

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court Of Common Pleas  
Doyet A. Early, III, Circuit Court Judge

---

Appellate Case No. 2016-001708

---

Adele J. Pope. . . . . Appellant,

v.

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

---

**RESPONDENT'S PETITION FOR REHEARING**

---

ALAN WILSON  
Attorney General

ROBERT D. COOK  
Solicitor General  
S.C. Bar No. 1373

J. EMORY SMITH, JR.  
Deputy Solicitor General  
S.C. Bar No. 5262

Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3680  
(803)734-3677 (Fax)  
esmith@scag.gov

Counsel for Respondent

**RECEIVED**  
JUL 16 2019  
SC Court of Appeals

Pursuant to Rule 221, SCACR, the Respondent Attorney General respectfully petitions for rehearing of this appeal. This Court's Opinion of June 19, 2019, included the following conclusion:

[W]hen a citizen in litigation with a governmental agency directs a FOIA request that agency, the agency must show the applicability of a specific FOIA exemption to each requested public record. If the government invokes the exemption in section 30-4-40(a)(4), “[m]atters *specifically* exempted from disclosure by statute or law,”[footnote omitted; emphasis as added by Court of Appeals] to seek protection under discovery rules, it must point to the specific language of a discovery rule that expressly prohibits disclosure of a particular type of record rather than vaguely referencing “discovery rules” or the “South Carolina Rules of Civil Procedure” and lumping all of the requested documents together into one category to justify nondisclosure.

This Court reversed the circuit court's order dismissing Pope's Complaint and remanded for further proceedings consistent with this opinion. Respectfully, that Opinion overlooked or misapprehended the following points:

1. The Rules of Civil Procedure place limitations on discovery beyond “expressly prohibit[ing] disclosure of a particular type of record.” Opinion, *supra*; *see, eg*, Rules 26(a)(frequency or intent of use of discovery shall be limited by the court under circumstances including but not limited to unreasonably cumulative, duplicative, burdensome or expensive discovery); 26(b), (information sought appears reasonably calculated to lead to the discovery of admissible evidence); 26(c)(motion for protective order to protect a party or person from annoyance embarrassment, oppression or undue burden).
2. The Rules of Civil Procedure do not require the production of documents sought in Requests for Production if objection is made by the party. Rule 34(b). If objection is made, the party submitting the request may move to compel production under Rule 37(a).

3. The circuit court is in charge of the scope and conduct of discovery under the Rules of Civil Procedure, and FOIA should not be used to avoid that authority.

4. The only document that the Attorney General had not provided was a “three page Wingate private agreement” (R. p. 192) that was the subject of pending motions in a civil proceeding to which Appellant and he were parties. *See also* R. pp 145,180 and 181. The Motion for Protective Order regarding that document filed by the Wingate firm asserted that it was privileged, which is an express exemption from release under the Rules of Civil Procedure and FOIA. R. p. 89; *see also*, pp 180 and 181. Regardless of whether the document was privileged, the Appellant’s FOIA request could not be used to take that issue out of the hands of the circuit court judge before whom it was pending.

5. The Opinion in a footnote incorrectly said that the Attorney General first asserted an exemption from discovery in a bench brief in May, 2016. His 2012 Motion for Judgment on the Pleadings asserted that “the items demanded in the Freedom of Information Act request at issue in this proceeding are exempt from disclosure under FOIA because they are subject to the rules regarding discovery in the Rules of Civil Procedure.” R. p. 132. The Attorney General’s proposed Amended Answer in 2013 included this defense: “The items demanded in the FOIA request at issue in this proceeding are exempt from disclosure under FOIA §30-4-40(a)(4) because they are subject to the rules regarding discovery in the Rules of Civil Procedure.” R. p. 153.

These grounds are supported by the following argument and authority.

#### **ARGUMENT**

The Respondent Attorney General strongly supports the Freedom of Information Act, and

his Office and his predecessors have a long history of advocating the importance of that law. His position in this case is that he has complied with the law in withholding the three page Wingate document that Appellant already has until a court rules on the Wingate firm's pending motion for protective order.

