

COMMONWEALTH OF VIRGINIA
FOURTEENTH JUDICIAL CIRCUIT

L.A. HARRIS, JR., JUDGE

GARY A. HICKS, JUDGE

JAMES S. YOFFY, JUDGE

RICHARD S. WALLERSTEIN, JR., JUDGE

JOHN MARSHALL, JUDGE



CIRCUIT COURT OF HENRICO COUNTY

GOVERNMENT COMPLEX
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August 10, 2017

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In re: Brian C. Davison v. Siobhan S. Dunnivant (CL17-737)

Dear Mr. Davison, Mr. Tunner, and Mr. Matheson,

On August 2, 2017, the Petitioner Brian C. Davison ("Mr. Davison") and Siobhan S. Dunnivant ("Senator Dunnivant"¹) appeared pursuant to the Court granting Mr. Davison's request to hear argument on his Motion to Reconsider the Court's Opinion Letter, dated June 14, 2017, wherein the Court sustained Senator Dunnivant's Demurrer and Granting Senator Dunnivant's Motion to Dismiss. The Court, having heard the *ore tenus* arguments of the parties, and having reviewed the pleadings, exhibits, and filings, rules as follows:

Mr. Davison filed his Verified Petition for Writ of Mandamus against Senator Dunnivant on March 6, 2017. In support of his Petition, Mr. Davison asserts that citizens post questions and

¹ Virginia Code Section 2.2-3705.7(2) defines Members of the General Assembly as "each member of the Senate of Virginia and the House of Delegates. . . ." Senator Dunnivant is a member of the General Assembly, a legislative body.

8/11/17
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Kathy M. Behan
Deputy Clerk, Henrico Circuit Court

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comments on Senator Dunnivant's "verified" Facebook page,² to which Senator Dunnivant often responds. On January 14, 2017, at 5:28 p.m., Mr. Davison posted comments pertaining to First Amendment and free speech issues on Senator Dunnivant's Facebook page. Mr. Davison alleges that Senator Dunnivant deleted his comments on her Facebook page, which is the subject of this pending action.

Thereafter, on January 17, 2017, Mr. Davison issued a FOIA request to Senator Dunnivant via her Virginia Senate email address (district12@senate.virginia.gov) for records pertaining to the aforementioned Facebook post. Mr. Davison had neither received the requested records nor a response until February 3, 2017, at which time Mr. Matheson, Esq., counsel for Senator Dunnivant, provided the following response to Mr. Davison, in pertinent part: "There are no public records responsive to your request. The contents of Senator Dunnivant's Facebook page are not 'public records' as that term is defined under [FOIA]..."

Mr. Davison argues that Senator Dunnivant violated FOIA in two ways, namely: (i) by failing to timely make one of the four required responses permitted under FOIA, and (ii) by refusing to provide the public records pertaining to the Facebook post at issue.

The Court Reverses its June 14, 2017 Opinion Letter and Overrules Senator Dunnivant's Demurrer and Denies Senator Dunnivant's Motion to Dismiss

Senator Dunnivant filed a Demurrer and Motion to Dismiss, on March 31, 2017, contending that (i) Senator Dunnivant is not a public body under FOIA, and FOIA duties are only applicable to public bodies, (ii) the comments pertaining to the Facebook post are not public records under FOIA, and FOIA only requires disclosure of public records, (iii) Senator Dunnivant is a misjoined party to this action because she is not a public body, and (iv) Mr. Davison has failed to join the necessary public body, the Senate of Virginia. The Court will address the third and fourth issues in its analysis of the first issue because such issues present the same question to the Court, precisely: Is Senator Dunnivant a "public body" under FOIA?

Demurrer Standard

A demurrer tests whether the Complaint states a cause of action upon which the relief sought can be granted. Shelor Motor Co. v. Miller, 261 Va. 473, 478 (2001). Although the properly pleaded facts in a plaintiff's Complaint are taken as true for purposes of the demurrer, a demurrer does not admit the correctness of a plaintiff's conclusions of law. Arlington Yellow Cab Co. v. Transp., Inc., 207 Va. 313, 318-19 (1996).

² "Verified" by Facebook to mean that Senator Dunnivant is an authentic public figure.

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“To survive a challenge by demurrer, a pleading must be made with ‘sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.’” Friends of the Rappahannock v. Caroline Cnty. Bd. Of Sup’rs, 286 Va. 38, 44 (2013). “In other words, despite the liberality of presentation which the court will indulge, the [Complaint] must state a cause of action.” Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 558 (2011) (quoting Hubbard v. Dresser, Inc., 271 Va. 117, 122-23 (2006)).

Mr. Davison has Pled Sufficient Facts in his Petition for Writ of Mandamus

In the case at bar, proceedings for the enforcement of rights and privileges conferred under FOIA were properly commenced by way of Mr. Davison’s Petition. As required, Mr. Davison’s Petition has alleged, with reasonable specificity, the circumstances in which his right to access certain records was denied. Specifically, Mr. Davison has alleged that (i) Senator Dunnivant is a public body subject to FOIA, (ii) the records he had requested are public records subject to FOIA, and (iii) Senator Dunnivant has violated the provisions of FOIA by failing to timely make a one of the four required responses and by failing to produce such requested records.

