In the

SUPREME COURT OF VIRGINIA

Record No. 121118

EMMETT H. HARMON, CHIEF OF THE JAMES CITY COUNTY POLICE DEPARTMENT,

and

THE JAMES CITY COUNTY POLICE DEPARTMENT,

Petitioners-Appellants,

v.

ADAM L. EWING,

Respondent-Appellee.

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

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STATEMENT OF THE CASE

Through this appeal, Petitioner-Appellants ("Petitioners") seek relief from the consequences of violating the Virginia Freedom of Information Act, Va. Code § 2.2-3700 et seq. ("FOIA" or "the Act"). The petition centers on Adam L. Ewing's ("Ewing") FOIA requests to Petitioners in November and December 2011. Petitioners withheld various records, and on January 12, 2012, Ewing challenged this by petitioning the James City County Circuit Court for a writ of mandamus. At the hearing on the petition on February 7, 2012, Petitioners presented no evidence. Judge Curran ruled for Ewing, and he issued the writ on March 30, 2012. Petitioners timely appealed.

This Court can and should deny this appeal. First, the evidence is insufficient to show that the withheld records are in fact exempt. Second, the Court interpreted the Act correctly in determining (i) that FOIA's general personnel records exemption did not apply to requests for local law enforcement personnel records, and (ii) that the Act mandates the release of arrestee information. Third, there is insufficient evidence to show that special circumstances justify Petitioner's violation of FOIA in this case.

BACKGROUND OF THE VIRGINIA FREEDOM OF INFORMATION ACT

The Virginia Freedom of Information Act "ensures the people of the Commonwealth ready access to public records in the custody of a public

body or its employees." Va. Code § 2.2-3700(b). "The affairs of government are not to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiaries of any action taken at any level of government."[1] *Id.*

FOIA favors transparency. Exemptions to FOIA are to be narrowly construed, and rights and privileges under the Act must be liberally construed. *Id.* "Unless a public body or its officers or employees specifically elect to exercise an exemption provided . . . all records shall be available for inspection and copying upon request." Va. Code § 2.2-3700(b); *see also* Va. Code § 2.2-3704(a). Requests for records need only identify the records sought with reasonable specificity. Va. Code § 2.2-3704(b). Every official elected and appointed to a public body subject to FOIA are to be familiar with its provisions. Va. Code § 2.2-3702.

FOIA establishes a strict protocol for responding to requests for records. The public body must respond within five business days and must either (1) release all responsive records or parts thereof except those

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[1] This respect for the citizens of this Commonwealth is far removed from the attitude of the Petitioners, who describe all members of the public as "potential law breakers." (Petition at 13-14).

N.B.: Citations to the record will be made parenthetically as follows: (R. at __). *Citations to the transcript of the hearing will be made parenthetically as follows:* (Tr. at __). *Citations to the Petition for Appeal will be made parenthetically as follows:* (Petition at __).

subject to an applicable exemption that the public body chooses to exercise; or (2) release a summary of the information contained in such records; or (3) exercise a conditional right to a seven-business-day response extension; or (4) note that the records do not exist or cannot be found.[2] Failure to respond within five business days is a per se violation of the Act. Va. Code § 2.2-3704(e).

In exercising an exemption under the Act, the public body must provide three pieces of information. The response must identify "with reasonable particularity" the *volume* and the *subject matter* of the records withheld and the *code section* that authorizes the exemption. Va. Code. § 2.2-3704(b)(1)-(2). "All public records and meetings shall be presumed open, unless an exemption is properly invoked." Va. Code. § 2.2-3700(b).

The rights granted under FOIA may be enforced through the writ of mandamus. Va. Code § 2.2-3713. The Act liberalizes the common law requirements for mandamus. Va. Code § 2.2-3713; *Cartwright v. Commonwealth Trans. Comm'r of Va.*, 270 Va. 58, 64-66; 613 S.E.2d 449, 452-53 (2005). A single denial of the rights and privileges conferred by the

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[2] *See* Va. Code § 2.2-3704(b), (d). While Va. Code § 2.2-3704(d) requires the parties to agree to a summary, this Court has found the requester's consent unnecessary where the request is for information required to be released pursuant to Va. Code § 2.2-3706. *Connell v. Kersey*, 262 Va. 154, 163; 547 S.E.2d 228, 233 (2001).

