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COMMENTS BEFORE THE VIRGINIA FREEDOM OF INFORMATION ACT ADVISORY COUNCIL, DECEMBER 3, 2024

I, Theodore C. Marcus, Esq. (*Not Admitted in Virginia), hereby submit these comments to the Virginia Freedom of Information Act (Va. Code §§ 2.2-3700 et seq.; "VFOIA") Advisory Council ("Council"). The comments specifically describe events associated with my personal experience and [unsuccessful] efforts in attempting to utilize the mandates of the VFOIA, specifically Va. Code § 2.2-3713's enforcement provisions, to achieve the good governance results the VFOIA contemplates. It is hoped these comments, and the underlying experience(s) described, will be put to good use by this Council swiftly and justly.

I. Background – Why VFOIA Was Invoked: the Riverbend High School Swim Program Debacle, Winter 2023-24.

On November 27, 2023, Spotsylvania County's Riverbend High School was a few days away from its first Winter season meet. That evening, its Head Coach, Rachael Adriani, as was her custom, announced the names of several co-captains, with roles and responsibilities for their respective portfolios ("Bear Pods", named after the several bear species, so named in alignment with Riverbend's mascot). One of the named co-captain's parents, Mrs. H., reacted very negatively to those choices, the Bear Pods model, and the aspirations underlying the model. Mrs. H. immediately began, orally and in writing, to assail the model and proceeded to undo it in relentless fashion.[1]

The pressure Mrs. H. applied to the coaches, the student-athletes, other parents, the administrators at Riverbend -- including the Athletic Director and the Principal (now ex-Principal, Xavier Downs – terminated in association with the events described here)[2], and even the Superintendent of the SCPS Division, Mark Taylor (also terminated in the

[1] The account of this matter is well-documented in the public record via several articles. Those articles, though not re-produced here as exhibits, can be found at: (1) Emails Show Riverbend Parent Involving School Board (substack.com); (1) Investigation, Legal Fees in Spotsylvania - by Adele Uphaus (substack.com); (1) FOIA Requests Ignored in Spotsylvania - by Adele Uphaus (substack.com); (1) Lisa Phelps, Mark Taylor Failed to Fully Comply with FOIA Request (substack.com); (1) FOIA Requests Ignored in Spotsylvania - by Adele Uphaus (substack.com); (1) Judge Dismisses Assault Case Brought by Former Riverbend Principal Xavier Downs (substack.com); (1) Text Messages Reveal Change in Tone about Mentoring (substack.com); (1) Riverbend Swim Team Investigation Status Unclear (substack.com); (1) Spotsy Wire Issued 'Cease and Desist' Order (substack.com); (1) Parents-Coaches-Admin Dispute Comes Poolside; Team in Disarray (substack.com); (1) COMMENTARY: Parents' Rights, Students Wronged, and a Community Searching for a Way Forward (substack.com).

[2] https://www.fredericksburgfreepress.com/2024/03/04/spotsylvania-school-board-terminates-riverbend-principal-downs/

context of these events)[3], and several members of his staff to overturn what she labeled a "social equity program for overweight kids" was successful in causing great chaos around the Program, chaos that, in short order, unraveled it entirely.

One coach, this commenter, resigned due to the unchecked and undue pressure Mrs. H.'s campaign created on him professionally (as a senior official and attorney serving in the Federal government) and personally (as a husband, father of three children, and respected member of the Spotsylvania community). The other coach, the long-time RHS Program leader and a central and respected figure in the Rappahannock area swim community as well as a wife and mother of two small children, was involuntarily placed on leave for approximately a month by Mr. Taylor for doing nothing more than defending her Program and choices of leadership. The Principal, at a December 20, 2023 meeting called for the parents of the kids in the Program to get answers, advocate for their coaches, and to stabilize the Program around their children, lost his composure at the meeting and, by almost all eye-witness accounts (and corroborated by a cell phone video), charged the Head Coach's husband, challenging him to a fight.[4]

Students were dismayed and left with an abrupt, confusing, hurtful and frustrating interruption to what had been a very promising swim season including months of pre-season effort and activity. Seniors, including those with post-secondary aspirations with swim, were left scrambling to secure their goals. The structure of the Program that provided order to practices, goal-setting for individual and team seasonal and post-seasonal targets, and peace of mind for the student-athletes and their families was shredded. Other adults without any, or with very little, connection to the student-athletes and their families were hurriedly pressed into service as "coaches" to salvage the season.

Rushed, undisciplined "investigations" were initiated under unclear mandates, unclear instructions, and unclear methods, procedures, protocols and controls, and carried out by unseasoned, fretting Division personnel who only made matters even worse. Goodwill, hopes for the season and its promise of a cohesive, competent, mutually supportive and mutually sacrificing "Team", success in the water and the essential quietude that 45 kids (and their families) needed for that success -- were dashed.

