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## The Personnel Information Exemption under § 2.2-3705.1(1)

Hawkins v. Town of South Hill

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On October 20, 2022, the Virginia Supreme Court published its decision in *Hawkins v. Town of South Hill*, Record No. 210848878, S.E.2d 408 (2022). The Supreme Court's opinion specifically focused on the personnel information exemption for public employees as set forth in § 2.2-3705.1(1) of the Virginia Freedom of Information Act (FOIA) (§ 2.2 3700 et seq. of the Code of Virginia). The Supreme Court analyzed this exemption in depth and set forth newly formulated guidance to be utilized in determining whether employee information contained in public records may be withheld from public disclosure.

### Background and Procedural History

In autumn of 2019, Richard Hawkins, III (Hawkins) requested documents from the Town of South Hill (Town) relating to employment disputes involving the Town Manager and various employees.<sup>1</sup> Hawkins submitted four FOIA requests in total and received a response from the Town each time.<sup>2</sup> Nonetheless, Hawkins believed the Town's responses to be deficient, and upon receiving the final FOIA response from the Town, he filed a pro se petition for a writ of mandamus (Petition) alleging that the Town asserted FOIA exemptions "too broadly and withheld documents that should have been released or redacted."<sup>3</sup> Hawkins requested the Mecklenburg County Circuit Court "to compel the Town to produce the requested documents, impose civil penalties under FOIA, and award him his attorney's fees and costs."<sup>4</sup> The Town responded with a demurrer asserting that Hawkins' Petition should be dismissed as he failed to state a cause of action upon which relief could be granted since the Town fully complied with the provisions of FOIA.<sup>5</sup>

At the demurrer hearing, the dispute before the circuit court was reduced to seven documents specifically.<sup>6</sup> The Town argued that these documents were not subject to release pursuant to the personnel information exemption set forth in § 2.2-3705.1(1) of the Code of Virginia.<sup>7</sup> The seven documents were: (i) a demand letter from a Town employee's attorney to the Town attorney regarding the employee's discrimination complaints (demand letter); (ii) a one-page petition to the Town's personnel committee from seven employees requesting a meeting regarding the Town

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<sup>1</sup> *Hawkins v. Town of South Hill*, Record No. 210848878, S.E.2d 408 (2022).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Manager (employee petition); (iii) an email chain from a Town employee to the Town Mayor and City Council regarding discipline of that employee (email chain); (iv) an unsigned document received by the Town Mayor complaining about the Town Manager and Town work environment (anonymous complaint); and documents (v) through (vii) were separate resignation letters from three different Town employees (resignation letters).<sup>8</sup>

The circuit court granted the Petition in part. The circuit court applied definitions of "personnel record" from a previous version of the statute, instead of "personnel information."<sup>9</sup> The court concluded that: (a) the anonymous complaint was not exempt from disclosure; (b) the employee petition was partially exempt from disclosure; and (c) the demand letter, email chain, and resignation letters were exempt under FOIA.<sup>10</sup> The issues of whether to award attorney fees and costs or whether Hawkins substantially prevailed were not addressed by the court. The court directed the Town to prepare the order reflecting the findings because the court "agreed with the Town's positions more than it did not."<sup>11</sup> Hawkins appealed the partial denial of his Petition, objecting to the denial of mandamus as to five documents, the purported denial of his request for attorney fees and costs, and the court not holding that he was a prevailing party under FOIA.<sup>12</sup>

## The Virginia Supreme Court's Decision

The Virginia Supreme Court determined that this appeal required it to examine the scope of the personnel information exemption to FOIA and reconcile the competing interests of open access to public records and the privacy expectations of government employees. In its analysis, the Supreme Court considered the historical basis of the personnel information exemption. Since its original inception in 1968, FOIA contained an exemption for "personnel records" that was grouped into an exemption along with medical, mental health, and scholastic records.<sup>13</sup> Over the years, the "personnel records" exemption was amended to reflect various opinions of the Attorney General, to the point that by 1989 the term covered only "personnel records containing information concerning identifiable individuals."<sup>14</sup> This remained the standard until 2016, when the Virginia legislature amended "personnel *records* containing information concerning identifiable individuals" to "personnel *information* concerning identifiable individuals" and provided a definition for "information."<sup>15</sup> The Supreme Court concluded that by enacting a right of redaction provision and limiting the exemption to "information" instead of the entirety of a public record, the General Assembly demonstrated its intent to narrow the exception and provide for partial disclosure.<sup>16</sup>

The Supreme Court delved into the current legal status of the personnel information exemption for public employees. Section 2.2-3705.1(1) of the Code of Virginia exempts "[p]ersonnel information concerning identifiable individuals" from disclosure. However, FOIA does not define "personnel information." After analysis of statutory canons of construction, legislative history, intent, federal FOIA, and other states' use of similar personnel information

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 1968 Acts of Assembly c. 479.

<sup>14</sup> *Hawkins, supra* n. 1 (citing 1989 Acts of Assembly, c. 358).

