set aside the "I

Feel Good" Charity, making clear the AG has waived any privilege that may have existed.

As the complaint states, when the AG failed to comply with Appellant's valid FOIA request, Appellant's statutory remedy was clear:

Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs ... The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists. S.C. Code Ann. §30-4-100. [Emphasis supplied.]

The complaint states that Appellant is a citizen of South Carolina. She made her application to the circuit court in the county where the FOIA request was made. The relief she sought was ripe at the time the complaint was filed.

The transfer to Richland County and consolidation of this FOIA suit with the Wingate Suit, the five-year delay, and the dismissal have increased the irreparable injury to Appellant, which FOIA acknowledges. The consolidation also continues to cause injury to others interested in seeing under FOIA the AG's contract with a private law firm to sue South Carolina citizens who were appealing a deal he brokered and which put the AG in effective control of a charity he regulates. See *Wilson, supra*.

Under Rule 56 summary judgment should be granted where, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. Rule 56, *South Carolina Rules of Civil Procedure*. That is the case here.

Allowing public bodies or public officials to decline to respond to FOIA requests and then deflect a FOIA noncompliance complaint with a series of motions

intended to further delay FOIA compliance would violate both the letter and spirit of FOIA. It would be particularly troublesome where the delaying tactics were employed by the public official charged with the enforcement of FOIA.

Because of the involvement of the AG, this appeal touches all citizens who rely on FOIA as a means to assure the transparency in government which is fundamental to our democratic society. FOIA compliance is essential for a strong press and honest government. It is vital to our democracy. The lower court's order does not serve that purpose.

The traditional role of the press has been to serve as a watchdog of government, thereby ensuring government transparency. The precedent established by the lower court's dismissal orders would render the watchdog toothless.

FOIA provides that public documents are to be made available by public officials and public bodies to citizens or to the media at a minimum cost and minimum delay. The media, upon which many citizens depend for information about government proceedings, use the "teeth" of FOIA to investigate and monitor the actions of public officials and public bodies.

Five years cannot be considered a minimum delay. Maneuvering through discovery in lawsuits in two counties to find documents requested under FOIA be considered anything but costly. If the lower court FOIA dismissal order stands, neither citizens nor newspapers, with their reduced news staffs, will have the means to obtain information under FOIA about the AG's contracts to sue South Carolina citizens.

Where FOIA has no teeth, there is no government transparency. Without FOIA and the light of public scrutiny, public officials are allowed to conduct their business in the shadows, where corruption thrives.

As soon as the AG answered the complaint as directed in 2011, this FOIA suit was ripe for summary judgment. Summary judgment should have been granted.

The Court should reverse the dismissal and direct that summary judgment be entered in Appellant's favor.

II. THE LOWER COURT ERRED IN RULING THAT PLAINTIFF'S FOIA REQUEST IS SUBORDINATE TO DISCOVERY IN CIVIL CASES IN TWO COUNTIES.

The AG took the position that Plaintiff's FOIA rights were suspended as a result of the AG having sued her in the Wingate Suit. The Circuit Court agreed, based primarily on an Order of the Honorable Marc H. Westbrook, dated October 25, 2002, in *Lominack vs. Myers*, Case No. 2002-CP-32-1890. That two-page Order was never reviewed by an appellate Court and made a finding that the FOIA did not expand discovery available in a criminal case.

There are no reported South Carolina cases which hold that the Rules of Civil Procedure applicable to discovery in a pending civil case can be used to stem a citizen's rights under the FOIA.

The Federal Courts have addressed that issue, and the D.C. Circuit held:

An attempt to interject FOIA "does not extend the scope of discovery under Rule 16" when done as part of criminal discovery. *DeLorean*, 717 F.2d at 480; accord *Murdock*, 548 F.2d at 602. Discovery limitations, civil or criminal, however, do not apply when FOIA requests are presented in a discrete civil action. The **plaintiff's rights in a FOIA action do not depend on his or her identity**; " '[t]he Act's sole concern is with what must be made public or not made public.'" *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, --- U.S. ----, 109 S.Ct. 1468, 1481, 103 L.Ed.2d 774 (1989) (citation

omitted); see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n. 23, 98 S.Ct. 2311, 2327 n. 23, 57 L.Ed.2d 159 (1978) (stating that person's **rights under FOIA are neither diminished nor enhanced by his "litigation-generated need"** for agency documents); accord *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10, 95 S.Ct. 1504, 1513 n. 10, 44 L.Ed.2d 29 (1975); see also *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir.1978) (stating that **"FOIA provides an independent basis for obtaining information potentially useful in a criminal trial"**), cert. denied, 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 242 (1979); *Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank of the United States*, 464 F.Supp. 804, 805 n. 2 (D.D.C.1979) (noting that FOIA plaintiff presumably sought documents for use in an arbitration proceeding, but holding that **"a party's rights under the FOIA are neither enhanced nor diminished by its status as a private litigant"**); see generally Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO.WASH.L.REV. 843, 861 (1981) ("**[A] party's desire to use information obtained under the FOIA in subsequent litigation is not a basis for denying an otherwise legitimate FOIA request.** Indeed, there are situations in which FOIA will permit access to information that would not be available through discovery.") (footnote omitted); Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD.L.REV. 119, 121 (1984) (same).

