THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

William Jeffrey Young, Circuit Court Judge
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-001006

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, Jr., Secretary of Transportation, ... Respondents.

APPELLANTS' FINAL REPLY BRIEF

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Appellants South Carolina Public Interest Foundation and Edward D. Sloan, Jr. appeal the Circuit Court's denial of attorneys' fees under the South Carolina Freedom of Information Act (FOIA).

STATEMENT OF THE CASE IN REPLY

Respondents, South Carolina Department of Transportation and Robert J. St. Onge, Secretary of Transportation ("DOT") imply that Appellants did not file this FOIA enforcement Complaint until after the Circuit Court had ordered the unredacted investigative report to be produced in the Driveway Case, and DOT had produced it. ("Thereafter, Appellants filed this suit . . . seeking the same report under FOIA") (Respondents' Brief, p. 3). This representation is grossly inaccurate.

From this erroneous implication, DOT argues that Appellants elected to pursue discovery of the documents under Rule 37, which grants the Respondents certain protections. They further reason or imply that because the Appellants elected the remedy by pursuing the documents under Rule 37, and only "thereafter" pursued the same documents already in their possession under FOIA, Appellants are not entitled to attorneys' fees under FOIA. All of these implications and arguments are erroneous. They misstate the sequence of events in the FOIA Case and in the Driveway Case.

The facts are these: someone informed the Appellants of the illegal conduct of certain DOT employees. As is their practice, Appellants first issued a FOIA request seeking the "public records" to establish the truth and validity of what they had heard. DOT produced only some of the "public records," and they redacted those. Nevertheless, Appellants believed they had sufficient information and proof to assert a Constitutional

violation for spending public funds for private purposes. Appellants filed the Driveway Case.

Appellants served discovery requests in the Driveway Case requesting production of the same documents that they had earlier requested under FOIA, unredacted. **In addition, within a few days** of filing the Driveway Case, Appellants filed suit to enforce their prior FOIA request, seeking the unredacted "public records," the FOIA Case. Appellants **simultaneously** pursued enforcement in the FOIA Case and their Motion to Compel in the Driveway Case. Both motions were heard in the same hearing, by the same judge. The Circuit Court eventually ordered production of the documents sought by Appellants under Rule 37, but for unknown reasons, did not address the FOIA enforcement claim.

Because there has been some confusion about the order of events in the two related cases, Appellants offer this timeline:

June 10, 2013,	Appellants served FOIA requests on the DOT. (R. p. 45).
June 20, 2013,	DOT served its response to the FOIA request. (R. p. 45).
June 24, 2013,	Appellants filed the Complaint in the Driveway Case. (DOT reports this as July 1, 2013) (Respondent's Brief, p. 2).
July 2, 2013,	Appellants Served Interrogatories and Requests for Production of Documents in the Driveway Case. (R. Pp 146-150).
July 5, 2013,	Appellants filed suit in the FOIA Case. (R. p. 44).
August 20, 2013,	DOT responded to the Appellants' Interrogatories and Requests for Production in the Driveway Case, with redactions, and asserting privileges. (R. pp. 154-166).

September 9, 2013,	Appellants filed a Motion to Compel in the Driveway Case. (R. pp. 144-145).
September 9, 2013,	Appellants filed a Motion for Summary Judgment in the FOIA Case. (R. pp. 68-86).
October 7, 2013,	Appellants filed a Motion for an *in camera* Review in the FOIA Case. (R. pp.97-100).
October 24, 2013,	The Circuit Court heard argument on both the Motion to Compel in the Driveway Case and the Motion for Summary Judgment in the FOIA Case **in the same hearing**. (R. pp. 1, 19).
October 24, 2013,	The Court entered an Order taking Plaintiffs' Motion for Summary Judgment under Advisement in the FOIA Case. (R. p. 1).
October 24, 2013,	The Court entered an Order taking Plaintiffs Motion to Compel under Advisement in the Driveway Case. (R. p. 19).
July 2, 2014,	The Circuit Court ordered the documents, the public records, produced in full under Rule 37 in the Driveway Case but failed to rule in the FOIA Case. (R. pp. 20-31).
January 20, 2015,	Appellants filed Plaintiffs' Motion for Attorneys' Fees and Costs with an affidavit of counsel in the FOIA Case. (R. pp. 106-130).
February 11, 2015,	DOT filed Defendant's Return to Plaintiff's Motion for Attorneys' Fees and Costs in the FOIA Case. (R. pp. 131-134).
March 23, 2015,	Appellants filed a Supplemental Affidavit in Support of Plaintiffs' Motion for Attorneys' Fees and Costs in the FOIA Case. (R. pp. 135-138).