Act is sufficient grounds for mandamus to issue. Va. Code § 2.2-3713(d). The Act provides for a mandatory award of attorney fees and costs, unless special circumstances make the award unjust. Va. Code § 2.2-3713(d); *White Dog Publishing, inc., et al. v. Culpeper County Board of Supervisors*, 272 Va. 377, 388; 634 S.E.2d 334, 340-41 (2006). If the court finds a violation to be willful and intentional, it must order a severe civil sanction. Va. Code 2.2-3714.

STATEMENT OF THE FACTS

On November 18, 2011, Adam L. Ewing ("Ewing"), by counsel, sent Petitioners a written FOIA request for various documents related to his arrest on May 13, 2011. (R. at 15). Petitioners denied this request pursuant to Va. Code § 2.2-3706(f)(1). (R. at 16). Petitioners did identify the volume of the documents withheld or provide criminal incident information, which is not exempt under the exemption cited. (R. at 16).

On December 20, 2011, Ewing's counsel sent a second FOIA request on his behalf. (R. at 17-18). This request sought (1) "criminal incident information" for all incidents since January 1, 2011 involving Officer Ryan Shelton; (2) the "identity of all individuals, other than juveniles, arrested or charged by Officer Ryan Shelton" or by another officer on information provided by Officer Ryan Shelton ("Arrestee Information"); (3) records

specifically concerning Officer Ryan Shelton kept pursuant to Va. Code § 15.2-1722 ("§ 15.2-1722 Records"), including *without limitation* his personnel file, complaints against him, and documents related to the investigation of complaints against him;[3] (4) the number of responsive documents being withheld and the specific basis for withholding such records. (R. at 17-18).

On December 22, 2011, the Petitioners responded to this request by providing exactly one record—the report related to Ewing's arrest in May. (R. at 19-25). The response simply did not address the other criminal incident information requested. (R. at 19). The response did not provide Arrestee Information, indicating that this request was an improper request for information, not a request for records. (R. at 19). The response did not provide any § 15.2-1722 Records, indicating that *if they exist*, they would be included within Officer Shelton's "entire personnel record [sic] and all documents therein have been withheld pursuant to Virginia Code §2.2-3705.1(1)." (R. at 19). This response did not identify with reasonable

[3] Contrary to Petitioners' repeated assertion, this request was not limited to personnel records, but sought all § 15.2-1722 documents without limitation. By virtue of this fact, the Petitioners have technically assigned error only to part of the writ, not the writ as a whole, which orders *all* § 15.2-1722 documents to be provided, not merely Officer Shelton's personnel file.

particularity the volume or subject matter of withheld records, and it cited no other exemptions. (R. at 19).

On December 23, 2011, Ewing renewed his request, noting that Petitioners' FOIA response "does not present an adequate basis under the law to deny the request" and particularly pointing out the failure to identify the volume of the records withheld.[4] (R. at 26-27). A week later counsel for Petitioners replied, arguing the response was sufficient because FOIA does not require "forensic accounting," but Officer Shelton's personnel file contained approximately 100 pages, excluding insurance information. (R. at 28). It failed to cite any further exemption for withholding the requested documents. (R. at 28).

On January 4, 2012, counsel for the parties communicated by telephone in anticipation of this litigation. Appellant's counsel then sent an email stating, "Following our conversation, I read over your FOIA request and spoke with JCCPD records staff. It appears that your request numbered 1 [seeking criminal incident information] was unintentionally misread and only the single criminal incident report involving your client and Officer Shelton was sent to you." (R. at 29). The email acknowledged

[4] This renewed request did not clarify the prior request, as indicated by Petitioners. (Petition at 5). It merely objected to the response and renewed the request for documents. (R. at 26-27).

there were additional responsive documents that would be provided. (R. at 29). The email closed by stating, "As to the other numbered requests, our position remains unchanged from our response letters." (R. at 29).

On January 10, 2012, Ewing served Petitioners with a copy his brief in support of his petition. (R. at 50, 69). (The petition was previously served. (R. at 14)). On January 11, 2012, counsel for Petitioners responded indicating that redacting the promised criminal incident information was taking longer than expected. (R. at 69). A full week later (twenty-nine days after the documents were initially requested), Petitioners sent the criminal incident information with a cover letter indicating the redaction took only 4.5 hours. (R. at 68).

