

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

KEVIN MCCARTHY
and BISCHOFF MARTINGAYLE, P.C.,

Plaintiffs/Petitioners,

v.

CASE NO.: CL15-_____

CITY OF VIRGINIA BEACH,
Serve: Mark D. Stiles, City Attorney
City Attorney's Office
2401 Courthouse Drive
Building 1, Room 260
Virginia Beach, VA 23456

and

JAMES CERVERA, in his capacity
as Chief of the Virginia Beach Police Department
and custodian of the records at issue,
Serve: Mark D. Stiles, City Attorney
City Attorney's Office
2401 Courthouse Drive
Building 1, Room 260
Virginia Beach, VA 23456

Defendants/Respondents.

VERIFIED COMPLAINT AND PETITION

NOW COME your plaintiffs, Kevin McCarthy and Bischoff Martingayle, P.C.,
by counsel, and as and for their Complaint against defendants/respondents
("defendants"), state as follows:

1. Kevin McCarthy resides in Arizona, and was a parent of Sean McCarthy, an individual who died on June 30, 2014 in the City of Virginia Beach.
2. Bischoff Martingayle, P.C. is a law firm based in the City of Virginia Beach. All of the attorneys in Bischoff Martingayle, P.C. are members

of the Virginia State Bar.

3. The City of Virginia Beach ("the City") is a Virginia municipal corporation with certain powers, duties and limitations set forth in the Constitution of Virginia and Code of Virginia. The City operates the Virginia Beach Police Department ("VBPD"), and James Cervera ("Chief Cervera") is Chief of the VBPD. Chief Cervera's duties include oversight and control of the VBPD and its policies, procedures and protocols.
4. Sean McCarthy is believed to have died from a wound inflicted by a handgun. His parents were advised by VBPD personnel that Sean McCarthy was thought to have committed suicide.
5. In an effort to learn more about Sean McCarthy's death and the nature of the investigation conducted, Kevin McCarthy submitted 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.
6. In response to the FOIA request, the VBPD provided some limited information, but withheld material "considered to be criminal investigation information or material" pursuant to Code of Virginia §2.2-3706(A)(2)(a). It was further stated by the VBPD that this was pursuant to "policy".
7. Kevin McCarthy subsequently engaged the services of Bischoff Martingayle, P.C. to assist in attempting to obtain the requested

information.

8. On April 7, 2015, an attorney with Bischoff Martingayle, P.C. spoke with a deputy city attorney in the Virginia Beach City Attorney's Office in an effort to obtain the information requested by Kevin McCarthy, and followed up with a letter of the same date. A copy of the April 7, 2015 letter sent by counsel for the Kevin McCarthy, along with the exhibits attached thereto, is attached collectively as Exhibit 1 (eight pages).
9. By letter dated April 8, 2015 (two pages), counsel for the City responded to Kevin McCarthy's counsel's letter and restated that it is "the policy of the [VBPD] 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." A copy of the April 8, 2015 letter is attached as Exhibit 2.
10. In a letter dated April 16, 2015 (copy attached as Exhibit 3, including Exhibit A attached to the letter), counsel for Kevin McCarthy clarified and restated a FOIA request on behalf of Kevin McCarthy and Bischoff Martingayle, P.C., requesting the following materials:
 1. All City of Virginia Beach records relating to the death of Sean McCarthy (as referenced by Kevin McCarthy in prior communications), including, but not limited to, all records in the possession and/or subject to the control of the Virginia Beach Police Department, Fire

Department, Emergency Medical Services and/or Rescue Squad;

2. All policies, procedures, protocols, directives and memoranda relating to the policy of the Virginia Beach Police Department described in the second paragraph on page one of your April 8, 2015 letter (copy attached for ease of reference as Exhibit A).

11. In a letter dated April 23, 2015 (Exhibit 4, minus attachments) the City's "Freedom of Information Specialist" responded to the April 16, 2015 FOIA request. Regarding the request for all investigative materials and any policies relating to the release of such material, the April 23, 2015 letter states as follows:

All policies, procedures, protocols, directives and memoranda relating to the policy of the Virginia Beach Police Department described in the second paragraph on page one of your April 8, 2015 letter....

Lt. Andrew Spiess advised that there is no written policy, procedure, protocol, directive or memorandum that is responsive to this request. He advised that it is an unwritten policy or practice of the Department to exercise its discretion by not releasing criminal investigative case file records relating to suicide because of the sensitive nature of the information. A new Supreme Court of Virginia opinion, *Fitzgerald v. Loudoun County Sheriff's Office*, issued April 16, 2015, affirms the Department's position in this regard and is enclosed.

