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In The  
**Supreme Court of Virginia**

RECORD NO. 171183

**DR. ALLAN L. BERGANO, DDS,**

*Appellant,*

v.

**CITY OF VIRGINIA BEACH,**

*Appellee.*

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**BRIEF *AMICUS CURIAE* OF THE  
VIRGINIA COALITION FOR OPEN GOVERNMENT**

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## **INTEREST OF AMICUS CURIAE**

Founded in 1996, the Virginia Coalition for Open Government (“VCOG”) is a nonpartisan, nonprofit membership organization dedicated to protecting the rights of Virginia residents to open access to public records and proceedings. VCOG appears regularly as a friend-of-the-court in cases implicating the public’s right-to-know, to advise the courts of the importance of rigorous enforcement of open-government laws and the civic benefits of government transparency to the community at large.

This case, involving the public’s right of access to records about how public money is spent in litigation matters, demonstrates the reason for the existence and specifics of the Virginia Freedom of Information Act. VCOG seeks leave to appear to ensure that the public’s right of access is not limited by the over-extension of what should be a very limited statutory exception to the public’s right to know how its funds are spent.

## STATEMENT OF THE CASE

Dr. Allan Bergano appealed a final judgment of the Virginia Beach Circuit Court in a proceeding under the Virginia Freedom of Information Act (“FOIA”). Dr. Bergano submitted a request to the City of Virginia Beach (the “City”) under FOIA, asking for copies of billing records of outside counsel hired by the City to represent it in litigation between Dr. Bergano and the City. Appx. 8.

The City produced copies of the records, but redacted almost all of the content of those records. Appx. 9-87. Dr. Bergano sued, seeking a level of disclosure he believed to be required by FOIA. The City contended that the redacted information was privileged. Appx. 155.

The court below reviewed the unredacted records *in camera* and ruled in favor of the City. Appx. 181. Dr. Bergano moved for rehearing, (Appx. 183), but the trial court denied his motion (Appx. 239), and entered final judgment for the City. Appx. 240.

On March 6, 2018, this Court awarded Dr. Bergano an appeal.

## ASSIGNMENTS OF ERROR

1. The trial court erred when it ruled that the City’s redactions were proper based on the City’s claim of a FOIA exemption. [Preserved: Appx. 3-5, 170- 73, 176, 178]
2. Based on the trial court’s finding of exemption, it erroneously failed to award Dr. Bergano his reasonable costs and attorney’s fees. [Preserved: Appx. 5]

## STANDARD OF REVIEW

The application of a FOIA exemption to a public record is a mixed question of law and fact. Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va., 287 Va. 330 (2014); Napper v. ABM Janitorial Servs., 284 Va. 55, 61 (2012). This Court normally views the facts in a light most favorable to the appellee and evaluates legal issues *de novo*. Dep't of Corrections v. Surovell, 290 Va. 255, 262 (2015). In this matter, the facts are not in dispute and the only issues for decision are legal issues. The issues in this appeal should be reviewed *de novo*.

## ARGUMENT AND CITATION TO AUTHORITY

The Appellant filed this case because public information is being hidden, in violation of Virginia law. Redactions applied by the City of Virginia Beach (the “City”) to attorney invoices do not show any thought or discernment that would separate privileged from non-privileged communications. Instead, the City has redacted so heavily that any meaningful review of the work performed is impossible. Attorney invoices themselves are not privileged.

### **A. The City’s Overactive Black Highlighter is Against the Law.**

The Virginia Freedom of Information Act (§§ 2.1-340 through 2.1-346.1 of the Code of Virginia) (“FOIA”) tells us almost all we need to know about this case. The redacted legal bills in the Appendix tell us the rest.

The City redacted information not subject to the attorney-client privilege, so the City violated FOIA. It is apparent upon review of the wholesale redactions shown in the record of this matter that the City went too far with its “black highlighter.”

Section 2.1-342(A) of FOIA provides, in part, that “[e]xcept as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records.” Certain statutory exceptions to the mandatory disclosure requirement of § 2.1-342(A) are enumerated in § 2.1-342(B). The only exception that would apply to the City’s invoices from its outside counsel is the attorney-client privilege exception in § 2.1-342(B)(5). In order to fall within this FOIA exemption, redacted content must in fact be privileged.

The attorney-client privilege does not attach to a document simply because it is passed from a lawyer to her client. See Va. Elec. & Power Co. v. Westmoreland-LG&E Partners, 259 Va. 319 (2000). For the privilege to apply, the communication must be made for the purpose of “procuring or providing legal advice.” See SNC-Lavalin Am., Inc. v. Alliant Techsystems, Inc., Civil Action No. 7:10CV00540, 2011 U.S. Dist. LEXIS 115535, 2011 at \*4 (W.D. Va. Oct. 6, 2011 (citing Henson v. Wyeth Labs., Inc., 118 F.R.D. 584, 587 (W.D. Va.1987))). The party asserting the



attorney-client privilege, the City, bears the burden of persuasion. Va. Elec. & Power, 259 Va. 319 (citing Commonwealth v. Edwards, 235 Va. 499, 509 (1988)).