This petition was filed on January 12, 2012, before those records were actually provided. (R. at 1). It was heard by the Honorable Judge Curran on February 7, 2012. (Tr. at 1). Judge Curran ruled from the bench that Petitioners had failed to exercise a valid exemption, and therefore the § 15.2-1722 Records and the Arrestee Information had to be released, and he awarded Ewing $5,000 in attorney fees, plus costs. (Tr. at 25-27). After extensive disputes between counsel concerning the terms of the order, Judge Curran entered an order memorializing his ruling on March 30, 2012.

(R. 84-90). Petitioners timely filed their notice of appeal and petition for appeal. (R. 91-92).

STANDARD OF REVIEW

The assignments of error in this case involve mixed issues of fact and law, raising issues of statutory interpretation and the sufficiency of evidence. Although conclusions of law are reviewed de novo, the trial court's findings of fact cannot be set aside unless they are plainly wrong or without evidence to support them. *Transcon. Ins. Co. v. Rbmw*, 262 Va. 502, 510; 551 S.E.2d 313, 317 (2001).

ARGUMENT AND AUTHORITIES

I. The circuit court correctly issued this writ because the Petitioners failed to prove the § 15.2-1722 Records to be exempt as a matter of fact.

Petitioners' only argument for withholding the § 15.2-1722 Records is that they are "personnel records" exempt under Va. Code § 2.2-3705.1(1) ("the Personnel File Exemption"). Petitioners had the burden of proving this contention in the circuit court. Va. Code § 2.2-3713(e). Petitioners failed to provide sufficient evidence to support its contention, and therefore the circuit court properly granted the writ.

Section 15.2-1722 Records include (a) personnel records, (b) arrest records, (c) investigative records, (d) reportable incident records, and (e)

noncriminal incident records. Each of these terms is specifically defined in § 15.2-1722(b). "Arrest Records" is defined broadly enough to cover the documents containing Arrestee Information. Va. Code § 15.2-1722(b). Ewing requested all § 15.2-1722 Records specifically relating to Officer Shelton. The Petitioners withheld all such documents upon the assertion that *"[i]f records responsive to your . . . . request exist*, they would be included within Ofc. Shelton's personnel record." (R. at 19 (Emphasis added)).

This response simply speculates or obfuscates about the § 15.2-1722 Records, which is impermissible under FOIA. *Cf.* Va. Code § 2.2-3704(b) (public bodies must identify "with reasonable particularity" the subject matter of withheld records). Ewing's mandamus petition challenged this use of the Personnel File Exemption (§ 2.2-3705.1(1)). At that point, it was the Petitioners' burden to demonstrate that the § 15.2-1722 Records were in fact personnel documents exempt under the Personnel File Exemption. Va. Code § 2.2-3713(e). Petitioners provided no evidence showing the actual content of § 15.2-1722 Records they possess, thereby precluding a finding that the Personnel File Exemption applied to any or all of them.[5] As such,

[5] Petitioners undermine their own argument that all the personnel documents (much less all the § 15.2-1722 Records) were exempt. They direct the Court's attention to Va. Code § 2.2-3705.8, which "addresses

the court properly granted the writ on this matter and the Petitioner's first assignment of err may be overruled.

Moreover, the request sought more than just personnel records. (R. at 17-18). The § 15.2-1722 Records requested include personnel records, arrest records, investigative records, reportable incident records, and noncriminal incident records. Section 15.2-1722 defines "arrest records" to include documents containing Arrestee Information. *Id.* Therefore, Petitioners' inability to prove that the Personnel File Exemption in fact applies to these arrest records makes Petitioners' second assignment of error harmless error at best, because the § 15.2-1722 Records contain the Arrestee Information sought.[6]

II. The circuit court correctly determined that the Personnel File Exemption did not apply to § 15.2-1722 Records as a matter of law.

Petitioners spend great effort trying to define the scope of "personnel records" under the Personnel File Exemption and arguing that this

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certain documents that although classified as personnel records are subject to release," including job classification, salary, etc., and they acknowledge this section applies to law enforcement personnel files. (Petition at 11-12). Petitioners have not released the (nonexempt) § 2.2-3705.8 documents, though they are responsive, and therefore are clearly in violation of FOIA.