12. The position that the City of Virginia Beach, VBPD and Chief Cervera have taken in this matter is flawed in several respects. Specifically,

- a. The blanket, automatic refusal to provide criminal investigative materials - - especially from closed files where there is no intention to prosecute or investigate further - - is contrary to the letter and spirit of the policy of the Freedom of Information Act set forth in Code §2.2-3700(B), which states, in part:

By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.

* * * * *

The provisions of this chapter 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. Any exemption from public access to records or meetings shall be narrowly construed....

A copy of Code §2.2-3700 is attached hereto for ease of reference as Exhibit 5.

- b. The blanket, automatic refusal to exercise the "discretion" set forth in Code §2.2-3706(A)(2)(a) constitutes an illegal and/or

unreasonable refusal by a municipality and its officials to consider each request on its merits and engage in an appropriate, rational discretionary analysis.

- c. There is no authority for the City of Virginia Beach and its officials to adopt or otherwise utilize an “unwritten policy or practice” to refuse to exercise discretion and automatically refuse to provide investigative materials.
- d. Any constitutionally sound exercise of discretion must include reasonable and objective criteria to guide decision-making, and the defendants’ “informal” policy/practice of refusing to release the requested information is arbitrary, capricious and violative of fundamental due process and equal protection rights guaranteed by the Constitution of Virginia. Cases from the United States Supreme Court and Supreme Court of Virginia have repeatedly held that due process and equal protection principles forbid allowing government officials to exercise unbridled, uncontrolled discretion and opinion in making decisions impacting citizens, and the analysis should be no different in this matter. See e.g., City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (“a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain...”, quoting Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966)); Tanner v. City of

Virginia Beach, 277 Va. 432 (2009) (striking down a standardless noise ordinance that the VBPD enforced through various informal procedures and tactics); Andrews v. Board of Supervisors of Loudoun Co., 200 Va. 637 (1959) (striking down part of a zoning ordinance for failure to provide “ascertainable terms or uniformity”, thus creating “the opportunity for arbitrary action and discrimination”); Booth v. Commonwealth, 197 Va. 177, 179-81 (1955) (striking down an alcohol interdiction statute for lack of objective standards).

e. Pursuant to any rational exercise of discretion, there is no basis for withholding the requested information from a parent of a young man believed to have committed suicide. Similarly, there is no logical basis for withholding such information from a law firm engaged to assist the parent of an alleged suicide victim. There is no reason to believe that Kevin McCarthy or his legal counsel would make illegal or improper use of any investigative materials, nor have the defendants claimed otherwise.

13. It is critical to remember that the Freedom of Information Act essentially divides information into three categories, specifically, that which must be disclosed, that which may be disclosed on a discretionary basis, and that which is exempt from disclosure. In essence, the defendants have rewritten the Freedom of Information

Act to reclassify certain “discretionary” materials as being automatically “exempt”. In doing so, the defendants violate the letter and spirit of the stated policy of the FOIA, automatically deprive information requesters from the benefit of the discretionary analysis provided in Code §2.2-3706(A)(2)(a), and violate the “Dillon Rule” by both refusing to exercise discretion provided by the General Assembly and by reclassifying information from “discretionary” to “exempt”.

13. Accordingly, pursuant to the provisions of Code §2.2-3713 and 3714, plaintiffs submit this Complaint seeking relief.

WHEREFORE, for the foregoing reasons, plaintiffs Kevin McCarthy and Bischoff Martingayle, P.C. respectfully request that this Honorable Court enter an order granting the following relief:

- A. A declaration that the defendants have violated and are violating the Virginia Freedom of Information Act with respect to the investigative materials requested by plaintiffs;
- B. An award of mandamus compelling the establishment of reasonable and objective written criteria to guide the subject “discretionary” analysis, compelling the release of the requested information, and granting an award of injunctive relief preventing and restraining future violations of the Virginia Freedom of Information Act as described in this Complaint;
- C. An award of all penalties, attorney’s fees, costs and other relief allowed pursuant to Code of Virginia §§2.2-3713 and 3714.


KEVIN MCCARTHY

New Jersey
STATE OF ~~ARIZONA~~,
CITY OF Bridgewater, to-wit:

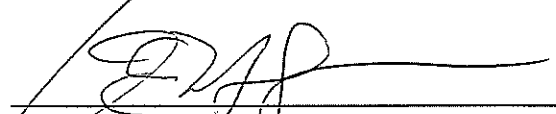
Subscribed and sworn to before me this 8th day of June, 2015, by Kevin McCarthy, who is either personally known to me or has produced proper identification.

