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September 23, 2015

Delegate James M. LeMunyon
P.O. Box 220962
Chantilly, VA 20153-0962

Re: Request for Exemption Review by FOIA Subcommittee

Dear Jim:

I write to make you aware of a recent Virginia Supreme Court opinion that has serious implications for citizens' ability to access information from the government under the current Virginia Freedom of Information Act. A copy of the opinion is attached. While options for a request for rehearing certainly are being considered, I hope that you and I can work to correct this through legislation if need be.

First, the Supreme Court decided that where a governmental entity claims that a document includes any amount of information, no matter how small, that would fit into a particular exemption, then it can withhold that document in its entirety. It need not produce a redacted version that would give public access to the non-exempt information, even if that information is voluminous and easily segregated from the exempt information. Second, it requires a court to give agency officials deference about the applicability of exemptions.

Turning to the specifics of the case, in June 2014, I submitted FOIA requests to the Virginia Department of Corrections ("VDOC") seeking various information pertaining to executions. VDOC refused to produce a number of records, including Execution Manuals, under FOIA. Specifically, VDOC asserted § 2.2-3705.2(6), which exempts, the category of "[e]ngineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure."

After thorough briefing and a full day hearing before the circuit court, Judge Roush (Fairfax Circuit Court) ordered VDOC to produce a number of records, including redacted copies of the Execution Manuals. VDOC appealed.

On September 17, 2015, the Supreme Court reversed Judge Roush's opinion. The most troubling aspect of the opinion is that it relieves public bodies of the obligation to redact documents that are only partially exempt under § 2.2-3705.2(6). Unless the public body elects to redact (entirely within its discretion), then the entire document is withheld. It is irrelevant how much of the document contains exempt material or how easy it would be to redact. You will see the Supreme Court's discussion of this issue on pages 11-15 of the attached opinion. The ruling also goes flatly against (but does not attempt to reconcile) FOIA Advisory Council opinions, which explicitly require redaction in this circumstance. This is an absurd result and cannot be what is intended by a doctrine aiming to facilitate access to the government.

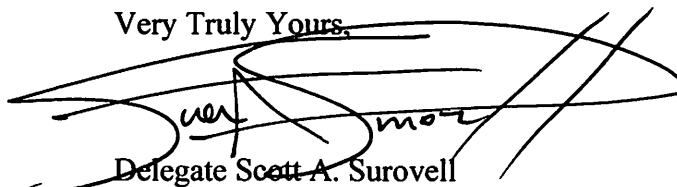
As you can imagine, the potential implications are very concerning. Any number of public bodies beyond VDOC—such as schools—could put *one* piece of exempt information of any kind into or attached to an otherwise non-exempt document, point to this particular exemption, and then rely on the Court's opinion to shield the entire record from the public. This ruling essentially incentivizes public bodies to engage in such tactics, knowing that interested citizens have no recourse.

The Supreme Court alludes to the fact that the General Assembly can change the result. On page 12 of the opinion, the Supreme Court states, "had the General Assembly intended to require redaction of documents that fall under the security exemption of subsection (6) of the statute, it would have included the phrase "those portions" or "portions thereof." The Court cannot read that language into subsection (6)."

Secondly, the opinion requires a trial court reviewing a FOIA decision to give an agency "deference" in determining whether a document is exempt or not. From my point of view this is like asking Virginians to trust the fox who is guarding the henhouse. If anything, a court should review an agency's decision on a FOIA with no deference at all.

Please treat this as a request by your FOIA Subcommittee to review this case and pursue legislative changes. I hope that the FOIA Commission is able to propose statutory clarification on the redaction issue so that FOIA provides the transparency to our constituents that it was intended to by the drafters. Feel free to contact me if you need any additional information or would like to review any additional briefing.

Very Truly Yours,



Delegate Scott A. Surovell
44th District

enclosure

cc: Ms. Maria Everett
MaryBeth W. Shreiner, Esq.
Senator Richard Stuart