[6] Plaintiff's failure to provide evidence of the actual contents of the withheld records also means the record on appeal is insufficient for this Court to to evaluate and resolve the assignments of error, and this case should be defaulted on that basis. *See* Va. Sup. Ct. R. 5:11(a).

exemption applies to § 15.2-1722 Records. Their interpretation, though, would violate the clear language of the Act and its legislative history.

Va. Code § 2.2-3706(g) provides that § 15.2-1722 Records "***shall be subject to the provisions of this chapter*** [i.e., FOIA]" with certain exceptions.[7] (Emphasis added). Section 15.2-1722 Records include local law enforcement personnel files. As such, § 2.2-3706(g) directly conflicts with the Personnel File Exemption (§ 3705.1(1)), upon which Petitioners rely, which provides:

> 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 . . . ."

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[7] Since 2010, the exemptions contained in § 2.2-3706(g) apply only to "noncriminal incident" records and "investigative" records, not to "personnel" records—terms that are all specifically defined in § 15.2-1722(b). 2010 Acts of Assembly c. 227. The exemptions applicable to local law enforcement personnel records are found only in § 2.2-3706(f)(11), which Petitioners never sought to exercise.

Petitioners repeatedly insist that Judge Curran ruled that Petitioners should have cited to the exceptions stated in Va. Code § 2.2-3706(g) rather than Personnel File Exemption. (Petition at 14, 17). Nothing in the Court's bench ruling or order supports this claim. (Tr. 25, 26-27; R. 84-85). The Court withheld any ruling as to whether an applicable exception existed. It simply ruled (correctly) that the Appellants failed to timely exercise an applicable exemption, and therefore waived any such applicable exemption. (Tr. 25, 26-27; R. 84-85).

Law enforcement personnel files cannot be both ***subject to*** FOIA under § 2.2-3706(g) and ***excluded from*** FOIA under § 2.2-3705.1(1). Section 2.2-3706(*i*) resolves this conflict: "In the event of conflict between this section [i.e., § 2.2-3706, including § 2.2-3706(g)] as it relates to requests made under this section and other provisions of law [including § 2.2-3705.1(1)], *this section shall control.*" (Emphasis added). Section 2.2-3706(g) (requiring § 15.2-1722 Records to be released) controls.[8] As this Court has said in the FOIA context, "In construing statutory language, we are bound by the plain meaning of clear and unambiguous language. We do not isolate particular words or phrases but, instead, examine a statute in

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[8] Petitioners try to avoid this conflict-resolution provision by narrowing the scope of § 2.2-3706 to criminal records alone. They point to the heading of § 2.2-3706, which mentions only criminal records, and note that § 2.2-3706(*i*) applies only to requests "made under this section." By claiming the request was merely a request for personnel records, not for criminal records, Petitioners assert it was not "made under" the criminal records provisions of § 2.2-3706. (Petition 16-17).

This argument fails on every point. Pursuant to the rule of construction laid out in Va. Code § 1-217: "The headlines of the sections . . . are intended as mere catchwords to indicate the contents of the sections and do not constitute part of the act of the General Assembly." Therefore, the heading of § 2.2-3706 does not limit the section to dealing exclusively with criminal records.

Second, the language of the FOIA request parallels the language of § 2.2-3706(g) in requesting all § 15.2-1722 Records, not merely personnel records. Personnel records are only one of five categories of § 15.2-1722 Records, which deals with both criminal and noncriminal records kept by local law enforcement. Based on the parallelism, there is no question that this was a request "made under" § 2.2-3706.

its entirety." *White Dog Publ., Inc. v. Culpeper County Bd. of Supervisors,* 272 Va. 377, 386; 634 S.E.2d 334, 339 (2006).

