VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

KEVIN MCCARTHY
and
BISCHOFF MARTINGAYLE, P.C.,

Plaintiffs,

v. Case No. CL15-2332

CITY OF VIRGINIA BEACH
and
JAMES CERVERA,

Defendants.

AMICUS BRIEF FILED ON BEHALF OF
THE VIRGINIA COALITION FOR OPEN GOVERNMENT

INTRODUCTION

What is the Virginia Coalition For Open Government?

The Virginia Coalition For Open Government (VCOG) is a nonprofit alliance that was formed in 1996 to promote expanded access to government records, meetings and other proceedings at the state and local level. Its efforts are focused solely on local/state information access. While the VCOG does some lobbying, its primary work is educational. The VCOG's board of directors represents the Commonwealth's access activists and friends of open government, including Virginia's librarians, advocacy groups, media, genealogists, public officials, and citizens of all walks of life.

Why Is the VCOG Filing An Amicus Brief?

Inman &
Strickler, P.L.C.

Attorneys at Law

The VCOG is moving to file the instant *Amicus Brief* because two of the issues that the VCOG sees that are before this Honorable Court are of critical importance to the core principles to the VCOG and, thus, to the interests of entities and the public that the VCOG strives to represent.

The two issues that the VCOG addresses in this *Amicus Brief* are:

1) Whether the City of Virginia Beach and the Police Department of Virginia Beach's (hereafter Respondents) stated unwritten policy of declaring a fiat (a blanket denial) that it will not release any information relating to suicides investigated in the City of Virginia Beach comports with the *Virginia Freedom Of Information Act* and the exercise of the discretion embodied in *Section 2.2-3706(A)(2)(a) of the Code of Virginia, as amended*; and

2) Whether the City of Virginia Beach's stated view, in its *Demurrer* in this case, that a circuit court has no legal authority to review a government authority's decision as to what to release in response to a properly filed FOIA request is correct.

Given the mission of the VCOG - to promote the free flow of information between the Commonwealth's government entities and the citizens of the Commonwealth- the VCOG's interest in both issues is clear and compelling.

As is demonstrated in this *Amicus Brief*, one of the largest and most prominent cities of the Commonwealth has stated with startling and unabashed impunity that it exercises an unwritten policy that it will not review any suicide investigations to determine whether any part of those investigations may be released when requested to do so via a properly filed Freedom Of Information request. VCOG has no doubt, nor should anyone else, that this is clearly a violation of the

Virginia Freedom of Information Act. The VCOG is opposed to blanket denials, be they criminal investigations of any kind. Further, that any city of the Commonwealth has become so lost as to state in filed pleadings that no court of the Commonwealth has the authority to review its decisions to refuse to follow the *Virginia Freedom Information Act* is a challenge which the VCOG was created to address in order to maintain the rights of the Commonwealth's citizens to know what its government's agents are doing. This *Amicus Brief* is filed to protect those rights, not intrude where none exist.

FACTS BEFORE THE COURT

FOIA

The case before this Honorable Court involves the death of Sean McCarthy. According to the *Complaint and Petition For Mandamus* (hereafter "*Petition*"), the family of Mr. McCarthy was advised by the Respondents that Mr. McCarthy was thought to have committed suicide. A criminal investigation was conducted by the Respondents because suicide is a crime in the Commonwealth. Further inquiry by the McCarthy family in an effort to learn about how Mr. McCarthy had met his demise and the investigation into how he met his demise involved a request for a copy of the case investigation and report, "pursuant to the *Virginia Freedom of Information Act* ("FOIA"), *Code of Virginia §2.2-3700 et. seq*." *Petition*, Page. 2

The Respondents, in response to the FOIA request, stated, in pertinent part, that they had withheld material "considered to be criminal investigation information

or material" pursuant to *Code of Virginia §2.2-3706(A)(2)(a)*. The Respondents further stated that their decision to withhold the "criminal investigation information or material" relating to Mr. McCarthy's suicide was pursuant to "policy." *Petition* at 2. This "policy" was clarified by the Respondents in a letter of April 8, 2015:

> . . . the policy of the [VBPD] [is] not to release criminal investigative materials *for apparent suicide cases* (which often contain graphic images and details), which might otherwise be published in the media or elsewhere if released." (Emphasis Added) SEE *Petition*, Exhibit 2.