This shouldn't have happened. Basic checks and balances, escalation processes, presumptions, chain of command, years of service, realities of vetting, and simple common sense should have produced far different, and vastly more beneficial outcomes. All the responsible athletic/administrative governance and system assurance mechanisms collapsed in the face of a single parent's pressure campaign as though they

[3] https://wjla.com/news/local/spotsylvania-county-public-schools-superintendent-fired-mark-taylor-controversy-school-board-budget-students-parents-teachers-libraries-education-experience; https://www.fox5dc.com/news/former-spotsylvania-county-superintendent-claims-he-was-fired-holding-christian-book-fair-lawsuit.

[4] https://www.facebook.com/SpotsyParentForPublicEducation/videos/update-at-bottom-of-this-textxavier-downs-who-is-the-principal-of-riverbend-high/3731091580548512/.

didn't exist at all or, worse, were somehow her personal assets. The events, including their sequence, were so bizarre and troubling that this Petitioner was compelled to seek explanation beyond what could easily be seen or assessed. Petitioner immediately resorted to the VFOIA to determine the real roots of what happened (and was happening) and, thus, identify a path to suitable remedial action including, possibly, restoring the Program to its legitimate *status quo*.

That information gathering began on December 23, 2023, *i.e.*, two days after the disastrous Swim Program parents meeting at Riverbend. The returns on those initial VFOIA requests shed some of the critical light, including this: [then] SCPS Chairperson, Lisa Phelps, a politically aligned, close friend of Mrs. H.'s, was personally involved, and actually co-directing the traffic associated with Mrs. H's efforts. Emails and text messages were produced (by others) showing Mrs. Phelps' involvement, her motives and her directions to Taylor and other Division top-end staff to serve her and Mrs. H.'s interests and desired outcomes.[5]

Further productions over the ensuing months bolstered that conclusion substantially. Still, despite the many records produced thus far (and thorough press reporting analyzing those records) that show the misfeasance, nonfeasance or doctrinal capture of so many top administrators, including Mrs. Phelps and other Board leaders (Mrs. April Gillespie was also corralled into the effort), the main sources of critical info that the public needs to assess the conduct of its servants in this matter -- *personal device text messages and personal emails between and among Mrs. Phelps, Ms. Gillespie, Mrs. H., the athletic Director of RHS (Jesse Lohr), Mr. Taylor, and Mr. Downs* -- concerning the RHS Swim Program and other programs experiencing similar dynamics involving Mrs. H. -- have not been produced despite months of steady, respectful and costly efforts by Petitioner through VFOIA. The cause appears solely to be the contumacy of the SCPS Respondents, the institution's internal intrigues, and its apparent organization-wide desire to escape appropriate scrutiny.

Another critical thread of accountability and transparency, however, was introduced by the SCPS in the form of an "independent third-party investigation". The stated goal and intent of this investigation was to shed light on what happened at RHS Swim. Its origins were murky, and it was somewhat hastily put together, but the investigation appears to have begun at some point in January 2024. It began with Ms. Amy Williams, SCPS's Human Resources chief,[6] assisted in some fashion at some later

[5] The record to date tends to show a mixed set of objectives. First, it is clear that Mrs. H. wanted a different leadership choice, one that centered on her daughter, a senior on the team at that time who was applying to one of the nation's military academies and needed leadership material for her application. Second, it is also clear that both Mrs. H. and SCPS Board Chairwoman Phelps – who consider themselves staunchly "anti-woke" -- viewed the Swim Program leadership model as some form of inclusiveness or "equity" experiment and, thus, anathema to their political worldview.

[6] This contention is based on a letter, dated January 28, 2024, from Ms. Williams to "Distribution." It is unclear if "Distribution" included all SCPS staff and Board members, or some subset thereof. The letter stated, among other things, the following: "Your responsibility is to preserve all Relevant Information in

point by counsel at the McGuire Woods law firm who apparently guided Ms. Williams through the gathering of documents and interviews of witnesses, which she conducted herself. This set-up, apparently, was deemed unfavorable after a few weeks. And, eventually, the SCPS relieved both Ms. Williams ***and*** McGuire Woods of their roles in favor of the retained services of Ms. Deb Yeng Collins, an attorney out of Norfolk, Virginia, who was brought in to conduct, as SCPS' accounting department coded it, a "Division Investigation."

Over the course of several weeks in the spring/summer of 2024, Ms. Yeng Collins -- as part of her "Division Investigation", interviewed several witnesses, including parents (some of whom were also SCPS employees) of student-athletes, their coaches and others (presumably the RHS Athletic Director, Jesse Lohr, and perhaps the former principal, former Superintendent, Board Members, etc. -- though this is not known by this commenter). Ms. Yeng Collins also reviewed voluminous records, including e-records (*e.g.*, texts and emails) associated with her "Division Investigation".[7]

It appears that, in the interviews, Ms. Yeng Collins made no affirmative effort to ensure that the witnesses understood the nature or parameters of her representation of the SCPS and any privileges that might apply to her activities. It does not appear that Ms. Yeng Collins gave any instructions to the interviewees, for example, about the confidentiality of their discussions with Ms. Yeng Collins or the need to maintain such confidentiality going forward, including with respect to whether the interviewees were permitted to discuss the proceedings with others (which many of the witnesses certainly did). And, Ms. Yeng Collins, apparently, took no steps to disabuse the witnesses of the notion that their cooperation might not (or, as it turns out, would not) lead to a public airing of the facts through some appropriate form, which was the sole motivation for several witnesses to sit for interviews in the first place.