This reading of the statute also comports with its legislative history. Prior to 1999, § 15.2-1722 provided that most § 15.2-1722 Records were except from FOIA.[9] On January 11, 1999, a joint subcommittee of the General Assembly reviewed this exemption and found it to conflict with the Act. They proposed to resolve the conflict in favor of transparency. Va. House Doc. No. 106 at 24-25 (2000); FOIA Counsel Adv. Op. AO-10-09 (2009). Accordingly, the General Assembly greatly narrowed the § 15.2-1722 Records exemption and placed it within FOIA itself, exempting only three subcatagories of § 15.2-1722 Records. *Id.* One of these subcategories concerned law enforcement personnel files, and it only exempted "[r]ecords of background investigations of applicants for law-enforcement agency employment or other confidential administrative investigations conducted pursuant to law." 1999 Acts of Assembly cc. 703, 726. A year later, the General Assembly amended the Act again, specifically bringing the § 15.2-1722 exemption into direct conflict with the Personnel File Exemption. 2000 Acts of Assembly c. 227. Accordingly, by virtue of the conflict resolution provision (also added in 1999) now found in

[9] In fact, § 15.2-1722 Records were exempt except insofar as they contained Arrestee Information. 1999 Acts of Assembly cc. 703, 726.

§ 2.2-3706(*i*), background and administrative investigations were the only parts of the local law enforcement personnel files exempt from release under FOIA. *See* 2000 Acts of Assembly c. 227.

In 2010 the General Assembly implicitly ratified this mandatory disclosure of law enforcement personnel files under § 2.2-3706(g). Specifically, it expanded and clarified the exemptions specifically applicable to law enforcement personnel files, placing them in § 2.2-6706(f)(11), but it did not expand them so as to exempt *all* law enforcement personnel files. 2010 Acts of Assembly c. 627. As such, these amendments and the clear language of the Act sufficiently manifest the General Assembly's intent that local law enforcement personnel records are to be accessible through FOIA, except as specifically provided in § 2.2-3706.[10]

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[10] Petitioners erroneously cite FOIA Advisory Council Opinion AO-27-03 (2003) as supporting their contention that all personnel files are exempt under Va. Code § 2.2-3706(g). (Petition at 15). The opinion, read in light of the law existing at the time, simply notes that part of the personnel files were exempt under § 2.2-3706(g). At that time, § 2.2-3706(g) contained the background and administrative investigation exemptions applicable to law enforcement personnel files. With the 2010 amendment, that is no longer true. To withhold any part of the law enforcement personnel file, Petitioners would have had to exercise the exemption available to them under § 2.2-3706(f)(11), and they did not.

Similarly, this Court should not be persuaded by Petitioners' references to the Order dated March 23, 2012 in *Ewing v. Shelton*, CL11-1476 (James City County Circuit Court). (Petition at 12-14). Petitioner has not introduced a transcript of that proceeding and has misconstrued the matter. Simply put, Judge Ford indicated from the bench that in addition to

Perhaps Petitioners could have used the exemptions in § 2.2-3706(f)(11) or § 2.2-3706(g) to withhold part of the § 15.2-1722 Records, but they simply did not exercise those exemptions—despite repeated opportunities to do so and a specific warning from Ewing that their response lacked legal support. (R. at 26). Moreover, they did not prove at trial that these exemptions applied or note them in their assignments of error, thereby waiving them for all intents and purposes. As indicated in Va. Code § 2.2-3700(b), "Unless a public body or its officers or employees specifically elect to exercise an exemption . . . all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked." *See also Va. Code* § 2.2-3704(b)(1)-(2) (requiring the public body to "cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records"); § 2.2-3713(e) ("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

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denying the defendant's motion to quash and Ewing's motion to compel, he would unilaterally amend Judge Curran order in *this* matter so as to place the FOIA documents under a protective order, without any lawful basis. Recognizing that this case was likely going to be appealed to this Court and legal complexities Judge Ford's amendment of Judge Curran's order would cause, Ewing through counsel withdrew his motion as it would no longer serve his interests in any conceivable manner.

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.").

Based on the clear and unambiguous language of FOIA, the manifest intent of the General Assembly, and Petitioner's failure to exercise any exemption except the inapplicable Personnel File Exemption, the circuit court correctly ordered Petitioners to produce the § 15.2-1722 Records.

III. The circuit court correctly ordered Petitioners to provide Arrestee Information pursuant to Va. Code § 2.2-3706(c).

Va. Code § 2.2-3706(c) provides, "Information in the custody of law-enforcement agencies relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest shall be released." Ewing's December FOIA request parallels this language, seeking Arrestee Information. Petitioners now attempt to evade this clear and unambiguous statutory mandate to release the information.