July 15, 2015, The Circuit Court denied Appellants' Request for Attorneys' Fees and Costs in the FOIA Case. (R. pp. 7-9).

Accordingly, Appellants **simultaneously** sought to compel production of the same documents via a Motion to Compel under Rule 37 in the Driveway Case, and to enforce their prior FOIA request in the FOIA case, and they have every right to do so.

Appellants received the requested "public records" only **a year after** they filed suit to enforce their FOIA request. Nevertheless, the Circuit Court denied their Motion for Attorneys' Fees and Costs under FOIA. Appellants appeal the Circuit Court's denial of their Motion for Attorneys' Fees and Costs in the FOIA Case.

ARGUMENT IN REPLY

I. RULE 37 DOES NOT NULLIFY FOIA.

Respondents argue that public bodies should enjoy the same status and treatment in shielding their activities and "public records" from exposure under FOIA as private litigants under the Rules of Civil Procedure. Respondents argue:

> The trial court noted the unfairness of allowing a litigant against the government to seek production of documents under Rule 37, SCRCP, simultaneously seek the same the same documents under FOIA, then, after prevailing under the former, demanding fees under the latter. . . . The result of sanctioning this dual course approach to discovery may mean that a State defendant may never be able to avail itself of the protections provided by Rule 37(a)(4) that is available to every other litigant in our courts.

(Respondent's Brief, p. 4) (emphasis added).

Thus, Respondents argue that Rule 37 nullifies FOIA, when a governmental body engages in litigation. This argument fails to recognize the public purposes of FOIA. FOIA distinguishes the rights of "public bodies" from ordinary litigants by demanding openness from "public bodies," in the production of "public records" at "a minimum of cost or delay," S.C. Code Ann. 30-4-15.

> **SECTION 30-4-15.** Findings and purpose.
>
> 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).

South Carolina law also facilitates judicial enforcement of the FOIA provisions.

SECTION 30-4-100. Injunctive relief; costs and attorney's fees.

(a) **Any citizen** of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. 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.

(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 (emphasis added).

FOIA opens state and local governments to the sunlight of public disclosure and requires the courts to enforce this openness by construing enforcement actions "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.**" S.C. Code Ann. 30-4-15. (emphasis added). The purposes of SCRCP 37 do not recognize or provide for a similar public purpose. As a "public body" under FOIA, DOT is **not** "every other litigant in our courts" (Respondent's Brief, p. 4).

The standard for production of documents under FOIA is broader and more inclusive than the standard for production of documents under Rule 37. Under Rule 37, the requested document must meet standards of Rule 26: "any matter, not privileged, which is **relevant to the subject matter involved in the pending action**." Accordingly, the scope of production under Rule 37 is limited to the issues in the litigation.

Under the Freedom of Information Act, production of a "'public record' is not so limited. The definition of "public record" includes "**all books, papers**, maps, photographs, cards, tapes, recordings, or other documentary materials **regardless of**

physical form or characteristics prepared, owned, used, **in the possession of, or retained by a public body**." S.C. Code Ann. 30-4-20(c) (emphasis added). Under FOIA, the "public records" need not relate to any particular litigation. Accordingly, the breadth of production provided under FOIA is far more comprehensive than production allowed under the South Carolina Rules of Civil Procedure.

Furthermore, a person need not be a litigant against a "public body" in order to obtain "public records." "**Any person** has a right to inspect or copy **any public record** of a public body." S.C. Code Ann. 30-4-30(a) (emphasis added).

The Respondents invite this Court to alter the Freedom of Information Act to hold that when a "public body" litigates, the Freedom of Information Act is no longer applicable to a request for a "public record," but rather that the Rules of Civil Procedure control the production of "public records." Respondents state, "Defendants argued that allowing a litigant to proceed simultaneously under FOIA and under the discovery rules has the effect of depriving a governmental defendant in court of substantial rights available to all litigants." (Respondents Brief, p. 2). This focus on the "rights" of a government litigant (or "public body") would nullify the Freedom of Information Act. Such a ruling would transgress far beyond the proper authority of this Court in interpreting a statute.

A "public record" must be disclosed under the Freedom of Information Act regardless of whether the "public body" is involved in litigation with the person requesting the "public record."

II. FOIA'S ATTORNEYS' FEES PROVISION DOES NOT HAVE A "SUBSTANTIAL JUSTIFICATION" DEFENSE.

In arguing against the award of attorneys' fees in this case, Respondents posit a rule of "substantial justification" for their refusal to produce "public records" under the Freedom of Information Act. They argue, "The Respondents were substantially justified in seeking to protect the information sought in this matter even though the court ordered the information be disclosed." (Respondents' Brief, p. 7). (Emphasis added). From that proposition, they argue that they should not be ordered to pay attorneys' fees under the Freedom of Information Act. (Respondents' Brief, pp. 7-10).