Taking the facts pled in Mr. Davison’s Petition as true, without admitting the truth of such allegations, the Court finds that Mr. Davison has pled facts sufficient to survive demurrer. Therefore, the Court reverses its previous ruling in its June 14, 2017 Opinion Letter, and accordingly, overrules Senator Dunnivant’s Demurrer and denies Senator Dunnivant’s Motion to Dismiss.

The Court Denies Mr. Davison’s Petition for Writ of Mandamus

Virginia Freedom of Information Act

The Virginia Freedom of Information Act serves to facilitate openness and transparency in the administration of government. See Va. Code § 2.2-3700. The intention and purpose of FOIA is to ensure that the people of the Commonwealth have ready access to public records in the custody of a public body, or its officers and employees, wherein the business of the people is being conducted. Id.

“The provisions of [FOIA] shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” Va. Code § 2.2-3700. Any exemption from public access to records, as provided in FOIA, shall be narrowly construed and such records shall not be withheld unless there is a specific exemption. Id. However, FOIA “shall not be construed to discourage the free

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discussion by government officials or employees of public matters with the citizens of the Commonwealth.” Id.

Petition for Writ of Mandamus

Virginia Code Section 2.2-3713(A) expressly authorizes any person, who has been denied the rights and privileges conferred by FOIA, “to enforce such rights and privileges by filing a petition for mandamus.” Such petition may be filed in the general district court or the circuit court of the jurisdiction in which the alleged FOIA violation occurred. Id.; Cartwright v. Commonwealth Transp. Comm’r, 270 Va. 58, 64 (2005).

“A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein.” Va. Code § 2.2-3713(D). If a court determines that the denial is a violation of FOIA, then “the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys’ fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust.” Id.

Once an action is commenced to enforce the provisions of FOIA, “the public body shall bear the burden of proof to establish an exclusion by a preponderance of the evidence. No court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies.” Va. Code § 2.2-3713(E). Further, “[a]ny failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.” Id.

Senator Dunnavant is a Public Body Under FOIA

Senator Dunnavant has maintained that she is not required to respond to a FOIA request because she is not a public body for purposes of FOIA. However, at the hearing, Senator Dunnavant conceded that she may be an agent of the Senate of Virginia.

The “Definitions” provision of FOIA, Virginia Code Section 2.2-3701, defines a “public body” as:

[A]ny legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations,

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corporations or agencies in the Commonwealth supported wholly or principally by public funds.

Further, the “public records” definition sets forth the various writings and recordings that encompass “public records” within the meaning of FOIA. Va. Code § 2.2-3701. A record is subject to FOIA if it is “prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” *Id.* (emphasis added).

The Court is cognizant of the fact that the definition of “public body” in Virginia Code Section 2.2-3701 does not contain “officers” or “employees” in its language. *However*, the Policy provision of FOIA provides that the very enactment of FOIA is to ensure that the people of the Commonwealth have ready access to “public records in the custody of a public body or its officers and employees.” Va. Code § 2.2-3700. And moreover, the Policy provision of FOIA states: “[u]nless a public body or its officers or employees specifically elect to exercise an exemption provided by [FOIA],... [then] all public records shall be available for inspection and copying upon request.” The Court finds it particularly noteworthy that the legislature chose to include such statutory language in the Policy provision of FOIA. The inclusion of the words “or its officers or employees” indicates that the legislature intended for FOIA requests to require responsive action from a public body, or its officers or employees.

The Court further notes that Virginia Code Section 2.2-3705.7(6) depicts what records the “Members of the General Assembly” do not have to disclose. Conversely, it can be argued that “Members of the General Assembly” shall disclose “public records.”

Accordingly, given the Court’s duty to construe the language of FOIA liberally, the Court finds that FOIA requests apply to a public body, its officers, employees, and agents. Senator Dunnivant, as a member and agent of the General Assembly, is a public body for the purposes of this Chapter. Therefore, a FOIA request may properly be directed to Senator Dunnivant.

Therefore, the Court dismisses Senator Dunnivant’s arguments that she is a misjoined party to this action because she is not a public body and Mr. Davison’s failure to join the Virginia Senator as a necessary public body.

Senator Dunnivant is the Custodian of the Requested Records

The Court finds that Senator Dunnivant is the custodian of the Facebook posts that Mr. Davison has requested. Susan Clarke Schaar, Clerk of the Senate of Virginia, testified that she is the FOIA Officer for the Senate of Virginia and that one of her responsibilities is to maintain

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certain public records.³ Ms. Schaar also testified that she is not the custodian of the Facebook records for any of the senators, including Senator Dunnivant. Additionally, both parties stipulated to the fact that Ms. Schaar has neither the ability to log on to Senator Dunnivant's Facebook page nor gain access to Senator Dunnivant's Facebook page.