Petitioners argue that the request is a request for information, not a request for a record, and therefore it is not a proper request under FOIA.[11] (Petition at 19-20). But § 2.2-3706(c) provides specifically, "***Information*** in

[11] Petitioners cite *Globe Newspapers Co. v. Commonwealth*, 264 Va. 622; 570 S.E.2d 809 (2002). The request in *Globe* sought the biological substance on the tip of a swab used as evidence in a rape case, not information whose release is mandated by FOIA.

the custody of law-enforcement agencies . . . shall be released." Though requests under FOIA are generally limited to records, not information, "In the event of conflict between [§ 2.2-3706] as it relates to requests made under this section and other provisions of law, this section shall control." Va. Code § 2.2-3706(*i*). Therefore, the "records limitation" applicable to other FOIA requests does not apply to requests for Arrestee Information. As this court said, "In construing statutory language, we are bound by the plain meaning of clear and unambiguous language." *White Dog Publ., Inc. v. Culpeper County Bd. of Supervisors,* 272 Va. 377, 386; 634 S.E.2d 334, 339 (2006).

Petitioners attempt to obscure this issue by suggesting that Ewing should have submitted a revised request seeking specific public records. (Petition at 5). That argument is unpersuasive. First, Ewing's request can reasonably be construed as a request for the records containing the Arrestee Information. Requests under the FOIA need only identify the records requested "with reasonable particularity." Va. Code 2.2-3704(b). This request, identifying the specific information sought, satisfies that requirement. In fact, Petitioners had no difficulty in identifying the *type of document* that would contain the Arrestee Information, suggesting the request should have specified arrest warrants, for instance. (Petition at 19).

Second, it is appears no request could be worded so as to induce Petitioners to release the Arrestee Information, as required under Va. Code § 2.2-3706(c). The December request specifically tracked the statutory language of Va. Code § 2.2-3706(c), and Petitioners argue it should have requested specific documents instead. But all documents containing Arrestee Information are, by definition, part of the "criminal investigative file" under § 2.2-3706(a) and therefore exempt under § 2.2-3706(f)(1). If Ewing had requested specific documents, they would have been withheld as exempt, as they were in November. The Virginia Freedom of Information Act is not supposed to be a riddle without an answer, but Petitioner makes it into one. According to them, requests for Arrestee Information are not requests for records, and records containing Arrestee Information may be withheld as exempt. This makes Va. Code § 2.2-3706(c) meaningless.

Petitioners proceed to make an extraordinary and unbelievable claim:

> The Police Chief does not contest that the identity of individuals arrested and charged must be released pursuant to Va. Code § 2.2-3706(C), but only when such identities are found within an existing public document. . . . In this case, a document did not exist and the circuit court erred in considering the lack of a responsive document.

(Petition at 20). No one can truly believe that the Chief of Police does not have documents identifying the citizens arrested by his officers last year. Va. Code § 15.2-1722(a) actually requires him to maintain such records.

Petitioners apparently premise this argument on the erroneous belief that they had to release the requested information *only* if it is already compiled into *a single list*. There is nothing in the Act or in this request to support that argument. The request was not a request for a list, but a request for identities. FOIA requires that the information to be released. That information can be released either as a summary, *see Connell v. Kersey*, 262 Va. 154, 163; 547 S.E.2d 228, 233 (2001), or in its original redacted or unredacted form—e.g., the arrest warrants or incident reports containing the Arrestee Information.

This solution, releasing many documents instead of one, also resolves the other objection Petitioners raise, namely that the writ issued by the court requires them to draft a new document responsive to the request. It does not. It merely requires them to release the redacted or nonredacted existing records from which Ewing might create such a list.

The 1991 Attorney General opinion cited by Petitioners supports this interpretation. That opinion concerned whether a public body has to create a list of certain information upon request. 1991 Op. Atty. Gen. Va. 9, 9. The Attorney General opined that the public body could distinguish between a request for information and a request for documents in this respect, but it had to release a list (if one existed) or records from which a list may be

compiled (if those records are not exempt). *Id.* at 11-12. The FOIA Advisory Counsel opinions cited by Petitioners (AO-14-00 (2000) and AO-05-05 (2005)) are also consistent with this position. Moreover, the provisions of the Act compelling the release of information (§ 2.2-3706(b) and (c)) were added after the Attorney General rendered his 1991 opinion, making the opinion of doubtful relevancy. See 1999 Acts of Assembly cc. 703, 726; 2010 Acts of Assembly c. 627; FOIA Counsel Adv. Op. AO-05-05 (2005).