Respectfully, the Court construed §30-4-40(a)(4) of FOIA and the Rules of Civil Procedure much too narrowly in only exempting records for which the "specific language of a discovery rule that expressly prohibits disclosure of a particular type of record" Privileged matter is "expressly exempt" ("any matter, not privileged, which is relevant . . .," (Rule 26(b)(1)), but the discovery rules provide other limitations on discovery that should constitute "specific exemptions" although not named as such. A sampling of these limitations include the following:

- a. "unless otherwise limited by order of the court . . . [p]arties may obtain discovery regarding any matter, not privileged which is relevant . . . ." Rule 26(b)(1). (emphasis added)
- b. Discovery "shall be limited by the court" if it "is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive" or "is unreasonably burdensome or expensive . . . ." Rule 26(a)(1)(emphasis added).
- c. "Upon motion [for a protective order] . . . , the court . . . may make any order which justice requires to protect a party or person from annoyance, empabarrsment, oppression or undue burden by expense . . . ." Rule 26 (c).
- d. Under Rule 34 (b), a party may object to a request for production of documents,

and the requesting party may then move to compel under Rule 37(a) for the court to order the discovery. The document does not have to be produced and is exempt from discovery unless and until a party moves to compel and the court grants the motion.

In each of these instances, the court makes the determination about whether the discovery requested may be obtained. The courts are in charge of discovery under the rules and as recognized by our Supreme Court. “It is well-settled that ‘the scope and conduct of discovery are within the sound discretion of the trial court . . . .’” *Palmetto Alliance, Inc. v. S. Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 436, 319 S.E.2d 695, 698 (1984). “Our judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.” *In re Anonymous Member of S. Carolina Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001).

The Wingate document is the only document at issue. (Plaintiff’s Circuit Court Brief, R. p. 173 - “AG’s refusal to release it has required the continued litigation of this action.”). When Appellant brought this FOIA suit, she had already moved to compel production of the document at issue in existing litigation, and the Wingate firm had moved for a protective order. R. pp. 16 and 84- 91. When those motions were filed, if not before, the document came under the control of the circuit court. The court would then determine whether the document was privileged and could be withheld. The Office of the Attorney General wrote the Honorable Casey Manning on March 7, 2013, that the Office had “no objection to disclosing [the document] if your Honor rules that it may be released.” R. p. 197. That letter “request[ed] a ruling from the Court regarding the production

of this document in the main action in case 4900” and that the Office was “prepared to submit this document to the Court and Plaintiff at the hearing on the [March 18, 2013] if the Court rules that it may be produced.” R. p. 197. The court had not heard those motions as of the hearing in the instant case in May, 2016.

With this Court’s Opinion, the parties must now go back to circuit court. The Opinion does not make clear, but apparently the Attorney General should then assert a specific exemption under the rules of discovery. To the extent necessary, he asserts that the Wingate document is exempt from discovery and therefore, FOIA, as a matter under the control of the court pursuant to the Rules of Civil Procedure because its production is under consideration pursuant to the Rules 26, 34 and 37, *supra*; see also point d, *supra*. These rules make clear that the court presiding over discovery makes the decision about the disclosure of documents under pending motions. These provisions constitute exemptions under Rule FOIA, and the circuit court’s consideration of these motions constitutes, “the rule of law” which must be observed. *In re Anonymous, supra*. The Wingate document is also exempt as privileged matter because that firm’s Motion for Protective order asks that the document be protected on that basis. The Attorney General should not be required under FOIA to release a document that a pending motion in court contends is privileged absent a ruling from that court denying that protective order or otherwise directing the release of the document.

Moreover, recognition of these exemptions is consistent with May 19, 2017, amendments to FOIA that allow a public body to “file a request for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive or otherwise improper requests . . .” §30-4-110(A). Although this provision was adopted after the circuit court dismissed Appellant’s suit, it is consistent with that action. Appellant’s attempting to use FOIA to bypass motions

pending before the court is burdensome and improper given the controlling effect of the discovery rules. Given this legislative amendment, the civil discovery objections can readily be asserted under §30-4-110 without argument about whether it falls under the rule of law exemption. Accordingly, less need exists for future guidance on the relationship of civil discovery to FOIA, and this case may be decided on the basis of the Attorney General's additional sustaining grounds including, but not limited to, mootness.