Instead, it appears that Ms. Yeng Collins and SCPS caused, or allowed, the interviewees to believe their cooperation was part of an appropriate and civically responsible effort by SCPS to provide accountability, starting with useful, comprehensive

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any location in which it exists, including, but not limited to, electronic communications (such as emails, *text messages, instant messages, online chats, communications sent via messaging applications including but not limited to WhatsApp*, Snapchat, iMessage, Facebook Messenger, Twitter, and Instagram, voicemail messages, and audio or video recordings). It also includes Relevant Information stored as electronic documents and data on your laptop and/or desktop, the cloud, shared intranet sites, external media (such as thumb drives or personal backup drives), *personal laptops*, or other *personal devices (such as cellular telephones and tablets)*, as well as Relevant Information stored as hard copy or paper documents or files." (emphases added).

[7] Some of these records may include material requested by this commenter in VFOIA requests but not given to him, e.g., the Phelps and Downs text and personal email records, though only the SCPS's officials know for certain and have not disclosed that to this commenter.

transparency, about the RHS Swim Program matter.[8] And, benefitting from those impressions, Ms. Yeng Collins procured their evidence and then supplied the material (in yet unknown form) to her client, SCPS. ***But, SCPS has refused to produce the presumed report pursuant to VFOIA*** and has given duplicitous answers about whether such a 'report' (if that's the right term) actually exists or, if it doesn't technically exist, SCPS has refused to explain what form Ms. Yeng Collins' "Division Investigation" was presented to them so that VFOIA can effectively be utilized to gain appropriate transparent access to that information or its contents (with any *appropriate* redactions).

Worse, it appears that the SCPS changed, or has attempted to change, the character of Ms. Yeng Collins' work midstream, *i.e.*, by re-classifying it from a "Division Investigation" (read: fact-finding investigation) by an independent third-party, to ordinary "Legal Services". That is, after running up a bill with Ms. Yeng Collins of roughly $81,587[9] from some point in February or March to late July/early August – all associated

[8] On this point, the following statement from Mr. Taylor to new-Chairperson Lorita Daniels on January 27, 2024, is instructive:

> Amy Williams and I are working on this set of issues. We are working closely with Daniel Masakayan with McGuire Woods, our HR attorney. I have also gotten input from Kelly Guempel, Allen Hicks and others. Ms. Williams is currently leading the investigation into concerns raised about the swim coaches and Mr. Downs, and she has gotten input from parents and additional SCPS staff who have been directly involved in swim team concerns and events.
> A third party investigation may be advisable, if only *to enhance public confidence* in our resolution of these concerns. Frankly, I had wanted to discuss with the Board whether a 3rd party investigator should be brought in. I don't want any Board member thinking that I am just taking direct orders from Ms. Phelps. I am entirely aware that you are the Board Chair, Dr. Daniels.
> Amy Williams first suggested a third party investigation due to the complexity of the concerns, the volume of information to be reviewed, *and the public's perception*. Many people have weighed in on this issue and media and social media have contributed to the complexity of the investigation and, perhaps, the *need for an independent third party Investigator*."

Email Memorandum from M. Taylor, SCPS Superintendent, to L. Daniels, SCPS Board Chair, January 27, 2024.

[9] The figures are derived from accessing SCPS' "Open Checkbook", a supposed transparency and accountability device offered at its website. The site shows payments (rounded up or down) of $10,200 around May 24, 2024, and $28,441 on June 21, 2024. Thereafter, there was a long pause in payments despite, presumably, regular presentation of invoices as per Ms. Yeng Collins' retainer agreement with SCPS, before payments resumed in August: $25,531 on August 9, 2024, and $17,415 on August 15, 2024. It is believed that every dollar shown is associated with the RHS Swim Program debacle and related matters. This $81,587, however, does not represent the full sum of expenditures with that matter, as there are almost certainly billed amounts from multiple other law firms associated with the effort including, but not limited to, the McGuire Woods firm, the Sands Anderson firm, and the Williams Mullen firm. All told, based on review of the Open Checkbooks account entries, the SCPS has spent some $500,000 in legal fees in 2024 as of August -- Petitioner does not know the exact figures from that amount (or later tallies) associated with the RHS Swim Program matter at this time, though SCPS clearly does. The amount of

with the "Division Investigation" as it was originally framed – the SCPS *paused payments in mid-summer to Ms. Yeng Collins* and then, after re-setting the accounting and description to "Legal Services", decided then to resume payments to her. SCPS has provided no information or explanation about the re-classification, the pause in payments, or the underlying rationale for it, thus fortifying the impression that Ms. Yeng Collins was forced to go along with the change in retention purposes – which is material to VFOIA – in order to paid for services already provided. And, when Ms. Yeng Collins' report (or whatever stands in its place that represents or contains her findings – not advice, but investigative findings) was requested through VFOIA both by the press and by this commenter (separately), the SCPS has simply refused to provide it, loosely claiming privilege to the extent such material exists, which SCPS apparently also will not confirm or sufficiently explain. And, of course, SCPS has not explained the payments pause and accounting 'adjustment' from "Division Investigation" to "Legal Services" associated with Ms. Yeng Collins' work.