Mr. McCarthy's family and their counsel continued to seek, *inter alia*, the "criminal investigation information or material" that had been withheld from the FOIA request. In another response, dated April 23, 2015, the Respondents again made clear the Respondent's position as to why it would not turn over *any* "criminal investigation information or material" relating to their determination of the suicide of Sean McCarthy:

> . . . . **there is no written policy, procedure, protocol, directive or memorandum that is responsive to this request . . . *it is an unwritten policy or practice*** of the [VBPD] **to exercise its discretion by not releasing criminal investigative case file records relating to suicide** because of the sensitive nature of the information. (Emphasis Added) *Letter of City of Virginia Beach FOIA Specialist*, April 23, 2015, *Petition*, Exhibit 4.

It should be noted that 1) the *FOIA* request was filed by the family of Sean McCarthy and 2) *suicide, while a crime in the Commonwealth, carries no criminal penalty* (SEE *infra*); there is no criminal prosecution that results from the "criminal investigation information or material" that the Respondents are so assiduously

protecting and refusing to release to Mr. McCarthy's family.

Thus, from the facts before the Court, the Respondents are, by their own admissions, refusing to release "criminal investigation information or material" to the family of the suicide victim because, they say, their policy is to protect families of suicide victims and because they have an unwritten policy of never releasing any "criminal investigation information or material" of what is, quite possibly, the only crime in Virginia that is never prosecuted in Virginia.

Respondents' Demurrer

The Respondents have filed a *Demurrer* in the instant matter. The *Demurrer* asserts that the Petitioners in this case have no right to ask this Court to review the Respondent's FOIA decisions and, therefore, the McCarthy family's request that this Honorable Court review that FOIA decision be dismissed. For example, the Respondents state:

> Plaintiffs challenge how the Defendants exercised their discretion, asserting — without any statutory or case law authority — that Defendants' discretion under FOIA is limited and subject to court review and remedy. Neither proposition is supported by Virginia law. *Demurrer*, Page 2

The Respondents' position, if found to be correct, means, by extension, that Virginia FOIA applicants have no recourse to the circuit courts of the Commonwealth for redress when the government agencies flout their FOIA obligations.

The VCOG is certain that the Respondents are wrong both on their facts and law as set forth in the *Demurrer*. In fact, the very case law that governs

FOIA law (and is attached to the *Demurrer* as an Exhibit) stands in stark dissonance with the Respondents' *Demurrer*. But, given the VCOG's charter and the enormity of the misstatement of the law that the Respondents are presenting to this Honorable Court, the VCOG is compelled to call this Honorable Court's attention to what it is sure the Court realizes cannot be a correct statement of FOIA jurisprudence.

LAW

Virginia FOIA

In April of this year, the Supreme Court of Virginia decided *Fitzgerald v. Loudoun County Sheriff's Office*, 771 S.E.2d 858 (2015). That case involved a strikingly similar situation as that before this Honorable Court, with the significant difference, however, that the government agency in that case, the Loudoun County Sheriff's Office, *exercised discretion* and reviewed the criminal investigation file of the suicide it had investigated and released some materials therein while not releasing others while the Respondents herein flatly refuse to do so in both this and any other FOIA suicide request.

In *Fitzgerald*, the Supreme Court described the facts of the case as follows:

> Fitzgerald sent a FOIA request to the Sheriff's Office seeking all documents related to the "noncriminal incident report into the suicide of Charles D. Riechers" in October 2007. The Custodian of Records for the Sheriff's Office responded by noting that the records sought were considered to be part of a criminal investigative file. The custodian referred Fitzgerald to *Code § 2.2–3706(A)(2)(a)* and noted that the Sheriff's Office would not release the file absent a court order. **The Sheriff's Office later provided to Fitzgerald various documents from the**

criminal investigative file, *but withheld the suicide note written by the decedent to his supervisor at the Pentagon.* Fitzgerald filed a petition in general district court seeking a mandamus order requiring the production of the withheld suicide note. The general district court denied the petition, as did the circuit court on a de novo appeal. (Emphasis Added) Id., at 859-60

The Supreme Court of Virginia then proceeded to describe the legal principles that undergird Virginia's FOIA:

Virginia Freedom of Information Act

The Virginia FOIA "has existed, in one form or another, since 1968" with the primary **purpose of facilitating "openness in the administration of government.**" *American Tradition Inst.*, 287 Va. at 339, 756 S.E.2d at 439–40. By its own terms, **the statute puts the interpretative thumb on the scale in favor of disclosure**: **"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."** *Code § 2.23700(B).* Disclosure exemptions must be "narrowly construed" in favor of disclosure. Id. (Emphasis Added) *Fitzgerald*, at 860-61.