Senator Dunnivant Failed to Provide the Records or Timely Make One of Four Statutorily Required Responses within Five Working Days Pursuant to FOIA

Mr. Davison asserts that Senator Dunnivant did not timely respond to his FOIA request in accordance with the time limits set forth in Virginia Code Section 2.2-3704. "A request for records need not make reference to FOIA in order to invoke its provisions or to impose the time limits for a response by the public body." Va. Code § 2.2-3704(B). Any public body that is subject to FOIA and is the custodian of the requested records shall, within five working days of receiving a request, either provide the requested records to the requester or make one of the four statutory required responses. *Id.* Virginia Code Section 2.2-3704(E) provides that the "[f]ailure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter."

Mr. Davison requested information from Senator Dunnivant on January 17, 2017. Senator Dunnivant was obligated to either produce the requested records or make one of four statutorily required responses to Mr. Davison within five working days. However, Senator Dunnivant did not respond until February 3, 2017. Thus, the Court finds that Senator Dunnivant failed to timely respond to Mr. Davison's request for records.

The testimony of Senator Dunnivant and the emails introduced into evidence establish that Senator Dunnivant, acting in accordance with what she believed to be the proper protocol, forwarded Mr. Davison's request to the FOIA Officer for the Senate of Virginia. Senator Dunnivant conceded that, having developed a better understanding of FOIA and its provisions since the commencement of this action, she did, in fact, fail to timely respond to Mr. Davison's request.

However, upon considering Senator Dunnivant's testimony, Mr. Davison conceded that Senator Dunnivant's violation of FOIA was not willful and knowing, and accordingly, withdrew his request that the Court find Senator Dunnivant to be in violation of FOIA. (Virginia Code Section 2.2-3714)

³ The Court notes, however, that the fact that Ms. Schaar does not have in her possession certain records does not therefore mean that such records are not public records and thus not subject to FOIA; rather, it merely means that she would not be the custodian of such records.

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Furthermore, while the Court finds that Senator Dunnivant's failure to timely respond to Mr. Davison constitutes a violation of FOIA, the Court finds that such violation is *de minimis*.

The Requested Facebook Records Are Not Public Records Under FOIA

Mr. Davison argues that communications between constituents and Senator Dunnivant on her Facebook page are public records subject to production under FOIA. Conversely, Senator Dunnivant asserts that the Facebook records requested by Mr. Davison are not public records subject to production under FOIA. This presents the Court with a novel legal issue regarding whether posts on a social media page maintained by a public body, or its employees, officers, or agents are considered "public records" under FOIA and thus subject to disclosure.

Only those records that are "prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business" are subject to production. Va. Code § 2.2-3701. Records that are not prepared for, or used in, the transaction of public business are not public records. *See id.* FOIA does not expressly define "transaction of public business." However, in 2013, the Attorney General issued an official advisory opinion noting that it is the content of the requested record that establishes whether such record qualifies as the transaction of public business and, thus, constitutes a public record. 2013 Op. Va. Att'y Gen. 81, *3. The Circuit Court of Loudoun County found that there is no clear guidance given to public officials or public bodies as to the appropriate response regarding requests for records that are not actually public records. *Burton v. Mann*, 74 Va. Cir. 471, 473 (2008). The court held that "[r]ecords that are subject to disclosure are those records, regardless of the form in which they were created, obtained, or retained, that have been prepared or owned by, or in the possession of, a public body or its officers, employees, or agents in the transaction of public business." *Id.* (internal citations removed). Likewise, there is an important distinction to be made between matters of public business and matters of public interest. *Id.* at 474. Facebook may contain public records.

Senator Dunnivant created her Facebook page when she was campaigning for the 12th District seat for the Senate of Virginia. Upon winning the election for the 12th District seat, Senator Dunnivant has continued to employ that Facebook page. Senator Dunnivant's Facebook page will not revert to the 12th District when she leaves her office, and she will retain control of such Facebook page. Furthermore, Senator Dunnivant does not employ her Facebook page to solicit participation from her constituents for the purpose of influencing or informing her decisions in transacting public business. Senator Dunnivant testified that she sometimes uses her Facebook page to keep her constituents apprised of the goings-on during session days, and likewise, she sometimes uses her Facebook page to discuss matters of a more personal nature.

The Court finds that certain Facebook records may be subject to disclosure under FOIA. However, the records sought in the case at bar are not public records under FOIA, and thus not

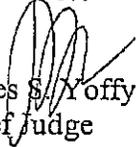
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subject to FOIA, because the Facebook posts and comments were neither prepared nor used in the transaction of public business. While the Facebook posts demonstrate public interest in the First Amendment and free speech issues, they are not public records.

Therefore, the Court denies Mr. Davison's Petition for Writ of Mandamus. Senator Dunnington will not be required to produce the requested information. Mr. Davison concedes that Senator Dunnington did not willfully and knowingly violate Virginia Code Section 2.2-3714. The Court further finds that Senator Dunnington's failure to respond to Mr. Davison's FOIA request within statutory time period was "*de minimis*". The Court denies Mr. Davison's request for his costs in bringing this action.

Mr. Tunner and Mr. Matheson are instructed to prepare the order in accordance with the Court's ruling and forward it to Mr. Davison's for his signature within 10 days of this Opinion Letter.

Very truly yours,


James S. Yoffy
Chief Judge