SUZANNE F. YOUNAN
NOTARY PUBLIC OF NEW JERSEY
I.D. No: 2284467
My Commission Expires Feb. 25, 2017


Notary Public


My Commission Expires: _____
Registration No.: _____

BISCHOFF MARTINGAYLE, P.C.


Duly authorized agent


COMMONWEALTH OF VIRGINIA,
CITY OF VIRGINIA BEACH, to-wit:

Subscribed and sworn to before me this 10th day of June, 2015, by Kevin E. Martingayle, a duly authorized agent of Bischoff Martingayle, P.C., who is either personally known to me or has produced proper identification.

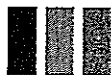

Official ~~Notary~~ Notary Public
Katherine L. Seabright
Notary Public
Commonwealth of Virginia
Commission Expires: 2/29/16
Registration #: 7524472

My Commission Expires: 2/29/16
Registration No.: 7524472

KEVIN MCCARTHY
and BISCHOFF MARTINGAYLE, P.C.

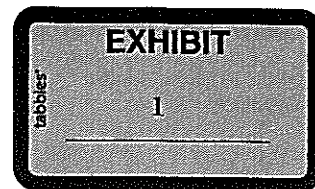
By 
Of Counsel

Kevin E. Martingayle, Esquire
BISCHOFF MARTINGAYLE, P.C.
3704 Pacific Avenue, Suite 300
Virginia Beach, VA 23451
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(757) 428-6982 (facsimile)
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BISCHOFF MARTINGAYLE

A REPUTATION FOR RESULTS™



Reply to Virginia Beach office
E-Mail: martingayle@bischoffmartingayle.com
Direct Dial (757) 416-6009

April 7, 2015

Via Electronic Mail (cboynton@vbgov.com)

Christopher S. Boynton
Office of the City Attorney
Municipal Center, Bldg. 1, Room 260
2401 Courthouse Drive
Virginia Beach, VA 23456

Re: FOIA request of Kevin McCarthy regarding the death of Sean McCarthy

Dear Chris:

Thank you for speaking with me late this morning concerning my client's efforts to obtain information from the Virginia Beach Police Department regarding the investigation of his son's apparent suicide. Attached as Exhibit A is a copy of FOIA request form that Kevin McCarthy filled out and submitted. Attached as Exhibit B is the February 19, 2015 response and the incident report attached thereto. Attached for your ease of reference as Exhibit C is a copy of Code §2.2-3706.

As we discussed, these are the concerns that Mr. McCarthy and his wife have:

1. It appears that the VBPD is refusing as a matter of policy to exercise the discretion set forth in Code §2.2-3706(2)(a). In instances where the General Assembly has afforded public officials with "discretion", it would appear to be inappropriate to refuse to exercise it simply as a matter of standing policy.
2. It is apparently undisputed that this is a "closed" investigation, and that it was determined that there was no "crime" committed. Therefore, it is questionable whether the potential exemption set forth in Code §2.2-3706(2)(a) applies.
3. Simply as a matter of fairness and basic decency, the McCarthys hope that the VBPD would be interested in helping them bring "closure" to their



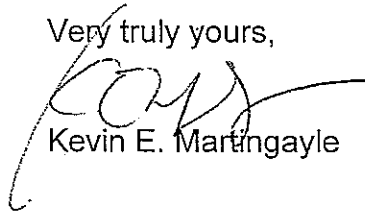
BISCHOFF MARTINGAYLE

grieving process by allowing them full access to the file that was compiled in this matter. It was devastating for the McCarthys to lose their son, and the inability to review the file materials relating to their son is hindering their ability to heal and move forward.

If you would please review this letter and enclosures with appropriate decision-makers within the VBPD and then respond, I would appreciate it. Even if the VBPD has the legal ability to stand behind the initial decision to withhold file materials, I certainly hope that this situation will be considered as an appropriate instance for exercise of the discretion provided by the General Assembly, and that the VBPD will permit the McCarthy family to review the entire file.

I appreciate your willingness to speak with me and look into this matter. Should you have any questions or concerns whatsoever, please do not hesitate to contact me. With best personal regards, I am,

Very truly yours,



Kevin E. Martingayle

KM/kls
Attachments

From: H. J. Beasley JBeasley@vbgov.com
Subject: RE: VBgov Form Submission - FOIA Request Form for Police Requests Only
Date: February 19, 2015 at 10:54 AM
To: kimccarthy@cox.net

Please see the attached documents reference your request.