The *Fitzgerald* opinion then applied the FOIA requirements to the suicide note sought:

1. Criminal Investigative Files

The proper sequencing of these provisions begins with an examination of *Code § 2.2–3706(A)(1)(a)*, which requires disclosure of certain specified "[c]riminal incident information." Fitzgerald properly concedes that the requested suicide note does not fall within this mandatory disclosure provision.

We next look to subsection (A)(2)(a), which permits, but

> does not mandate, disclosure of "[c]riminal investigative files." Sitting as fact finder, the circuit court found that the requested suicide note was one of many documents in a criminal investigative file protected from mandatory disclosure by *Code § 2.2–3706(A)(2)(a)*. At no point did Fitzgerald suggest, nor did any evidence imply, that the Sheriff's Office acted outside its lawful authority in opening a criminal investigative file to investigate the unexpected and unattended death of a senior United States Air Force official. The Sheriff's Office thus had the discretion, but not the duty, to disclose documents within this file. Id, at 861

Our High Court then went on to affirm the circuit court's decision to deny the petitioner's *Writ of Mandamus*:

> . . . . the record supports the circuit court's finding that the suicide note was obtained in the course of a criminal investigation. Id. at 863

The Supreme Court of Virginia then affirmed the Circuit Court's holding. It never held, as the *Demurrer's* argument implies, that circuit courts have no authority to review FOIA decisions relating to criminal investigation files of suicides.

<u>*Suicide Defined*</u>

Suicide is a crime in the Commonwealth of Virginia. The VCOG believes that the analysis of the Respondent's FOIA unwritten policy to *never* release any part of a criminal investigation of a *suicide*, irrespective of the nature of *any* of the material in the investigative file and irrespective of the *status* of said investigative file, while, apparently, not applying such an automatic policy to any other criminal investigative file of any other crime warrants an understanding of what exactly the crime of suicide is. What is the exact legal definition of the one crime that the

Respondents feel justifies their automatic, clearly *nondiscretionary denial* of the release of any investigative material without even looking at the contents of the investigative file?

Wackwitz v. Roy, 244 Va. 60 (1992), 418 S.E.2d 861, provided an excellent description of the crime of suicide in Virginia:

> Under English common law, suicide was a felony. Felonious homicide is ... the killing of a human creature ... without justification or excuse. This may be done either by killing one's self, or another man. 4 William Blackstone, *Commentaries* 188. One who killed himself was punished "by a forfeiture of all his goods and chattels to the king." Id. at 190.
>
> The General Assembly has declared that "[t]he common law of England, insofar as it is not repugnant to the principles of the *Bill of Rights* and *Constitution* of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." *Code § 1–10.* Although the General Assembly can abrogate the common law, its intent to do so must be " 'plainly manifested.' "*Hyman v. Glover*, 232 Va. 140, 143, 348 S.E.2d 269, 271 (1986) (quoting *Hannabass v. Ryan*, 164 Va. 519, 525, 180 S.E. 416, 418 (1935)).
>
> We are aware of only one legislative enactment that addresses suicide as a crime. *Code § 55–4* provides that "[n]o suicide . . . shall work a corruption of blood or forfeiture of estate." **Thus, although the General Assembly has rescinded the punishment for suicide, it has not decriminalized the act.** Suicide, therefore, remains a common law crime in Virginia as it does in a number of other common-law states. See, e.g., *Southern Life & Health Ins. Co. v. Wynn*, 29 Ala.App. 207, 194 So. 421 (1940); *Commonwealth v. Mink*, 123 Mass. 422 (1877); *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961); *State v. Carney*, 69 N.J.L. 478, 55 A. 44 (1903);

> *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891), overruled on other grounds by *State v. Torrence*, 406 S.E.2d 315 (S.C.1991). . . . **Suicide is defined as "the deliberate and intentional destruction of his own life by a person of years of discretion and of sound mind.**" *Webster's Third New International Dictionary* 2286 (1981) (Emphasis Added) *Wackwitz*, at 65

Accordingly, ***in Virginia, suicide is a crime*** - quite possibly the only one in Virginia - for which "the General Assembly has rescinded the punishment."

The VCOG believes that this fact - that suicide is a crime for which there is no punishment - should be taken into account when this Honorable Court considers how the Respondents' unwritten policy of never releasing any material from a criminal investigation of only suicides when presented with a FOIA request comports with both the letter and public policy of Virginia FOIA.

