

In the Supreme Court of Virginia

Record No. 121118

**EMMETT H. HARMON, Chief of the
James City County Police Department, et al.,**

Appellants,

v.

ADAM L. EWING,

Appellee.

Appellee's Petition for Rehearing

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ARGUMENT

- I. **This Court's Order of February 8, 2013, in this matter nullifies portions of the statutory language of Virginia FOIA, rejects the proper application of § 2.2-3706(G), and overlooks other portions of the statutory language.**

A. Introduction

This Court has repeatedly stated that every part of a statute is presumed to have some effect and no part will be treated as meaningless unless absolutely necessary. E.g., Baker v. Commonwealth, 284 Va. 572, 577, 733 S.E.2d 642, 645 (2012); Brown v. Commonwealth, 284 Va. 538, 544, 733 S.E.2d 638, 641 (2012); Idoux v. Estate of Helou, 279 Va. 548, 554, 691 S.E.2d 773, 776 (2010). The Court's ruling in this matter would treat portions of the Virginia FOIA as meaningless when an alternative reading is readily available. Further, it rejects the proper application of a conflict resolution provision specifically enacted by the General Assembly to address this and similar issues. Finally, it overlooks other statutory provisions. Specifically, the Court's determination that no conflict exists between Code § 2.2-3706(G) and Code § 2.2-3705.1(1) negates the meaning of portions of §§ 2.2-3706(G), (F)(11), -3705.8, and -3713(E), and fails to apply § 2.2-3706(I) where appropriate. Moreover, its ruling that part of the arrestee information requested pursuant to Code § 2.2-3706(C) overlooks portions of Code §§ 2.2-3700(B), -3704(B), and -3713(E).

B. Personnel Records

i. Summary of the law, facts, and the Court's interpretation.

As stated in the Court's Order (Order at 3-4), Code § 2.2-3706(G) provides as follows:

Records kept by law-enforcement agencies as required by § 15.2-1722 shall be subject to the provisions of this chapter except that those portions of noncriminal incident or other investigative reports or materials that contain identifying information of a personal, medical or financial nature may be withheld where the release of such information would jeopardize the safety or privacy of any person.

Code § 15.2-1722, mentioned in this provision, requires chiefs of police and sheriffs to keep personnel and other records. Code § 2.2-3706(I) then provides, "In the event of conflict between this section as it relates to requests made under this section and other provisions of law, this section shall control." Ewing requested all of the § 15.2-1722 records specifically concerning Officer Shelton. (JA at 17-18).

Notably, Code § 2.2-3706(F)(11) excludes from Va. FOIA "[r]ecords of (i) background investigations of applicants for law-enforcement agency employment, (ii) administrative investigations relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that

are made confidential by law.” JCCPD never sought to exercise this exemption. (JA at 19, 28-29, 75-84, 120-28).

The sole exemption JCCPD relies upon in reference to § 15.2-1722 records is Code § 2.2-3705.1(1), which provides in relevant part:

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof.

The Court determined that Code § 2.2-3706(G) does not conflict with Code § 2.2-3705.1(1) because, under Code § 2.2-3706(G), “The provisions of ‘*this chapter*,’ that is, all of VFOIA, include not only the disclosure provisions of VFOIA but also the exclusion provisions of the chapter set forth in Code § 2.2-3705.1.” (Order at 4-5). It reversed the circuit court’s order compelling disclosure of these personnel records. (Order at 5).

ii. The Court’s ruling resolves, rather than avoids, a conflict.

The Court’s interpretation implies that local law enforcement records are “excluded from” the provisions of “this chapter” per Code § 2.2-3705.1 even though the records are “subject to” the provisions of “this chapter” per

Code § 2.2-3706(G). This is a contradiction in terms. Documents cannot be both “excluded from” and “subject to” the provisions of “this chapter.”

The Court’s ruling does not avoid a conflict in statutory terms; it merely resolves the conflict by making Code § 2.2-3705.1(1) control § 2.2-3706(G), contrary to § 2.2-3706(I). Code § 2.2-3706(I) provides that § 2.2-3706 (including subsection G) controls in the event of a conflict. Code § 2.2-3706(I) shows that the General Assembly recognized that conflicts would exist and specifically desired § 2.2-3706 to control. The Court’s ruling would overrule that express and unambiguous legislative decision.

iii. Redundancy of Code § 2.2-3706(G).

Moreover, the Court’s ruling makes the opening language of Code § 2.2-3706(G) redundant and meaningless in light of Code § 2.2-3704(A). Code § 2.2-3704(A) provides in relevant part, “Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth.” “Public records” is defined in Code § 2.2-3701 broadly enough to cover the records kept pursuant to Code § 15.2-1722. In other words, Code § 2.2-3704(A) makes the records kept pursuant to Code § 15.2-1722 subject to Virginia FOIA without reference to Code § 2.2-3706(G). Thus, when the Court’s reads the opening language of Code § 2.2-3706(G)—specifically, “Records kept by

law-enforcement agencies as required by § 15.2-1722 shall be subject to the provisions of this chapter”—as being simply a reference to the chapter as a whole, the language is redundant and meaningless. The § 15.2-1722 records are already subject to the provisions of the Virginia FOIA by virtue of Code § 2.2-3704(A).

iv. Redundancy of Code § 2.2-3706(F)(11).