JB

Sgt. H.J. Beasley, III
Virginia Beach Police Department
Office of Internal Affairs
2509 Princess Anne Rd. - Bldg. 11
Virginia Beach, VA 23456
Office: (757) 385-4145
Fax: (757) 385-4007

From: no-reply@vbgov.com [mailto:no-reply@vbgov.com]
Sent: Wednesday, February 18, 2015 3:44 PM
To: Greg M. Gonda; Shawn Hoffman; Frank D. Wins; Robert C. Neves; H. J. Beasley
Subject: VBgov Form Submission - FOIA Request Form for Police Requests Only

This is an automatically generated email from VBgov.com.

FOIA Request Form for Police Requests Only - New Submission

Requestor's Name:

Kevin McCarthy

Firm or Company Name:

Nothing Entered

Street Address:

40601 N. Harbour Town Ct.

City:

Anthem

State:

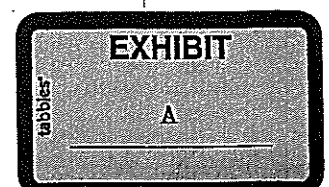
AZ

Zip:

85086

Phone Number:

410 991-7868



Alternative Phone Number:

Nothing Entered

Email:

kfmccarthy@cox.net

Document(s) Requested:

Case Investigation

Additional Information/Comments:

Sean P. McCarthy is my son. I am requesting the Case Investigation/Report

Incident Date/Times:

06/30/2014 09:20 AM

Incident Address/Location:

332 Laskin Rd. #228 Virginia Beach VA 23451

Client/Victim Name:

Sean P. McCarthy

Report Number:

CASE#: 2014026553

Officer's Name:

JONES, T. M. (Investigating Officer)

Suspect's Name:

Nothing Entered

Court Date or Date Needed:

Nothing Entered

Document Delivery:

Email - Be Sure to Provide Email Address Above





City of Virginia Beach

VBgov.com

DEPARTMENT OF POLICE
OFFICE OF INTERNAL AFFAIRS
OFFICE: (757)-385-4145
FAX: (757) 385-4007

MUNICIPAL CENTER
BUILDING 11
2509 PRINCESS ANNE ROAD
VIRGINIA BEACH, VA 23456-9064

February 19, 2015

Mr. Kevin McCarthy
40601 N. Harbour Town Court
Anthem, AZ 85086

RE: Freedom of Information Act Number: FOI2015-227

Dear Mr. McCarthy,

Enclosed you will find a public copy of police incident report number 2014-026553. All other material is considered to be criminal investigation information or material. As such, it is exempted from disclosure under Section 2.2-3706 (2) (a) of the code of Virginia (Freedom of Information Act). It is the policy of this office not to release criminal investigative information or material without a Subpoena.

The items being withheld from disclosure are as follows:

PD-3A Case File maintained in Police Services Division – 47 pages

PD-3 Investigative Report stored in electronic database – 9 Pages

230 Images (Photographs) in 2 folders maintained by the Forensics Division.

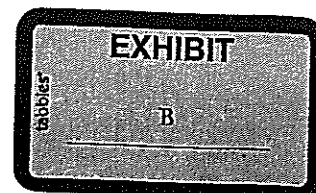
Should you have any questions or need further information, I can be reached at (757) 385-4145.

Sincerely,

Sergeant H. J. Beasley

Custodian of Records

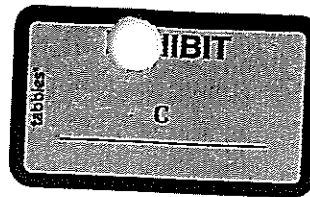
cc: File



**Virginia Beach Police Department
INCIDENT REPORT
PUBLIC COPY**

CASE#: 2014026553

Location of Incident 300-BLK LASKIN RD VIRGINIA BEACH VA 23451		Zone: 226 Neighborhood: OCEANFRONT - 31ST ST SOUTH	Date / Time Reported: 06/30/2014 09:20 AM Last Known Secure: 06/26/2014 02:37 PM At Found: 06/30/2014 09:10 AM	
Reporting Officer Supervisor Investigating Officer	MANTONI, P. J. WALTERS, B. E. JONES, T. M.	Case Status OTHER Date: 01/22/2015	Disposition	
Crime# 1: DEATH, SUICIDE (99A4) - Completed			Premise: RESIDENCE, SINGLE-FAMILY How Left Scene?	
Entry	Exit	Security Type		
1:	1:	1:		
2:	2:	2:		
Criminal Activity	Weapons/Tools		(A) - automatic	Bias/Motivation
1:	1: HANDGUN			NONE (NO BIAS)
2:	2:			
3:	3:			
Modus Operandi:	Method of Entry		Trademarks	
Injuries:				
Information on VICTIMS and OTHERS INVOLVED are restricted.				
No RELATED PROPERTIES				
No RELATED VEHICLES				
END OF REPORT				
If you have additional information or questions regarding this incident, please contact the Investigator at (757) 385-4101.				