The Freedom of Information Act does not contain a "substantially justified" standard for denying the award of attorney's fees. Many years ago, the Supreme Court rejected this argument. "The appellant urges this Court to reverse the attorney fee award on grounds that DHEC **acted in good faith** reliance on its regulation. We **decline** to do so. The trial judge did not abuse his discretion in awarding fees **to encourage agencies to comply with FOIA requests**." *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 568, 324 S.E.2d 313, 316 (1984).

The standard is whether the person requesting the public records "prevails" in litigation.

> (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). In the case at bar, the Appellants prevailed. The Circuit Court ordered production of the requested "public records."

Respondents erroneously rely on other statutes with different standards for the award of attorneys' fees. These other statutes explicitly allow for a defense of "substantial

justification." FOIA does not. Respondents cite S.C. Code. Ann. § 15-77-300, a different fee shifting statute, but fail to quote it. That statute contains an explicit "substantial justification" standard:

> (A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) the court finds that **the agency acted without substantial justification** in pressing its claim against the party; and
>
> (2) the court finds that there are **no special circumstances** that would make the award of attorney's fees unjust.
>
> The agency is presumed to be **substantially justified** in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

S.C. Code. Ann. § 15-77-300 (emphasis added). Accordingly, the statutory standard of § 15-77-300 is **different from** and not applicable to an award of attorney's fees under the Freedom of Information Act.

Similarly, Respondents cite the federal Equal Access to Justice Act, 28 U.S.C.A. § 2412, which like § 15-77-300 contains an explicit rule of substantial justification.

> **(d)(1)(A)** Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, **unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust**.

28 U.S.C.A. § 2412 (d)(1)(A) (emphasis added).

Neither S.C. Code Ann. § 15-77-300, nor the federal Equal Access to Justice Act, nor any case law interpreting either of those acts is applicable to the standard under the Freedom of Information Act.

III. AN AWARD OF ATTORNEYS' FEES UNDER FOIA HONORS LEGISLATIVE INTENT AND ENCOURAGES COMPLIANCE.

An award of attorneys' fees under FOIA honors its legislative intent. Furthermore, awarding a prevailing plaintiff his attorneys fees under FOIA "encourage[s] agencies to comply with FOIA requests. "The trial judge did not abuse his discretion in awarding fees **to encourage agencies to comply with FOIA requests**." *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 568, 324 S.E.2d 313, 316 (1984).

The Supreme Court of South Carolina recently addressed the award of attorneys' fees under FOIA in two cases brought by Mr. Sloan. *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011); *Sloan v. South Carolina Department of Revenue,* 409 S.C. 551, 555-56, 762 S.E.2d 687, 689 (2014).

The South Carolina Supreme Court analyzed this issue at length in *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 156-58, 711 S.E.2d 895, 897-98 (2011). In that case, Sloan had secured "voluntary" production of requested public records only after he filed suit to enforce FOIA. The Court approved the award of attorney's fees, even when the documents were produced without an explicit order requiring their production.

> We . . . agree with the trial court that Sloan was a prevailing party for purposes of the FOIA attorney's fees provision. We find persuasive the decision of the Montana Supreme Court in *Havre Daily News, LLC v. City of Havre,* 333 Mont. 331, 142 P.3d 864 (2006). The *Havre* court addressed whether the post-complaint voluntary production of disputed documents precludes prevailing party status to a plaintiff:
>
> > Although Havre correctly observes that the Newspaper did not technically "prevail" in its action in the District Court, the court granted summary judgment in favor of Havre precisely because Havre mooted the case by providing the Newspaper with unredacted copies of the Reports. Absent Havre's conduct, the case would not have become moot. **In mooting the case, Havre provided the Newspaper with the very relief it sought to procure through litigation; thus, the Newspaper has prevailed in substance, albeit without court intervention.** Given these circumstances, we will

> consider the Newspaper to be the prevailing party with respect to its request for unredacted copies of the Reports. Otherwise, a similarly situated party could, after extensive litigation, at the eleventh hour, and facing imminent defeat, simply moot a case in order to dodge this fee-shifting statute.