Additionally, Code § 2.2-3706(F)(11) specifically excludes from the provisions of Virginia FOIA portions of the local police personnel files. This narrow exemption is significant and meaningful if local police personnel files are subject to Virginia FOIA, but it is merely redundant of Code § 2.2-3705.1(1) and therefore meaningless under the Court’s reading of the statute. Ewing contends that § 2.2-3706(G) makes records kept pursuant to Code § 15.2-1722 subject to Virginia FOIA except as provided in Code § 2.2-3706. The Court’s ruling would allow any Virginia FOIA exemption to apply to records kept pursuant to Code § 15.2-1722, thereby making Code § 2.2-3706(F)(11) totally or partially meaningless.

v. Effect on Code §§ 2.2-3705.8 and -3713(E).

Finally, Ewing renews his arguments that JCCPD simply failed to demonstrate that the records kept pursuant to Code § 15.2-1722 were “personnel records” that are exempt under Code § 2.2-3705.1(1). “In any

action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence.” Code § 2.2-3713(E) (emphasis added). No evidence was presented to the circuit court to show that any, much less all, of the responsive records were personnel records exempt from disclosure under Code § 2.2-3705.1(1). (JA at 75-84, 120-28).

As stated in his Brief of the Appellee, at 11-18, the records kept pursuant to Code § 15.2-1722 are more than just personnel records, and under Code § 2.2-3705.8, certain personnel records are subject to disclosure despite Code § 2.2-3705.1(1). JCCPD failed to present any evidence to demonstrate that the records it was keeping pursuant to Code § 15.2-1722 were personnel records, and it failed to produce the personnel records that were subject to disclosure pursuant to Code § 2.2-3705.8. This failure of proof is a proper basis for affirming the circuit court’s writ of mandamus. Moreover, the Court’s ruling has the effect of negating the obligations of the public body to prove that FOIA exemptions actually apply and would ignore the applicability of Code § 2.2-3705.8 to at least a portion of the personnel records.

C. Arrestee Information (Code § 2.2-3706(C) Records)

As to the arrestee information, the Court's analysis is well reasoned in determining, first, that pairing the arresting officer's name with a reasonable timeframe is an appropriate means of requesting arrestee information (Order at 5-6), and second that Code § 2.2-3706(D) and (F)(1) would be appropriate exemptions to cite to avoid disclosure of individuals arrested upon the information provided by a specific officer (Order at 6). The Court appears to err, however, in invoking exemptions on behalf of JCCPD. JCCPD simply never invoked or proved Code § 2.2-3706(D) and (F)(1) to apply in response to the FOIA request, in pleadings before litigation, at the hearing on the merits, or at any time in the course of this appeal. Notably, the release of these documents are not *prohibited* under Virginia FOIA (see, in contrast, Code 2.2-3706(E)), as the Court's order seems to suggest. (Order at 6).

Virginia FOIA specifically provides: "Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, . . . all public records shall be available for inspection and copying upon request." Code § 2.2-3700(B) (emphasis added). Moreover:

Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all

cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

2. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

Code § 2.2-3704(B) (emphasis added). “In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.” Code § 2.2-3713(E) (emphasis added).

JCCPD never invoked an exemption—*any* exemption—with respect to the arrestee information. (JA at 19, 28-29). It merely asserted that the request was improper. Moreover, it never identified the volume of the responsive records not provided. Finally, it offered no evidence that the exemptions relied upon by the Court apply to the records actually withheld. (JA at 75-84, 120-28). The Court’s ruling overlooks the public body’s obligation to actually cite and exemption prior in a timely manner pursuant to Code § 2.2-3700(B) and -3704(B) and to prove that an exemption

actually applies at the hearing on the merits, per Code § 2.2-3713(B). The Court's ruling in effect substitutes a legal analysis devised by the Court for the procedure articulated by the General Assembly for responding to FOIA requests and litigating the arising disputes.

D. Request for Attorney Fees for Appeal

In light of the foregoing, Ewing renews his requests for attorney fees incurred on this appeal. (Brief of Appellee at 48-49).

CONCLUSION

Wherefore, Appellee Adam L. Ewing respectfully requests this Court to rehear this matter in oral arguments, and to enter an order affirming the circuit court's decision and remanding the case for the limited purpose of enforcement and awarding further attorney fees for this appeal.

Respectfully submitted,
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CERTIFICATE

I hereby certify, that on March 5, 2013, I served a copy of the foregoing via U.S. Mail, first class, postage prepaid to:

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I further certify that I have complied with all of the requirements of Rule 5:37(d), and that this petition is less than 10 pages in length.

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