§ 2.2-3706. Disclosure of criminal records; limitations.

A. All public bodies engaged in criminal law-enforcement activities shall provide requested records in accordance with this chapter as follows:

1. Records required to be released:

a. Criminal incident information relating to felony offenses, which shall include:

- (1) A general description of the criminal activity reported;
- (2) The date the alleged crime was committed;
- (3) The general location where the alleged crime was committed;
- (4) The identity of the investigating officer or other point of contact; and
- (5) A general description of any injuries suffered or property damaged or stolen.

A verbal response as agreed to by the requester and the public body is sufficient to satisfy the requirements of subdivision a.

Where the release of criminal incident information, however, is likely to jeopardize an ongoing investigation or prosecution or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information. Nothing in subdivision a shall be construed to authorize the withholding of those portions of such information that are not likely to cause the above-referenced damage;

b. Adult arrestee photographs taken during the initial intake following the arrest and as part of the routine booking procedure, except when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of the photograph will no longer jeopardize the investigation; and

c. Information relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest;

2. Discretionary releases. The following records are excluded from the provisions of this chapter, but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law:

a. Criminal investigative files, defined as any documents and information, including complaints, court orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements, and evidence relating to a criminal investigation or prosecution, other than criminal incident information subject to release in accordance with subdivision 1 a;

b. Reports submitted in confidence to (i) state and local law-enforcement agencies, (ii) investigators authorized pursuant to Chapter 3.2 (§ 2.2-307 et seq.), and (iii) campus police departments of public institutions of higher education established pursuant to Chapter 17 (§ 23-232 et seq.) of Title 23;

c. Records of local law-enforcement agencies relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such agencies under a promise of anonymity;

d. All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment;

e. Records of law-enforcement agencies, to the extent that such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public;

f. All records of adult persons under (i) investigation or supervision by a local pretrial services agency in accordance with Article 5 (§ [19.2-152.2](#) et seq.) of Chapter 9 of Title 19.2; (ii) investigation, probation supervision, or monitoring by a local community-based probation services agency in accordance with Article 9 (§ [9.1-173](#) et seq.) of Chapter 1 of Title 9.1; or (iii) investigation or supervision by state probation and parole services in accordance with Article 2 (§ [53.1-141](#) et seq.) of Chapter 4 of Title 53.1;

g. Records of a law-enforcement agency to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties;

h. Those portions of any records containing information related to undercover operations or protective details that would reveal the staffing, logistics, or tactical plans of such undercover operations or protective details. Nothing in this subdivision shall operate to allow the withholding of information concerning the overall costs or expenses associated with undercover operations or protective details;

i. Records of (i) background investigations of applicants for law-enforcement agency employment, (ii) administrative investigations relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that are made confidential by law;

j. The identity of any victim, witness, or undercover officer, or investigative techniques or procedures. However, the identity of any victim or witness shall be withheld if disclosure is prohibited or restricted under § [19.2-11.2](#); and

k. Records of the Sex Offender and Crimes Against Minors Registry maintained by the Department of State Police pursuant to Chapter 9 (§ [9.1-900](#) et seq.) of Title 9.1, including information obtained from state, local, and regional officials, except to the extent that information is required to be posted on the Internet pursuant to § [9.1-913](#); and

3. Prohibited releases. The identity of any individual providing information about a crime or criminal activity under a promise of anonymity shall not be disclosed.

B. Noncriminal records. Records (i) required to be maintained by law-enforcement agencies pursuant to § [15.2-1722](#) or (ii) maintained by other public bodies engaged in criminal law-enforcement activities shall be subject to the provisions of this chapter except that those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical, or financial nature may be withheld where the release of such information would jeopardize the safety or privacy of any person. Access to personnel records of persons employed by a law-enforcement agency shall be governed by the provisions of subdivision A 2 i of this section and subdivision 1 of § [2.2-3705.1](#), as applicable.

C. Records of any call for service or other communication to an emergency 911 system or communicated with any other equivalent reporting system shall be subject to the provisions of this chapter.