Id. at 878 (emphasis added). Similarly, under the facts of this case, we find that Sloan is the prevailing party under section 30–4–100(b). 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. *See Litchfield Plantation Co. v. Georgetown County 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."); *see also Wildlands CPR v. U.S. Forest Serv.,* 558 F.Supp.2d 1096, 1098 (D.Mont.2008) (finding that if a complainant receives relief "via ... unilateral change in position by the agency," he is entitled to fees under the federal FOIA statute); *Spokane Research & Def. Fund v. City of Spokane,* 155 Wash.2d 89, 117 P.3d 1117, 1125 (2005) (en banc) ("[P]ermitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit ... would undercut the policy behind the act." (alteration in original) (quoting *Coal. on Gov't Spying v. King County Dep't of Pub. Safety,* 59 Wash.App. 856, 801 P.2d 1009, 1013 (1990))).

We believe this approach is in harmony with legislative intent, as expressed in the preamble to our FOIA statute:

> 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). Honoring legislative intent as expressed in FOIA by awarding attorney's fees in these circumstances may serve as an impetus for public bodies to comply with a FOIA request and thus avoid the imposition of an attorney's fee award. *See Soc'y of Prof'l Journalists v. Sexton,* 283 S.C. 563, 324 S.E.2d 313 (1984) (finding attorney's fees may be awarded to encourage agencies to comply with FOIA requests).

> Here, Sloan's complaint prompted Friends to do what a series of FOIA letter-requests could not accomplish— produce the requested documents. Accordingly, Sloan prevailed and is entitled to an award of attorney's fees.

Id., (emphasis in original).

The Supreme Court again addressed the awarding of attorneys' fees under FOIA in *Sloan v. South Carolina Department of Revenue.*

> "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**." [*Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011)]. 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 (2014) (footnotes omitted, emphasis added).

This court addressed this issue in *Pope v. Wilson*, 832 S.E.2d 442 (Ct. App. 2019). "Pope argue[d] she is entitled to attorney's fees because the AG violated FOIA." *Id.* at 449. Pope had sought documents during discovery in a civil case. "Pope also sent a FOIA request for these items to the Attorney General and filed a motion to compel [their] production." *Id.* at 444. The Circuit Court ruled that "her FOIA request was subordinate to discovery rules. She assert[ed] that her status as a defendant in the [related] litigation [did] not affect her rights under FOIA." *Id.* at 446. The Court of Appeals agreed. "We decline to depart from precedent by imposing a blanket prohibition on disclosure whenever the person seeking public records is simultaneously being sued by the public body in

possession of those records." *Id.* at 448. This court also agreed that an award of attorney's fees under FOIA honors legislative intent. *Id.* n. 9.

This Court should follow the foregoing rulings of the South Carolina Supreme Court and this Court that when a person is forced to resort to the courts in order to enforce to a request for a "public record" from a "public body," they are "entitled" to fees and costs. The public purpose of the Freedom of Information Act supports the payment of attorneys' fees.

An award of fees will "serve as an impetus for public bodies to comply with a FOIA request and thus avoid the imposition of an attorney's fee award." *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 156-58, 711 S.E.2d 895, 897-98 (2011).

IV. RESPONDENTS DO NOT CONTEST OTHER IMPORTANT ASPECTS OF THE APPELLANTS' ATTORNEYS' FEES CLAIM.

Appellants invite the Court's attention to several issues the Respondents do not argue. Respondents do not argue that the requested documents were not "public records." Respondents do not argue that the Circuit Court improperly ordered the documents produced, even under the less generous Rules of Civil Procedure. Respondents do not object to the overall **amount** of attorneys' fees claimed, any individual entry, or the rate claimed.

Appellants' counsel filed an initial affidavit and statements documenting attorneys' fees and costs (R. pp. 125-129). Through December 31, 2013, in the Circuit Court, Appellants incurred $6,137.50 in attorneys' fees and $200.00 in costs pursuing this matter, for a total of **$6,337.50**. Later, on or about March 23, 2015, Appellants filed a Supplemental Affidavit in Support of Plaintiffs' Motion for Attorneys' Fees and Costs showing that Appellants incurred $11,304.38 as fees and costs through December 31, 2014.

(R. pp. 135-137). Since then, Appellants have incurred additional fees and costs, which must be addressed on remand from this Court.

CONCLUSION

Rule 37 does not nullify FOIA. FOIA's attorneys' fees provisions do not have a "substantial justification" defense. An award of attorneys' fees under FOIA honors legislative intent and encourages compliance. Respondents do not argue that the requested documents were not "public records" under FOIA, nor do they argue that the Circuit Court erred in ordering full disclosure. Finally, Respondents do not contest the amount of the claimed attorneys' fees and costs.

WHEREFORE, Appellants pray the Court for an order:

1. Awarding the Appellants' attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b);
2. remanding the case for calculation of all fees and costs due, and
3. Granting Appellants such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Pursuant to Appellate Rule 211(a), the undersigned hereby certifies that his Final Brief and Final Reply Brief for Appellants complies with Rule 211(b).

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