II. A Debacle in the Courts – VFOIA Mandamus Enforcement

This commenter, faced with a stonewall at the SCPS, petitioned the courts (General District Court, Spotsylvania County, Judge Jane Reynolds) as the only option to get the final factual accounting promised to Virginia citizens through VFOIA's transparency mandates.

Because it was clear the SCPS Respondents were not going to comply with the VFOIA with respect to the public records in question, this commenter – appropriately – sought relief in Court as per the enforcement provisions of the VFOIA. Specifically, Section 2.2-3713 states as follows:

> C. *Notwithstanding the provisions of § 8.01-644*, the petition for mandamus or injunction *shall be heard within seven days* of the date when the same is made, provided the *party against whom the petition is brought has received a copy of the petition at least three working days prior to filing*. However, if the petition or the affidavit supporting the petition for mandamus or injunction alleges violations of the open meetings requirements of this chapter, *the three-day notice* to the party against whom the petition is brought shall not be required. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

Va. Code § 2.2-3713(C) (emphases added).

money spent on this matter, which is clearly north of $100,000 and likely close to $200,000 or more, speaks to the matter's significance and relevance to the public without having to say more.

In open court, this commenter carefully explained and described the steps taken to provide "a copy of the Petition" to the Respondents, including via email to their Counsel, Micah Schwartz (which occurred the requisite three working days before filing and was acknowledged by Mr. Schwartz via email) and through hand-delivery to the SCPS, including verifying receipt, via email, of the Petition both via Mr. Schwartz and the SCPS VFOIA Compliance Officer, Dr. Dennis Martin. By recollection, counsel for the SCPS Respondents affirmed all of those facts or, in any event, did not deny them.[10] This commenter also included in those submissions to Respondents an appropriate affidavit, on Form DC-495 (of the General District Court), which complied with all the affidavit requirements under VFOIA for mandamus petitions.[11] Petitioner also walked the Court through the Affidavit completion steps Petitioner took to comply with § 2.2-3713(C).

However, SCPS Respondents' counsel contended that this commenter's "service" of the Petition to the Respondents ***was defective*** in that (a) Petitioner "served" it himself, which counsel alleged was improper "service" because a party cannot "serve process" under Virginia's civil code – "service" must be via private process server or the County Sheriff; (b) "service" cannot be effectuated by electronic mail under the Code provisions cited by counsel (not VFOIA's provisions); and (c) "service" by hand to the SCPS front desk clerk, despite acknowledgement of receipt by the SCPS VFOIA Officer (and even coupled with the e-mailing of the Petition to SCPS Counsel, as described) was not sufficient to cure the "service defects" alleged.

Judge Reynolds not only agreed with Respondents' arguments about "defective service", but she advised that she had "skimmed the Petition" earlier in the morning (or, in any event, prior to the hearing) and, after indicating that "it was long", had reached her own view that it could not proceed, i.e., due to the modes and manners of "service", *etc*. Ultimately, the Court determined that the hearing required by the VFOIA could not go forward due to the Respondents having not been properly "served" and proceeded to advise Petitioner that "service" would need to be cured, including through "service" via Sheriff or private process server, and that the Affidavit would also need to be revised to conform to the requirements of law.[12]

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[10] All of the factual recitation herein is based on this commenter's recollections. This commenter does NOT have a copy of any transcript of the proceedings. Indeed, although a transcript was made, Petitioner has learned, after the fact, that the transcription was done at the request of, and for the sole benefit of, the Respondents. Petitioner has requested the Clerk of the General District Court to investigate the matter on the grounds of fundamental unfairness, lack of transparency, and abuse of the proceedings. No response has been made to that request.

[11] The affidavit was specifically designed to comply with VFOIA, which is noted on the face of the document ("Va. Code §§ 2.2-3713, 2.2-3816"). The Form DC-495 is entitled: "Petition for Injunction or Mandamus—Freedom of Information Act and Affidavit for Good Cause or Protection of Social Security Numbers Act". The Affidavit was duly executed in all its parts and affixed with the Petition as part of Petitioner's filing and submission to the Court and Respondents, as Petitioner advised the Court.