Although whether to address additional sustaining grounds is within the appellate court's discretion under *I'On, LLC v. Town of Mt. Pleasant*, 338 SC 406, 410, 526 S.E. 2d 716, 723 (2000), that case also noted the "principle that a court usually should refrain from deciding unnecessary questions." *Id.* Here, addressing the merits of the exemption issue is unnecessary when the case can be decided on the grounds of mootness as discussed in Respondent's brief and at oral argument. *Sloan v. Friends of Hunley, Inc.*, 630 S.E.2d 474, 478, 369 S.C. 20, 26 (2006)(case moot when requested documents provided). The Attorney General's Office has provided the only document responsive to Appellant's request, and the Wingate document is in her possession due to the federal litigation.

## CONCLUSION

Only one document remains at issue, the Wingate document, and Appellant already has it. This Court should affirm the circuit court's decision at least as to result on the grounds of exemption or mootness as discussed above. This case has been pending for nearly eight years despite the Attorney General's requests during that period that the circuit court decide the discovery motions pertaining to that document and despite Appellant's having the document in her

possession for nearly six of those years as a result of Federal litigation. Remanding the case for further proceedings with another appeal thereafter is unnecessary on this Record and under this case law. This matter should be concluded, and the decision of the circuit court affirmed.

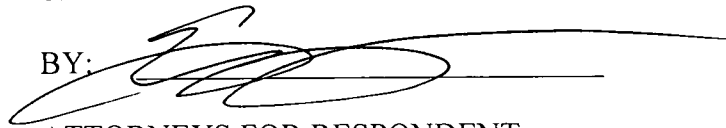
Respectfully submitted,

ALAN WILSON  
Attorney General

ROBERT D. COOK  
Solicitor General  
S.C. Bar No. 1373

J. EMORY SMITH, JR.  
Deputy Solicitor General  
S.C. Bar No. 5262

BY:

A handwritten signature in black ink, appearing to be 'AW', written over a horizontal line.

ATTORNEYS FOR RESPONDENT  
ATTORNEY GENERAL

July 16, 2019

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court Of Common Pleas  
Doyet A. Early, III, Circuit Court Judge

---

Appellate Case No. 2016-001708

---

Adele J. Pope. . . . . Appellant,

v.

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

---

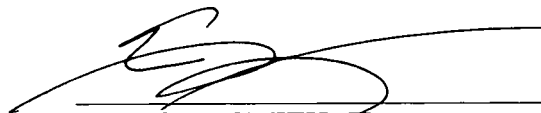
**CERTIFICATE OF SERVICE**

---

I hereby certify that I have served the Petition for Rehearing of Respondent Attorney General upon counsel for Appellant by mailing copies to him at the address below via the United States Mail this July 16, 2019.

Adam T. Silvernail, Esquire  
Law Office of Adam T. Silvernail  
P.O. Box 7995  
Columbia, South Carolina 29202-7995

**RECEIVED**  
JUL 16 2019  
SC Court of Appeals



J. EMORY SMITH, JR.  
Deputy Solicitor General  
Attorney for Respondent Attorney General



ALAN WILSON  
ATTORNEY GENERAL

July 16, 2019

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
HAND DELIVERED

Re: Pope v. Wilson Appellate Case No. 2016-001708

Dear Ms. Kitchings:

Enclosed for filing with your Office are the original and six copies of the Attorney General's Petition for Rehearing together with a certificate of service. Please confirm filing by stamping the enclosed copy of the Petition.

Thank you for your assistance.

Respectfully submitted,

J. Emory Smith, Jr.  
Deputy Solicitor General

cc: Adam T. Silvernail, Esquire

**RECEIVED**  
JUL 16 2019  
SC Court of Appeals