D. Conflict resolution. In the event of conflict between this section as it relates to requests made under this section and other provisions of law, this section shall control.

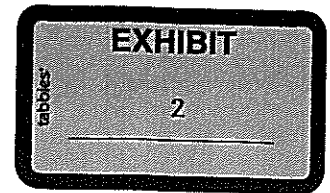
(1999, cc. [703](#), [726](#), § [2.1-342.2](#); 2000, c. [227](#); 2001, c. [844](#); 2002, cc. [393](#), [715](#), [769](#), [830](#); 2004, cc. [685](#), [735](#); 2006, cc. [857](#), [914](#); 2007, c. [133](#); 2010, c. [627](#); 2011, cc. [798](#), [871](#); 2013, c. [695](#).)

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MARK D. STILES
CITY ATTORNEY

City of Virginia Beach



VBgov.com

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VIRGINIA BEACH, VIRGINIA 23456-9004
(757) 385-4531
FAX (757) 385-5687
TTY: 711

April 8, 2015

Via Electronic Mail
martingayle@bischoffmartingayle.com

Kevin Martingayle
BISCHOFF MARTINGAYLE
3704 Pacific Avenue, Suite 300
Virginia Beach, VA 23451-2719

Re: FOIA request of Kevin McCarthy regarding the death of Sean McCarthy

Dear Kevin:

This letter responds to your letter dated April 7, 2015 on behalf of your client, Kevin McCarthy. I understand that your client previously spoke with Lieutenant Andrew Spiess and/or Deputy Chief John Bell about this request, but you have asked several questions concerning your client's efforts to obtain release of documents relating to the criminal investigation of Mr. McCarthy's son's apparent suicide under the Virginia Freedom of Information Act (FOIA).

Addressing your first question, you indicated that the Virginia Beach Police Department is refusing as a matter of policy to exercise its discretion as set forth in Code §2.2-3706(2)(a). After discussing this issue with Lt. Spiess, Sgt. H.J. Beasley, Deputy Chief Bell and Chief James Cervera, the Virginia Beach Police Department believes that its discretion must be exercised fairly and uniformly to make criminal investigative documents available to all our citizens once the records have been released to anyone. Accordingly, and largely out of respect for grieving family members in cases such as these, it is the policy of the Department 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.

April 8, 2015

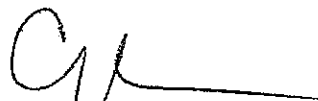
The Virginia Freedom of Information Advisory Council affirmed last year that criminal investigative materials relating to suicide cases may be withheld within a police department's discretion. (See 2014 Va. FOIA AO-04-14, Suicide reports and related records may be withheld as criminal investigative files because suicide remains a crime in Virginia).

The Department restates its offer to allow Mr. McCarthy to be briefed by the detectives who conducted the investigation. You may contact me or have Mr. McCarthy contact Sgt. Beasley directly if Mr. McCarthy wishes to avail himself of this opportunity.

If you have any further questions or concerns regarding this matter, please let me know.

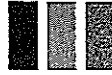
With kind regards, I remain

Very truly yours,



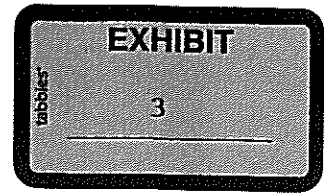
Christopher S. Boynton
Deputy City Attorney

cc: Chief James A. Cervera
Deputy Chief John Bell
Lieutenant Andrew Spiess
Sergeant H.J. Beasley



BISCHOFF MARTINGAYLE

A REPUTATION FOR RESULTS™



Reply to Virginia Beach office
E-Mail: martingayle@bischoffmartingayle.com
Direct Dial (757) 416-6009

April 16, 2015

Via Electronic Mail (cboynton@vb.gov.com)

Christopher S. Boynton
Office of the City Attorney
Municipal Center, Bldg. 1, Room 260
2401 Courthouse Drive
Virginia Beach, VA 23456

Re: FOIA request of Kevin McCarthy regarding the death of Sean McCarthy

Dear Chris:

Thank you for your letter of April 8, 2015 responding to mine dated April 7, 2015 relating to the FOIA request of Kevin McCarthy. Unfortunately, it appears that we will be seeking relief in court, unless something changes in the City's position and we are able to resolve this amicably.