[12] On this point, the Court actually remonstrated with Petitioner that he needed to "write this down" (*i.e.*, the incorrect code cites for service and affidavits for good cause) and be certain to correct the defects. It should be noted the Court appeared to apply a heightened standard for conformance/compliance to

Then, the Court announced its intent to "continue" the hearing to a future date, and proceeded to a discussion of the parties' respective schedules and the court's own calendar. When the Court turned to this commenter, I asked the Court whether the Court was *requiring* a continuance, or whether I would be permitted to dismiss my Petition without prejudice, *i.e*., to preserve my *seven-day hearing rights* as articulated in VFOIA for enforcement. The Court looked bemused, shaking her head as if to suggest I was possibly making a misstep, but I made clear that I was looking to preserve the expedited hearing in section 2.2-3713 and didn't want to waive it by *agreeing* to some movable date in the relatively distant future. I asked, and was granted, dismissal of my Petition, with the Court advising me to cure the "service" and affidavit defects prior to any re-filing of the Petition for Mandamus.

Subsequently, this commenter moved the Court to reconsider its ruling. That motion was denied. This commenter appealed, but was compelled to withdraw the appeal as being 'time-barred' – i.e., I had 10 days to note my appeal and I missed that cut-off by a day (or two) due to the timing of the motion for reconsideration (the Judge left town after her ruling and didn't return for several days). Rather than argue to the Circuit Court on appeal that the time for the Court to reconsider the motion should have tolled the time for appeal, this commenter 'gave up the ghost' and, instead, decided the correct path for Justice in this matter lay in the present course, as described more fully now.

III. How This Was *Supposed* to Go . . .

A. "The Legal Piece" -- Mandamus or Injunction Petitions by "Notice", not "Service"

The Court was wrong in (i) determining that "service of process" under the ordinary requirements of Virginia civil litigation and civil procedure was required for a Petition under Va. Code 2.2-3713(C), and (ii) for deciding, based on that erroneous conclusion, that jurisdiction over the Respondents and the matter was lacking.

The plain language of the VFOIA mandamus provision eschews the use of "service" in favor of the phrases "received a copy", i.e., of the Petition, and "notice". By those choices, it is abundantly clear that the legislative intent behind the enforcement mechanism for VFOIA is NOT the same as what might apply in other contexts not germane to VFOIA enforcement. For example, the plain meaning of the term "notwithstanding" is as follows:

Petitioner because, as the Court repeatedly observed, Petitioner "is a lawyer", despite Petitioner stating in the Petition and in open Court that Petitioner is just a citizen proceeding 'pro se' and not licensed in Virginia and not an expert either in VFOIA or Virginia law more generally. Of course, VFOIA enforcement shouldn't be this hard; after all, it is for ordinary citizens without law degrees to use to seek their rights to open government.

> without being prevented by (something) : despite — used to say that something happens or is true even though there is something that might prevent it from happening or being true.

Brittanica [Online] Dictionary, https://www.britannica.com/dictionary/notwithstanding# In other words, proposition 'x' is true even though proposition 'y' would otherwise be true but for the specific proposition 'x.'

Following that, § 2.2-3713(C) connects "notwithstanding" to Va. Code § 8.01-644. In other words, § 2.2-3713 is to be found "true" or is "to happen despite" what might otherwise be the state of the law, i.e., via application of Va. Code § 8.01-644. The latter provision states:

> § 8.01-644. Application for mandamus or prohibition.
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> Except as provided in § 2.2-3713, application for a writ of mandamus or a writ of prohibition shall be on petition verified by oath, after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application a reasonable time before such application is made.

Viewing both Va. Code § 2.2-3713 and 8.01-644 together (as one must, especially given that each refers to the other!), one ***must*** conclude that the requirements for mandamus petitions in the ordinary civil context – 8.01-644 – do not apply in the VFOIA context and that, instead, ***only*** what is written in 2.2-3713 governs a petitioner's VFOIA enforcement action. This is not merely the implied will of the legislature, but is its express will by force of language in ***both*** provisions.[13]

The Virginia Supreme Court, in *Cartright v. Commonwealth*, describes how VFOIA Petitions ***are supposed to work***, and makes clear that mandamus, for these purposes, is not supposed to be a minefield for petitioners to be exploited by wily counsel and their scofflaw respondents, and ignored by ill-advised judges who "skim" thoroughly

[13] This is consistent, of course, with the legislative history on the underlying house and senate bills that form 2.2-3713. *See* Rights and Remedies Subcommittee Report, VFOIA Advisory Council Meeting Summary, July 22, 2010 ("The Subcommittee next discussed HB 976/SB 147 concerning when notice of a FOIA petition must be given to a public body. Staff advised that this issue was brought before the FOIA Council in 2009 by Prince William County Public Schools in response to a specific issue there. The FOIA Council had recommended language to resolve the issue of when notice is to be given. However, during the General Assembly Session, Prince William County Public Schools objected to the language. As a result, both bills were again sent to the FOIA Council. The difference between the two bills was that in SB 147 notice was to be served on a public body, while in HB 976 notice was to be received by the public body. Mr. Wiley noted that the use of the word "served" means by the sheriff or other process server and that unnecessarily delays the process. Mr. Wiley suggested that notice be given to the public body, but that the length of time before the FOIA suit may be filed be specified. By consensus the Subcommittee agreed to recommend the following language. "Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made provided the party against whom the writ is brought has received a copy of the petition at least three working days prior to filing.")