“[T]he public body may not simply treat the words “attorney-client privilege” or “legal advice” as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue. Rather, the public body can meet its burden only by providing some objective indicia that the exemption is applicable under the circumstances. Illinois Education Assoc. v. Illinois State Board of Education, 791 N.E. 2D 522, 531 (Ill. 2003).

Review of the relevant invoices shows immediately that the redactions were overdone. The first few invoices in the Appendix in this matter are indicative examples. See Appendix at pp. 10-15, 18-26. Everything of substance is redacted. Nothing remains on the invoices to explain how the public’s money was spent, apart from a date, number of hours, and the name of a timekeeper. It is certainly possible that some of the attorney and paralegal time entries on these invoices might have included privileged communications from lawyer to client, or descriptions of privileged communications received by the lawyers from their client. It is not the case, however, that all of them are privileged. The trial court erred when it found that the City’s monolithic redactions were proper under the attorney-client privilege exemption of FOIA.

**B. If This Is a Close Call, Disclosure Wins.**

FOIA must be construed broadly. The statute requires it. As this Court recently affirmed:

By its own terms, the statute puts the interpretative thumb on the scale in favor of disclosure: “The provisions of [VFOIA] 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 § 2.2-3700(B). Disclosure exemptions must be “narrowly construed” in favor of disclosure.

Fitzgerald v. Loudoun County Sheriff’s Office, 289 Va. 499, 505 (2015). If the Court has any doubts (and it should have plenty) that the City redacted more of the content of the attorney invoices than absolutely necessary to protect actually privileged communications, the only result in this case must be to correct that violation of FOIA.

**C. Available Authority Shows That the City Over-Redacted**

The Attorney General of Virginia has issued an opinion addressing over-redaction of attorney billing records, and arrived at the precise place advocated by the Appellant in this matter and by your *amicus curiae*. The wholesale redaction committed by the City is against Virginia law.

The public policy underlying the attorney-client privilege is to ensure that the client is free to make a full, complete and accurate disclosure of all facts unencumbered by fear that the client’s disclosure will be used or divulged by the attorney or by fear of disclosure by any legal process. [ internal citation omitted ] In the facts you present, the disclosure of the itemized billing statements generally would not

include matters communicated in confidence to the Town attorney. Considering all of the above and giving the required narrow construction ..., it is my opinion that the attorney-client privilege exception does not apply to the itemized billing statements in question. It is also my opinion that isolated entries which may include matters properly within the scope of an exception in the Act do not operate to except an entire record from the mandatory disclosure requirement of [FOIA].

1987-88 Va. Att’y Gen. Rep. 30.

The Court of Appeals of Kentucky agreed with that state’s attorney general that it was correct to reject the “blanket redaction of all descriptive portions of the disclosed billing records without particularized demonstration that each description is privileged.” Cabinet for Health and Family Services v. Scorsone, 251 S.W.3d 328 (Ky. App. 2008).

The State of Washington has built its clarification of this same point right into the code:

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney’s mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure. The legislature intends to clarify that the public’s interest in open, accountable government includes an accounting of any expenditure of public resources, including through liability insurance, upon private legal counsel or private consultants.

RCW 42.56.904.

In Missouri, the attorney-client privilege was held not to apply to the itemized billing statement of a municipal attorney. See Tipton v. Barton, 747 S.W.2d 325 (Mo. App. 1988). And in New Jersey, the Superior Court Appellate Division noted that the attorney-client privilege “ordinarily does not apply to lawyers’ bills for services to a public entity.” Hunterdon County Policemen’s Benev. Ass’n Local 188 v. Township of Franklin, 669 A.2d 299, 286 N.J. Super. 389, 394 (N.J. Super. A.D., 1996).

### CONCLUSION

For the foregoing reasons, this Court should reverse the lower court’s judgment on the FOIA issue and remand the case, causing the lower court to direct the City to produce unredacted invoices, excepting only redactions that this Court’s *in camera* review of the record shows to be within the narrowly written and narrowly construed FOIA exemption for the attorney-client privilege.

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2018, pursuant to Rule 5:26, three paper copies of the Brief of Amicus Curiae have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Amicus Curiae was served, via email, upon:

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A handwritten signature in blue ink, appearing to be 'Ch W', is written above a horizontal line.

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