To make sure that there are no questions or concerns regarding Mr. McCarthy having "standing" to request records pursuant to the Virginia Freedom of Information Act, I am restating his request in the name of our law firm, which is based in Virginia Beach. For the sake of clarity, Mr. McCarthy and this law firm are requesting the following:

1. All City of Virginia Beach records relating to the death of Sean McCarthy (as referenced by Kevin McCarthy in prior communications), including, but not limited to, all records in the possession and/or subject to the control of the Virginia Beach Police Department, Fire Department, Emergency Medical Services and/or Rescue Squad;
2. All policies, procedures, protocols, directives and memoranda relating to the policy of the Virginia Beach Police Department described in the second paragraph on page one of your April 8, 2015 letter (copy attached for ease of reference as Exhibit A).



BISCHOFF MARTINGAYLE

Regarding the records in #1, I assume that some or most of the records are not part of any criminal investigative file. To the extent that the VBFD, VBEMS and/or any rescue squad has records, they should be produced.

As for #2, I am concerned that the VBPD has adopted a policy of refusing to exercise the discretion given it in the FOIA. Automatically saying "no" is not an appropriate or reasonable exercise of the discretion given by the General Assembly.

Should you have any questions or concerns regarding the nature or scope of the information requested in this correspondence, please do not hesitate to contact me. I appreciate your attention in this matter, and look forward to receiving the requested information. With best personal regards, I am,

Very truly yours,



Kevin E. Martingayle

KM/kl
Attachment
cc: Kevin McCarthy



City of Virginia Beach

VBgov.com

MARK D. STILES
CITY ATTORNEY

April 8, 2015

MUNICIPAL CENTER
BUILDING 1
2401 COURTHOUSE DRIVE
VIRGINIA BEACH, VIRGINIA 23456-9004
(757) 385-4531
FAX (757) 385-5887
TTY: 711

Via Electronic Mail

martingayle@bischoffmartingayle.com

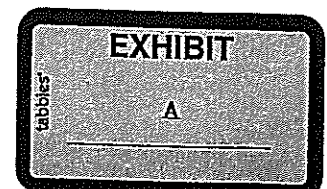
Kevin Martingayle
BISCHOFF MARTINGAYLE
3704 Pacific Avenue, Suite 300
Virginia Beach, VA 23451-2719

Re: FOIA request of Kevin McCarthy regarding the death of Sean McCarthy

Dear Kevin:

This letter responds to your letter dated April 7, 2015 on behalf of your client, Kevin McCarthy. I understand that your client previously spoke with Lieutenant Andrew Spiess and/or Deputy Chief John Bell about this request, but you have asked several questions concerning your client's efforts to obtain release of documents relating to the criminal investigation of Mr. McCarthy's son's apparent suicide under the Virginia Freedom of Information Act (FOIA).

Addressing your first question, you indicated that the Virginia Beach Police Department is refusing as a matter of policy to exercise its discretion as set forth in Code §2.2-3706(2)(a). After discussing this issue with Lt. Spiess, Sgt. H.J. Beasley, Deputy Chief Bell and Chief James Cervera, the Virginia Beach Police Department believes that its discretion must be exercised fairly and uniformly to make criminal investigative documents available to all our citizens once the records have been released to anyone. Accordingly, and largely out of respect for grieving family members in cases such as these, it is the policy of the Department 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.



April 8, 2015

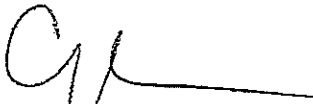
The Virginia Freedom of Information Advisory Council affirmed last year that criminal investigative materials relating to suicide cases may be withheld within a police department's discretion. (See 2014 Va. FOIA AO-04-14, Suicide reports and related records may be withheld as criminal investigative files because suicide remains a crime in Virginia).

The Department restates its offer to allow Mr. McCarthy to be briefed by the detectives who conducted the investigation. You may contact me or have Mr. McCarthy contact Sgt. Beasley directly if Mr. McCarthy wishes to avail himself of this opportunity.

If you have any further questions or concerns regarding this matter, please let me know.