crafted and appropriately framed Petitions hoping, apparently, to force VFOIA enforcement into more traditional modes of resolution, including denial of the seven-day hearing right:

> The intent of the General Assembly in enacting the FOIA *is clearly expressed in its provisions*. As pertinent here, the General Assembly's intent is to 'ensure[ ] the people of the Commonwealth ready access to records in the custody of a public body or its officers and employees' so as 'to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.' Code § 2.2-3700(B). To effectuate that intent, the General Assembly has expressly provided that the provisions of the FOIA are to be 'liberally construed.' *Id*.; *see also Beck v. Shelton*, 267 Va. 482, 487, 593 S.E.2d 195, 197 (2004); *City of Danville v. Laird*, 223 Va. 271, 276, 288 S.E.2d 429, 431 (1982).
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> Specific provisions of the FOIA foster *its salutary statutory scheme to provide freedom of information consistent with open government*. Code § 2.2-3713(A) expressly authorizes '[a]ny person . denied the rights and privileges conferred by this chapter . to enforce such rights and privileges by filing a petition for mandamus.' In addition, the statute further provides that the petition for mandamus may be filed in either the general district court or the circuit court of the jurisdiction in which the denial of the right or privilege under the FOIA is alleged to have occurred. *Id*. This is the only instance in which the general district courts are given concurrent jurisdiction with the circuit courts to hear mandamus proceedings. *See* Code § 16.1-77(6).
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> The statute further provides that '[t]he petition for mandamus . . . *shall be heard within seven days of the date when the same is made*.' Code § 2.2-3713(C). 'A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein.' Code § 2.2-3713(D). And if the court finds the denial to constitute a violation of the FOIA, 'the petitioner shall be entitled to recover reasonable costs 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*.
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> Finally, and perhaps most significantly, the statute provides that in such proceedings '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). This is contrary to the rule in common law mandamus proceedings which places the burden on the petitioner to prove the violation of a right or privilege and in which there is a presumption of

regularity in the conduct of government business. *See Legum v. Harris*, 205 Va. 99, 103, 135 S.E.2d 125, 128 (1964).[14]

Section 2.2-3713(C)'s express language, its legislative history, and relevant precedent make unmistakably clear VFOIA's citizen-centric character and the design of the General Assembly to give to the citizens of the Commonwealth a simple and streamlined way to enforce the transparency and open government requirements established by VFOIA by focusing on simply ensuring the "receipt" of "notice" of the Petition.[15]

Similarly, VFOIA's affidavit requirements are not, and are not intended to be, applications for federal top secret clearance. Va. Code § 2.2-3713(A) simply states that "[a]ny person . denied the rights and privileges conferred by [FOIA] may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause."[16] All requirements for the affidavit, accordingly, are met when the affiant "swear[s] that he believes it to be true."[17] These requirements certainly were met in this case.

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[14] *Cartright v. Commonwealth Transportation Board*, 270 Va. 58, 613 S.E.2d 449 (2005) (emphases added). As the Supreme Court of Virginia further observed: "The provisions of Code § 2.2-3713 *significantly distinguish the right to mandamus it provides from the common law right to mandamus*. By granting concurrent jurisdiction to the circuit and general district courts, expediting the proceedings, providing for an award of costs and attorneys' fees, and shifting the burden of proof to the public body, the General Assembly has evinced an intent to provide mandamus relief under Code § 2.2-3713(A) different from that of common law mandamus. These distinctions are entirely consistent with the *express purpose of the FOIA and manifestly facilitate access to appropriate governmental records*. Contrary to VDOT's contention, we are of opinion that the lack of any reference in this statute to the common law requirement that the petition prove a lack of adequate remedy at law evinces the intent of the General Assembly to eliminate that common law prerequisite to the issuance of a writ of mandamus. Such is clearly consistent with the salutary statutory scheme of the FOIA." *Id*. (emphases added). Here, the Court (and Respondents' counsel in putting forth improper argument that induced, or may have induced, error, it would appear) has improperly applied ex-VFOIA law standards, i.e., service and affidavits, where they do not belong, both expressly and impliedly. This is egregious error by the Court.

[15] Petitioner is not suggesting that there are not VFOIA petitioners in the Commonwealth who use process servers or Sheriffs to provide the "notice" § 2.2-3713(C) requires in its "received by" language. Presumably, there is nothing *wrong* with a given petitioner going that route, especially if concerned about attempting to provide notice through other means, or simply unable to ensure that notice other than through the aid of process servers and Sheriffs. Nonetheless, even in those situations, VFOIA is satisfied by proof of receipt three days ahead of filing, not the arcana of "service of process" proofs to haul respondents into court. That there are many VFOIA Mandamus petitions actively prosecuted in the Commonwealth is clear. *See, e.g.*, FOI_2017-10-31_petition_for_writ_of_mandamus.pdf (rcfp.org); 4.23.20-Notice-of-suit-to-VA-OAG.pdf (climatelitigationwatch.org); GetFile.cfm (virginia.gov); Pieron Petition for Writ (schillingshow.com); Kessler_FOIA_Lawsuit_(FINAL).pdf | DocDroid.