North v. Walsh, 881 F.2d 1088 (D.C. Cir. 1989) [emphasis supplied]

In addition, the Court in *Hoover v. United States Dept. Of the Interior*, 611 F.2d 1132 (5th Cir. 1980), specifically held that a FOIA plaintiff's status as a defendant in civil litigation filed by the government **does not affect his rights under FOIA:**

The appellant landowner's right under the FOIA, where he is in effect asserting the rights of the public to obtain such appraisals, is inherently different than his particularized status as the landowner in the condemnation proceeding. He is entitled to vindicate his public rights in the instant FOIA suit in accordance with the requirements of the FOIA. *Id.*

Because the circuit court erred in finding that this FOIA matter was subordinate to ongoing discovery in a long-running tort suit (in which no claim or

counterclaim is made under FOIA) and a lawsuit in another county, the circuit court's Order should be reversed.

III. THE LOWER COURTS' TRANSFER, CONSOLIDATION AND DISMISSAL OF A 2011 FOIA SUIT WHERE SUMMARY JUDGMENT WAS APPROPRIATE DENIED APPELLANT'S FOIA, DUE PROCESS AND EQUAL PROTECTION RIGHTS.

The AG is a public body under FOIA. The FOIA request was properly made from Newberry County. Newberry County is where Appellant lives; has her office; and made the FOIA requests. The AG is a statewide official who conducts state business in Newberry County.

None of the AG's co-plaintiffs in the Wingate Suit had any right to participate in, or interfere with, Appellant's FOIA rights or the rights of any other person seeking public documents under FOIA related to the AG's involvement in the charity created by entertainer James Brown.

There was no basis for transfer of venue to Richland County or consolidation with the Wingate Suit. There was no basis for repeated delays lasting for years. Yet the AG sought them to advance position he is taking in a 2010 tort suit he filed against Buchanan and Appellant.

Five years is too long to delay any FOIA compliance. As the State official charged with the enforcement of FOIA, the AG must set an example for all public bodies. The AG did not do so in this case. He, instead, suppressed the FOIA rights of Appellant and others to advance his position in a tort suit he elected to file six years earlier against citizens conducting an appeal of a settlement he brokered.

The suppression of Appellant's FOIA rights allowed the appellate courts to be left with the false impression that Appellant and Buchanan had committed a federal

felony. It also leaves the impression that the AG's use of a private lawyer to sue South Carolina citizens is proper. In addition to having lost their FOIA rights for five years, Buchanan and Appellant have suffered permanent damage to their careers and reputations by the refusal of the AG to release public documents.

The Court should find that citizens have a right to file FOIA enforcement cases brought against a statewide official in the county where they reside, work and make the FOIA request.

The Court should find that the AG targeted Appellant for FOIA denial, venue transfer and consolidation to advance the AG's position in a civil suit he chose to bring against Appellant and Buchanan. These actions, and the lower court's support of them, were manifestly unjust to Appellant, and violate Appellant's Due Process and Equal Protection rights. *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000).

IV. APPELLANT IS ENTITLED TO ATTORNEY'S FEES UNDER FOIA BECAUSE THE AG DID NOT COMPLY WITH HER FOIA REQUEST.

The award of attorneys' fees under FOIA is an essential part of the enforcement mechanism. FOIA rights must not be limited to those who can, at their own expense, sue when their FOIA rights are denied.

The need for attorney's fees is especially important where the FOIA request has been denied by the AG, the constitutional officer charged with the enforcement of FOIA, and a trust which he created and controls.

If the constitutional officer charged with the enforcement of FOIA can, with impunity, turn a tort suit he filed against a citizen using a private attorney into a FOIA graveyard, FOIA will not be safe in South Carolina.

Plaintiff's final cause of action is a request for the attorneys' fees and costs incurred in filing and pursuing this action. S.C. Code Ann. §30-4-100 authorizes this Court to award reasonable attorneys' fees and costs to a plaintiff who prevails in whole or in part. See *Sloan v. Friends of the Hunley, Inc.*, 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." (internal citations omitted)).

Reasonable attorney's fees and costs, including for this appeal, are especially appropriate here. After a Federal Court released the Wingate Agreement years after this suit was filed, and the Wingate Agreement declared on its face that it was subject to FOIA, the AG continued his refusal to release it. Instead, the AG attempted to subordinate this FOIA request to discovery in two lawsuits in counties other than that where the FOIA request was made.

Conclusion

For the reasons set out above, Appellant asks this Court to find that Appellant's FOIA, Due Process and Equal Protections rights have been violated in the years that have passed since the AG's 2011 refusal to comply with her valid FOIA request. Appellant respectfully asks that this Court reverse the dismissal order of the lower court; remand to the circuit court for entry of summary judgment in favor of Appellant, including a finding that the Wingate Agreement and other documents requested by Appellant under FOIA be produced; and that the related relief set out in the complaint be granted. The lower court should be directed to determine and direct

an award of reasonable attorney's fees and costs against the AG for Appellant's pursuit of this FOIA suit and the appeal, up to and until the AG has fully complied with Appellant's FOIA request.

Respectfully submitted,



Adam T. Silvernail (Bar No. 80219)
Law Office of Adam T. Silvernail, LLC
1905 Marion Street (29201)
Post Office Box 7995
Columbia, South Carolina 29202-7995
(803) 779-1770
adam@silvernaillawfirm.com

Counsel for Appellant

April 27, 2017

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-1708

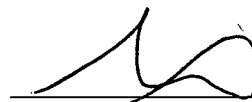
Adele J. Pope..... Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant hereby certifies that the Brief of Appellant and Appellant's Reply Brief comply with Rule 211(b).



Adam T. Silvernail

RECEIVED

APR 27 2017

SC Court of Appeals