ARGUMENT

FOIA Law Applied

The VCOG has asked to file this *Amicus Brief* because its mission is to promote and protect the Virginia FOIA principles. The VCOG sees those principles being flouted by the Respondents in this case. The Respondents have stated that when they receive FOIA requests relating to *suicide* criminal investigations, they do not turn over *any* material from the criminal investigations of suicides because they have an unwritten policy to turn nothing over so as to protect the suicide victim's families from anguish.

As initial observation, the VCOG believes this unwritten policy clearly

violates Virginia law and public policy. Having an unwritten FOIA policy is, obviously, a contradiction in terms. It is pure sophistry and should not be tolerated by this Honorable Court. An unwritten FOIA policy in no way "facilitates openness in the administration of government," nor does it "promote public awareness of government activities." To the contrary, such an unwritten policy seems to be intended to hide what the policy of the Respondents actually is! The VCOG is terribly dismayed that an informed, advanced municipality such as the Respondents would intentionally act in this manner.

Worse, the Respondents' continued refusal to consider whether any part of any criminal investigation file of any suicide may be released pursuant to a FOIA request in light of the *Fitzgerald* case is impossible to comprehend. There is nothing in the *Fitzgerald* case that supports the Respondents' position. In *Fitzgerald*, the government agency - a Sheriff's Department - had released some of the criminal investigation file but chose not to release at least one part - a suicide note - that was the subject of the writ. SEE *Fitzgerald* at 860 **That government agency exercised its discretion**. ***The Respondents in the instant matter refuse to exercise their discretion at all.*** **Instead, the Respondents, have changed the FOIA provisions from allowing possible release of information to an exemption from release altogether.** The Respondents' stated position cannot be more inimical to the stated purpose of FOIA as reflected by the Supreme Court in its *Fitzgerald* opinion.

Contrary to the Respondents' implied argument that failure to act is the same

as action, failure to act is failure to act. A decision to exercise no discretion is not an act of discretion, it is the unlawful creation of an exemption category to the FOIA statute where one does not exist. It is insulting to the Court and to the public FOIA is meant to serve. Never looking to see if anything in a suicide investigative file may be released pursuant to a FOIA request is not the same as looking to see if anything may be released. As with the Respondents having an unwritten FOIA policy for suicides, the Respondents' refusal to ever consider whether there is anything in any suicide criminal investigation which may be released pursuant to a FOIA request in no way "facilitates openness in the administration of government," nor does it "promote public awareness of government activities."

The VCOG would remind the Court that the Respondents' unwritten FOIA policy of never releasing anything in response to a FOIA request for information from a criminal investigation of a suicide involves a crime - quite possibly the only crime in the Commonwealth - that has no criminal punishment. This means, the VCOG submits, that because suicides are crimes with no criminal penalties, their criminal investigations are ones where review of the criminal investigation files upon receiving a FOIA request and the application of discretion with which the Respondents are endowed would be more likely to yield the release of information pursuant to FOIA request. Possible security issues or criminal investigation techniques that might otherwise need to be kept from the public may not be at issue in suicide investigations. Instead, because the Respondents have adopted a policy of

never exercising their discretion and, thus, never reviewing criminal investigation files of suicides, the Respondents have no way of knowing whether there are materials which, in the exercise of their discretion they might release. This unwritten suicide FOIA policy, is one of never looking, never knowing, never releasing and, frankly, violating the FOIA law and policies. It is the VCOG's fervent hope that this Honorable Court will act in the name of the public and correct the Respondents' clearly misguided and illegal approach to FOIA requests with respect to suicide criminal investigations. This principle should apply to all criminal investigation FOIA requests. That is there should never be a policy of "blanket" denials of FOIA requests as to do so makes a mockery of the whole concept of "discretion" as embodied in FOIA.

Demurrer

There are two simple reasons that the Respondents' *Demurrer* is simply wrong: it is wrong on the facts and it is wrong on the law. Accordingly, it should be given short, if not no, shrift.

First, the *Demurrer* is wrong on the facts. The Respondents repeatedly maintain in their *Demurrer* that this Honorable Court has no authority under FOIA to review their exercise of their decision not to release any part of the "criminal investigation information or material" relating to Mr. McCarthy's suicide. To support this position, the Respondents repeatedly assert that in some way their unwritten policy of never releasing any part of a criminal investigation of any suicide

when a FOIA request is made is an exercise of its discretion under FOIA. See *Demurrer*, Pages 1, 2, 3, 4. As the VCOG has argued *supra*, making no choice is not making a choice; saying that it is does not make it so.