[16] *See Bragg v. Rappahannock Board of Supervisors* (2018).

[17] *Id*.

This commenter, in his VFOIA enforcement efforts, used the very form designed for the express purpose of satisfying the VFOIA's affidavit requirements under 2.2-3713(A). It was the very form provided in the General District Court's online directory and, in any event, the very form available with the Clerk's office for these purposes. Far from it constituting mistaken reliance by Petitioner on "legal advice" from the Clerk (another erroneous suggestion by Respondents' counsel that the Court eagerly embraced), it is actually *the* sufficient instrument to ensure the VFOIA requirements are met. To put it bluntly: the Form DC-495 *is the* affidavit, and no further document is needed in supplement to satisfy VFOIA's 2.2-3713(A)'s requirements.

In every way, this commenter met the requirements – and no Commonwealth citizen should have to do more – to have been able to go forward on October 15, 2024 with his Petition. But the doors of the Court were shut anyway.

2. The General District Court Likely – and Improperly – Relied on its "Benchbook" Instead of the Law in Granting Respondents' Special Appearance Challenge.

The Court's confidence in its position about "service" being required instead of "notice", as I argued and 2.2-3713 states, gave me pause. Not only did it raise questions that perhaps an improper *ex parte* contact between Respondents (through counsel, presumably) and the Court took place, but it defied what seemed to be the clear realities of Va. Code § 2.2-3713 (as discussed above, argued in Court and as reported in the Press after consultation with experts on the subject matter). This caused me to try to get to the bottom of these anomalies.

After further research, I learned that the 2023 edition (and editions going back to 2013 apparently, i.e., two years after the amendments to VFOIA that established the 3 + 7 day shot clock for notice and commencement of hearings, as discussed above) of the Judicial District Court Benchbook contains material, found at page 202, that ***utterly misstates § 2.2-3713's*** notice (not "service") requirements for initiating enforcement proceedings through mandamus or injunction.[18] Specifically, it reads:

> The Seven-Day Hearing Requirement. Section 2.2-3713.C requires that a hearing on a FOIA petition be held within seven days after filing, "provided the party against whom the petition is brought has received a copy of the petition at least three days prior to filing." The three-day notice requirement is not required if the petition alleges a violation of FOIA's open meetings requirements. This presumably is an effort by the General Assembly to promote settlement of FOIA conflicts, while providing for a quick hearing in the event an injunction is

[18] *See* https://www.vacourts.gov/static/courts/gd/resources/manuals/districtcourtbencbook.pdf

> needed. ***Providing a copy of a petition before filing is not a substitute for service of process after filing***."[19]

There is no reference given in the Benchbook for the italicized/bolded language and, in all candor, Petitioner has been unable to unearth any despite extensive research and further effort with officials at the Virginia Supreme Court who oversee the Judicial Benchbook's Committee and its publication.

Although a court's Benchbook is, presumably, not precedent[20] of any type for the rendering of a decision (and, in any event, the Court – perhaps deliberately -- did not cite it as support for its ruling on the "service" issue raised by both the Court and the Respondents' counsel), it seems inescapably clear that it was leveraged to deprive Petitioner of his day in court, i.e., as the General Assembly intended it under § 2.2-3713, and not as per the dictates of judges' calendars.[21]

III. Remedies Requested From *This* Body.

[19] *Id*. (emphasis added). Needless to say, and in light of the foregoing arguments, the Benchbook would appear to be dangerously in error and likely to place extraordinary burdens on VFOIA petitioners throughout the Commonwealth in deprivation of their rights and in contravention of the General Assembly's express intent.

[20] *See, e.g.*, Benchbook for U.S. District Court Judges, at https://www.govinfo.gov/content/pkg/GOVPUB-JU13-PURL-gpo36767/pdf/GOVPUB-JU13-PURL-gpo36767.pdf ("It is important to emphasize that while much of the material in the Benchbook comes from case law, federal rules, and statutes, the particulars of the procedures suggested here represent only the recommendations of the Benchbook Committee. The information provided is deemed to be accurate and valuable, but it is not intended to serve as legal authority and should not be cited as such. And because circuit law may vary, particularly with respect to procedures, judges should always familiarize themselves with the requirements of their circuit's law."). Petitioner did not see a similar label warning, as it were, for the 2023 Benchbook at issue here, but assumes Virginia law is consistent with federal law and that benchbooks are not legal precedent for anything.