<sup>15</sup> 2016 Acts of Assembly, cc. 620, 716.

<sup>16</sup> *Hawkins, supra* n. 1.



exemptions, the Supreme Court determined "personnel information" to mean "data, facts, or statements within a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual's employment relationship with the entity, and are private, but for the individual's employment with the entity."<sup>17</sup>

The Supreme Court further acknowledges that the definition is "narrowly limited to those employed by the government and does not encompass any individual whose information merely happens to appear in a public record."<sup>18</sup> In addition, the Supreme Court, when discussing the "personnel information" exemption, recognized that "the only content exempt from disclosure is that which is tied to the employment of the individual in some way, and which otherwise would not be disclosed to the employer."<sup>19</sup> Moreover, this interpretation "furthers the stated goal of ensuring public access to government business conducted by employees of that government."<sup>20</sup>

While acknowledging that the "'personnel information' exemption, like the 'personnel record' exemption before it, is a 'privacy-based exemption, designed to protect the subject of the record from the dissemination of personal information,'" the Supreme Court refused to determine which specific pieces of information are private.<sup>21</sup> As a substitute, the Supreme Court advocated for an objective test which provides "that data, facts, and statements are private if their disclosure would constitute an 'unwarranted invasion of personal privacy' to a reasonable person under the circumstances."<sup>22</sup> Furthermore, the Supreme Court did not specifically clarify what content qualifies as private but pointed out that such a determination is required within "the context of each case."<sup>23</sup>

The Supreme Court found that the circuit court erred in its interpretation and application of the personnel information exemption under § 2.2-3705.1(1) of the Code of Virginia.<sup>24</sup> The Supreme Court reversed the decision of the circuit court regarding the anonymous complaint, the employee petition, the demand letter, the email chain, and the resignation letters. The circuit court considered these documents to be exempt, or partially exempt, under FOIA.

Nevertheless, the Supreme Court did not entirely condemn the analysis of the circuit court. The Supreme Court held that the lower court correctly applied the requirements of § 2.2-3704.1 of the Code of Virginia regarding the allowance for redactions of partially exempt documents. Moreover, the Supreme Court held that the circuit court was in the best position to assess exactly "what is private in the context of this case."<sup>25</sup> The Supreme Court remanded this matter back to the circuit court for further consideration in light of the Supreme Court's guidance provided in this opinion "on what constitutes 'personnel information' under [FOIA]."<sup>26</sup>

The Supreme Court affirmed the circuit court's ruling on awarding attorney fees and costs and whether Hawkins "substantially prevailed."<sup>27</sup> Subsection D of § 2.2-3713 of the Code of

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<sup>17</sup> *Hawkins, supra* n.1.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



Virginia provides for the recovery of attorney fees and costs when (1) a court finds that the denial of the request was "in violation of the provisions" of FOIA and (2) a party "substantially prevails on the merits of the case." The circuit court did not address the awarding of attorney fees or costs to Hawkins. The court's only reference to whether either party prevailed was the circuit court's request that the Town draft the final order because "[t]he Court agreed with the Town's position more than it did not."<sup>28</sup> This information undermines an argument from Hawkins that he substantially prevailed in this matter. In addition, Hawkins failed to obtain a ruling by the circuit court on the prevailing party issue or the issue of attorney fees and costs, and he endorsed the final order with objections but did not request the circuit court to revise its orders to address either issue.<sup>29</sup> Since the circuit court made no ruling on attorney fees and costs or on whether Hawkins "substantially prevailed" in the initial opinion or final order, the Supreme Court found there is no ruling to address on appeal and consequently affirmed the circuit court on both issues.<sup>30</sup>

## Impact of Decision and Conclusion

The decision in the *Hawkins v. South Hill* case establishes precedent as to what may be protected as "personnel information" for public employees under FOIA. Subsection B of § 2.2-3700 of the Code of Virginia provides that 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." Subsection B of § 2.2-3700 also provides that "[a]ny exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld unless specifically made exempt pursuant to this chapter or other specific provision of law."

In the context of FOIA, the Supreme Court determined in this case that the meaning of personnel most clearly intended by the legislature is "a body of persons employed in some service' or government employees."<sup>31</sup> This definition is narrowly limited to those employed by the government and does not encompass any individual whose information merely happens to appear in a public record.<sup>32</sup> Furthermore, "personnel information" was determined to mean "data, facts, and statements [that] are private if their disclosure would constitute an 'unwarranted invasion of personal privacy' to a reasonable person under the circumstances."<sup>33</sup>

The Supreme Court left the determination of whether information was private to be examined individually within "the context of each case."<sup>34</sup> The Supreme Court remanded this matter back to the circuit court to apply the guidance provided in this decision to the specific facts of this case for determination of whether the five documents (the anonymous complaint, the employee petition, the demand letter, the email chain, and the resignation letters) in dispute should be released or withheld by the Town. Therefore, the ultimate impact of this decision is currently pending until the circuit court issues a ruling on exactly which information, if any, may be protected or must be released pursuant to the provisions of FOIA.

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*



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