Appellant's attempts to avoid releasing Arrestee Information are unpersuasive, and the writ in this respect was appropriately granted.

IV. The circuit court legitimately ordered Petitioners to pay costs and attorney fees.

Petitioners contend that the circuit court erred in awarding attorney fees, because Petitioners' allegedly relied on case law, FOIA Advisory Council opinions, and Attorney General opinions in responding to Ewing's request, creating special circumstances that make the award of fees and costs unjust. (Petition at 25-26).

This Court's decision in *White Dog Publ., Inc. v. Culpeper County Bd. of Supervisors*, 272 Va. 377, 388; 634 S.E.2d 334, 340-41 (2006), shows the high bar necessary to establish special circumstances under Va. Code § 2.2-3713(d). In *White Dog*, the public body argued the existence of special circumstances based on the following facts: (1) the practice in

violation of FOIA had been in place for four years without a complaint; (2) the violation was not willful or knowing; (3) the general district court's favorable ruling (overturned by the circuit court and the Supreme Court) showed reasonable judges and attorneys can disagree on whether the practice constituted a violation; (4) the attorney for the public body did extensive research on FOIA; (5) the public body respected its other obligations under FOIA. *Id.* The circuit court accepted these arguments, but this Court reversed the circuit court, holding, "[N]one of those grounds constituted 'special circumstances' sufficient to make an award of attorney's fees and reasonable costs unjust in the circumstances of this case." *Id.*

The evidence in this case is far less persuasive. Notably, Petitioners' response to Ewing's petition did not argue the existence of special circumstances, and at the hearing on the merits the only arguments Petitioners raised in opposition to attorney fees was *Where is the harm?* and *This violation was not willful.* (Petition, at Exhibit 1; Tr. at 17). They did not argue reasonable reliance on persuasive authority. Appellant's FOIA responses show little evidence of reliance on secondary legal authorities. (R. at 16, 19, 28-29, 68-69). Petitioners presented no additional evidence of special circumstance at the hearing on the merits. The evidence instead

shows the Petitioners repeatedly failed to exercise the FOIA exemptions in the manner prescribed, namely by failing to identify with reasonable particularity the volume and subject matter of the withheld documents. Additionally. Petitioners repeatedly failed to cite exemptions permitting them to withhold documents they were withholding. Specifically, they withheld "criminal incident information" in November without a legal basis, initially withheld most of the "criminal incident information" in December based on an alleged misreading of the clear request, and they withheld substantial parts of the § 15.2-1722 Records (arrest, investigative, reportable incidents, and noncriminal incidents records) claiming they are part of a personnel file. Moreover, they admit in their Petition that the Act does not protect the "entire" personnel file, yet they have failed to provide the nonexempt records. (See note 5, above). The only real evidence they point to of reliance on persuasive authority are their post facto citations in the pleadings filed in this case. Based on this, the record simply does not support a finding that special circumstances exist.

The circuit court's decision not to find the existence of special circumstances was properly within its discretion, and is entitled to deference by this Court.

CONCLUSION

Based on the foregoing, Ewing respectfully requests this Court to DENY the Petitioner-Appellants' petition for appeal and to award Ewing all attorney fees and costs incurred in this appeal pursuant to Va. Code § 2.2-3713(d).

Respectfully submitted,

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(804) 783-2000 / (804) 783-2105 fax
Counsel for Adam L. Ewing

CERTIFICATE

I hereby certify, that on July 16, 2012, within 21 days after services of the petition for appeal in this case, seven (7) printed copies of the foregoing were filed with the Clerk of this Court by hand, and a true copy of the foregoing was sent via first class US mail, postage prepaid, to counsel for Petitioner-Appellants Emmett H. Harmon, Chief of the James City County Police Department and the James City County Police Department at the following address:

Leo P. Rogers, County Attorney
Lola Rodriguez Perkins, Assistant County Attorney
Office of the County Attorney for James City
101-D Mounts Bay Road
Post Office Box 8784
Williamsburg, VA 23187-8784

I further certify that the foregoing does not exceed 25 pages, and it complies with Rule 5:18 of the Rules of the Virginia Supreme Court.

Andrew T Bodoh, Esquire