[21] "[S]hall be heard", means "shall be heard". *See* Va. Code § 2.2-3713. This is the will of the General Assembly and further evidence of the legislative intent NOT to gum the works with the often undue labors and intricacies of "service of process" too often seen in ordinary civil litigation. (See, e.g., https://www.reddit.com/r/AskReddit/comments/p3wckq/process_servers_whats_the_most_bizarre_scenario/ ("Not a process server, but I do hire them. One of my clients had a girlfriend who had a mental breakdown and took off with their 5 year old. She'd been destabilizing for a few weeks and he'd already hired me to figure out his rights as far as custody and what not, and also to help figure out how to get this woman out of his house and into a facility. She got wind of it - we found out later her equally crazy mother snitched - and took off kid in tow. I got an emergency custody order from the court, but in order for it to go into effect she had to be served. Cue the world's best process server tracking this woman down all over the city. She had an open facebook account and kept checking in at different locations, so he basically drove all around town looking for her. She was switching between buses and ubers, and dragging that poor kid along with her the whole time.").

At pages 32-33 of the ***2012 Benchbook***, the first after the 2011 amendments at issue, contained the following (appropriate) language, in pertinent part:

> 8. The Virginia Freedom of Information Act (FOIA) (§ 2.2-3700 et seq.) may be enforced in the general district court or in circuit court. See §§ 16.1-77, -83, -106. Note that certain injunctive powers are given the general district court.
>
> a. Special time requirements apply to hearings on FOIA actions. Section 2.2-3713 mandates a hearing on a FOIA claim within seven (7) days if the party against whom the FOIA petition has received a copy of the petition at least three (3) working days prior to the filing of the petition.

This language would appear to be correct and consistent with the express language of section 2.2-3713. However, by the time of the 2013 Benchbook, the language had been changed to what appears there now (see above) in the 2023 Benchbook. Thus, something happened between 2012's publication and 2014's that clearly was the result of planned, intentional and likely discussed effort. Of course, an inquiry is needed to understand the scope and circumstances of that effort. If misconduct was involved, as seems possible, that misconduct requires appropriate correction. And, even if no "misconduct" was involved, the idea of the Benchbook overriding the legislative will should not be considered a small matter and, indeed, the Benchbook should be appropriately reviewed to determine if there are other similar maltreatments of law and the facts and circumstances associated with whatever is unearthed.

And, presently with respect to the instant VFOIA 2.2-3713 matter, please urgently consider and take the following steps:

1. **Issue a 'bulletin'** or similar document over the appropriate authorship and letterhead to distribution (all district court and circuit judges, their Benchbook Committee leadership and staff, general district court and circuit court clerks, the top administrative officials in the VA Supreme Court, and the key legislative stakeholders) that says, essentially:

   - there "appears to be a material discrepancy between the judicial benchbook guidance on VFOIA mandamus/injunction cases and the plain language and legislative history of section 2.2-3713 that is resulting in, or may result in, depriving litigants of the statute's intended operation;
   - the discrepancy, and its origins and impact, are under review by the appropriate General Assembly personnel, the Virginia FOIA Advisory subject matter experts and Judicial branch administrative personnel for appropriate remedial action; and
   - until further notice, judges and their courthouse staff are advised to disregard the general district court benchbook guidance stating or suggesting that service of process, either via private process server or the local Sheriff's

office, is required in order to secure personal jurisdiction over respondents in section 2.2-3713 enforcement cases."

2. **Establish an emergency committee** (if 'emergency' is too strong a word, then such other word that suggests the proper urgency) of judiciary oversight personnel from both the general assembly and the Virginia Supreme Court to review the facts, identify the scope of error and potential harm, and develop an appropriate remedy to ensure full compliance with, and understanding of, the law at all levels of the Judiciary.

3. **Notify the VFOIA Bar (or the entire Virginia Bar if appropriate), as well as members of the Press** of the ongoing review, Bulletin and related facts/issues to ensure appropriate public awareness and that pending or future cases are properly litigated under the statute's process requirements, not the courts' ordinary process requirements.

Conclusion

I have done what/all I can do to assist the process here. I am now asking that you allow me to hand this over to this body to take from here. Faith in government is the "tie that binds" us as citizens. Nothing else has the same effect in ensuring and assuring the federalist system established by the Framers.

Please take action to fix the problems I have placed before you. This matter is, essentially, non-justiciable (the judges know what their benchbook says but they'll never say they're using it to override statutory requirements in clear violation of separation of powers, of judicial ethics, and faithful stewardship of the law). Too many district courts have the poisoned well of that benchbook for responsible officials to allow them to just 'use their best judgments' to ignore its misstatement(s?) of law. Indeed, some probably believe fully that service of process is required for every civil case, including VFOIA enforcement.

Practitioners naturally think they have to follow what the judges require and, in any event, they're so used to traditional means for initiating civil cases that they assume service of process is required anyway. So lore, myth, legend and habits combine to deprive citizens of the VFOIA mechanism to which they are entitled, and with respect to which they have at least some chance at ensuring honest and transparent government of their communities.

It's a total, total mess.

Respectfully submitted,

/s/

Theodore C. Marcus, Esq. (Pro Se – NOT Admitted in Virginia)