"Discretion" is defined as

> The result of separating or distinguishing; the freedom to decide what should be done in a particular situation. *Merriam Webster Dictionary*

With respect to *FOIA requests relating to criminal investigations of suicides*, the Respondents have made it clear that they do nothing to "separate" or "distinguish" one request from another, they do nothing to choose what from the contents of one suicide's investigative file to release versus the contents from another. Further, the Respondents have made it clear by their own words that they have an unwritten policy that they do nothing to "decide what should be done" in one "particular" FOIA request regarding a suicide criminal investigation. The *Demurrer's* assertion that the Respondents exercised discretion in this case or any other FOIA request involving suicide criminal investigations is factually not true. **The Respondents have not exercised discretion. Simply saying that they have done so does not make it so. The Respondents have chosen to exercise no discretion and have done so based upon a policy that cannot be found in writing anywhere**. Accordingly, by definition, the *Demurrer*'s factual contention, that the Respondents have exercised discretion in the matter before the court, is incorrect. Thus, the *Demurrer's* argument that the Respondents' proper exercise of discretion under FOIA in some way

precludes this Honorable Court from reviewing the Respondents' FOIA decision fails.

The *Demurrer* must fail for a second and equally obvious reason. The Respondents insist that FOIA provides no recourse for review of the proper exercise of discretionary power under FOIA and, further, that there exists no authority that has a right to review a proper exercise of FOIA decisions. *Demurrer*, Page 3 As noted *supra*, the VCOG does not believe that the Respondents have exercised their discretion in any way; the Respondents have avowedly abdicated that responsibility via their exercise of their unwritten policy with respect to FOIA requests relating to criminal investigations of suicides. Nonetheless, the Respondents' pled argument that this Honorable Court has no authority to review the Respondents' abuse of FOIA must not go without response. The idea is so appalling to the policy behind FOIA (see *Fitzgerald*) that the VCOG feels the Respondents must be disabused of this terrible mistake of law.

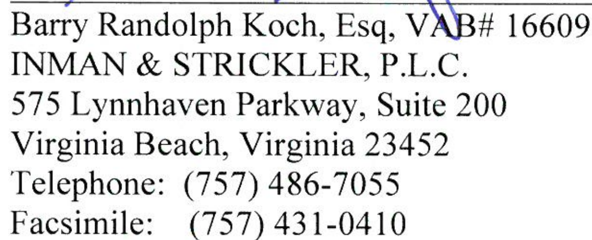
As described *supra*, *Fitzgerald*, decided in April, 2015 by the Supreme Court of Virginia, involved an appeal of a circuit court decision of a *Writ of Mandamus* questioning the decision of a sheriff's department on what to release and what not to release from a criminal investigation file of a suicide. The Supreme Court affirmed the circuit court holding. **The Supreme Court of Virginia did not hold that the circuit court had no jurisdiction to hear the matter**. Instead, it affirmed the lower court's holding:

> In sum, the record supports the circuit court's finding that the suicide note was obtained in the course of a criminal investigation. Finding no error in the circuit court's application of the governing statutes, we affirm. *Fitzgerald* at 863

The VCOG cannot imagine a clearer answer to the Respondents' *Demurrer* than that.

Accordingly, the VCOG strongly urges this Honorable Court to ignore the Respondents' *Demurrer* in its entirety.

VIRGINIA COALITION FOR OPEN GOVERNMENT
By Counsel



Barry Randolph Koch, Esq, VAB# 16609
INMAN & STRICKLER, P.L.C.
575 Lynnhaven Parkway, Suite 200
Virginia Beach, Virginia 23452
Telephone: (757) 486-7055
Facsimile: (757) 431-0410

Andrew R. Sebok, Esq., VAB# 26169
LAW OFFICES ANDREW R. SEBOK
Attorney at Law
1520 Holland Avenue
Norfolk, VA 23509

Certificate of Mailing

I hereby certify that a true copy of the foregoing AMICUS BRIEF FILED ON BEHALF OF THE VIRGINIA COALITION FOR OPEN GOVERNMENT was faxed and emailed to Plaintiffs/Petitioners' counsel, Kevin E. Martingayle, Esquire, Bischoff Martingayle, P.C., 3704 Pacific Avenue, Ste. 300, Virginia Beach, Virginia 23451 (martingayle@bischoffmartingayle.com), and to Defendants/Respondents' counsel, Christopher S. Boynton, Deputy City Attorney, City of Virginia Beach City Attorney's Office, 2401 Courthouse Drive, Suite 260, Virginia Beach, VA 23456 (cboynton@vbgov.com) and via facsimile: 385-5687, on this 29 day of June, 2015.

Barry Randolph Koch