With kind regards, I remain

Very truly yours,



Christopher S. Boynton
Deputy City Attorney

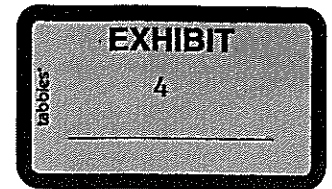
cc: Chief James A. Cervera
Deputy Chief John Bell
Lieutenant Andrew Spiess
Sergeant H.J. Beasley



MARK D. STILES
CITY ATTORNEY

In Reply Refer to File No.: FO3942

City of Virginia Beach



VBgov.com

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BUILDING 1
2401 COURTHOUSE DRIVE
VIRGINIA BEACH, VA 23456-9004
(757)385-4531
FAX (757)385-5687
TTY: 711

April 23, 2015

Kevin E. Martingayle, Esquire
Bischoff Martingayle, P.C.
3704 Pacific Avenue
Suite 200
Virginia Beach, VA 23451

Re: *Freedom of Information Act Request*

Dear Kevin:

I am responding to your letter to Deputy City Attorney Christopher S. Boynton, dated and received April 16, 2015, wherein you requested the following public records:

All City of Virginia Beach records relating to the death of Sean McCarthy (as referenced by Kevin McCarthy in prior communications), including, but not limited to, all records in the possession and/or subject to the control of the Virginia Beach Police Department, Fire Department, Emergency Medical Services and/or Rescue Squad

I forwarded this request to Emergency Communications and Citizens Services (ECCS), Emergency Medical Services (EMS), the Fire Department and the Police Department.

Crystal Fox of ECCS provided the enclosed 911 and dispatch audio files and Calls for Service Reports. Employee identification numbers have been redacted pursuant to Virginia Code § 2.2-3705.1(1), Drivers' license and vehicle license plate numbers have been redacted pursuant to Virginia Code § 46.2-208, personal and medical information have been redacted pursuant to Virginia Code § 2.2-3706(B), Social Security Numbers have been redacted pursuant to Virginia Code § 2.2-3815(A), and police cell phones numbers have been redacted pursuant to Virginia Code § 2.2-3706(A)(2)(g).

One partially redacted paragraph, appearing in each Calls for Service report, is a dispatcher notation regarding an unrelated individual in another apartment that has no connection to this case.

You will note that three of the audio files (Fire, EMS and 2nd Precinct) are notated as "summed" files, meaning that the excess "dead air" has been removed.

Donna Aydlette of the Fire Department provided the enclosed Fire Incident Report.

Division Chief Ed Brazle of EMS provided a copy of the VBDEMS Incident/Medical Report. A Medical Release Authorization is normally required to provide this record to an individual who is not the subject of the record. However, because no services were actually provided, we are releasing the report to you and your client absent a release. Employee identification numbers have been redacted pursuant to Virginia Code § 2.2-3705.1(1)

I obtained the enclosed public copy of the Police Incident Report from the online ePro database. Deputy Chief William Dean identified a criminal investigation case file containing 47 pages, an electronic investigation report containing 9 pages and 230 photographs held by the Forensic Division. He has requested that these documents be withheld pursuant to Virginia Code § 2.2-3706(A)(2)(a).

All policies, procedures, protocols, directives and memoranda relating to the policy of the Virginia Beach Police Department described in the second paragraph on page one of your April 8, 2015 letter

Lt. Andrew Spiess advised that there is no written policy, procedure, protocol, directive or memorandum that is responsive to this request. He advised that it is an unwritten policy or practice of the Department to exercise its discretion by not releasing criminal investigative case file records relating to suicide because of the sensitive nature of the information. A new Supreme Court of Virginia opinion, *Fitzgerald v. Loudoun County Sheriff's Office*, issued April 16, 2015, affirms the Department's position in this regard and is enclosed. The Department restates its offer to sit down with Mr. McCarthy and discuss this investigation. Please advise if your client wishes to avail himself of this opportunity.

Kevin Martingayle
April 23, 2015
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If you have any questions regarding this response, please feel free to contact me at 385-4052 or nbloom@vbgov.com.

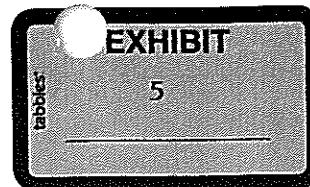
Sincerely,

Nancy L. Bloom

Freedom of Information Specialist

Enclosure

cc: Deputy City Attorney Christopher S. Boynton
Deputy Chief William Dean
Lt. Andrew Spiess
Division Chief Ed Brazle
Crystal Fox, ECCS
Donna Aydlette, Fire

[prev](#) | [next](#)

§ 2.2-3700. Short title; policy.

A. This chapter may be cited as "The Virginia Freedom of Information Act."

B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

The provisions of this chapter 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. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law. This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.

All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.

Any ordinance adopted by a local governing body that conflicts with the provisions of this chapter shall be void.

(1968, c. 479, § 2.1-340; 1976, c. 467, § 2.1-340.1; 1989, c. 358; 1990, c. 538; 1999, cc. [703](#), [726](#); 2001, c. [844](#); 2002, c. [393](#).)

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