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

KEVIN MCCARTHY
and
BISCHOFF MARTINGAYLE, P.C.,

Plaintiffs/Petitioners,

v. Case No. CL15-2332

CITY OF VIRGINIA BEACH
and
JAMES CERVERA,

Defendants/Respondents.

DEMURRER

COME NOW the Defendants, City of Virginia Beach and James Cervera, by counsel, and hereby demur to the Verified Complaint and Petition filed by the Plaintiffs, stating as follows:

Kevin McCarthy, an Arizona resident, and the law firm Bischoff Martingayle, P.C. have sued the City and its police chief, James Cervera, alleging the Defendants violated the Virginia Freedom of Information Act, Virginia Code § 2.2-3700 *et seq.*, when they exercised their discretionary authority in declining to release to them copies of the Virginia Beach Police Department's "criminal investigative files" pursuant to Virginia Code § 2.2-3706(A)(2)(a). The investigation relates to Mr. McCarthy's son's apparent suicide. Because the release of such information is discretionary as a matter of law, and the Virginia Freedom of Information Act does not circumscribe the exercise of that discretion in any form or fashion, Plaintiffs have failed to state a claim upon which relief may be granted and the matter should be dismissed with prejudice.

Plaintiffs have sought release of the Virginia Beach Police Department's criminal investigate files relating to the death investigation of Mr. McCarthy's son, Sean McCarthy. The

City, by and through its Police Department and the City Attorney's office, declined to provide the requested files under the City's discretionary authority, specifically set forth in Virginia Code § 2.2-3706(A)(2)(a). The Supreme Court of Virginia, on April 16, 2015, made clear that a suicide note discovered during an ongoing criminal investigation may be withheld from release per a local law enforcement entity's statutory discretion. *Fitzgerald v. Loudoun County Sheriff's Office*, 771 S.E.2d 858, 2015 Va. LEXIS 48 (2015) (holding that "[a]t 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.") (Opinion attached as "Exhibit 1").

Plaintiffs do not appear to contest that Defendants' had discretion to release or not release these documents under the plain language of the Virginia Freedom of Information Act. Rather, 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.

The Virginia Freedom of Information Act is entirely a creature of statute. No Virginia common law right to government records exists separate and apart from the Act, and accordingly, any remedies it provides are in derogation of the common law, constitute a waiver of the public bodies' sovereign immunity, and must be strictly construed. *See Sabre Construction Corporation v. County of Fairfax*, 256 Va. 68, 73, 501 S.E.2d 144, 147-48 (1998) (internal citations omitted). Simply put, any remedies afforded to a requesting party must be found in the applicable statute scheme itself or they do not exist.

The Virginia Freedom of Information Act provides a remedy for a requesting party to

obtain documents to which it is entitled under the text of the Act; however it provides no standard for or mechanism to challenge an exercise of discretion by a public records custodian. *See* Va. Code § 2.2-3700 *et seq.* Contrast the Virginia Freedom of Information Act with other acts of the General Assembly, such as the Virginia Public Procurement Act, wherein the legislature did provide a specific legal standard and mechanism for challenging when a locality has exceeded its statutory discretion. *See* Va. Code § 2.2-4358(C). Other Virginia Code provisions allowing for a challenge to a locality's exercise of discretion include Virginia Code §§ 15.2-2306(A), 28.1-1313, and 28.1-1413. It is clear that the General Assembly knows well how to craft a review standard for discretionary acts of a public body when it wants to do so. However, it elected not to create a standard or mechanism of review for an exercise of discretion under the Virginia Freedom of Information Act. And where the legislature has elected not to craft a review process or a remedy for a locality's exercise of its discretion under FOIA, it would be error for this court to fashion one from whole cloth. As the Virginia Freedom of Information Advisory Council has opined:

> "You are correct that each of the exemptions cited is discretionary.... Therefore a custodian may choose to release records to which are exempt from mandatory disclosure under FOIA, unless another law prohibits such release.... FOIA is a procedural law, and so long as the response follows that statutory procedure, nothing more than noted above is required under FOIA when a custodian exercises the discretion to withhold requested records in their entirety.... FOIA does not set forth any standards or limitations guiding the use of discretion to disclose exempt records... The remedy provisions likewise do not address the use or abuse of discretion by a records custodian. Reading these provisions together, it appears that all is required is for a public body to establish that an exemption exist and so inform the requested in its response..."

See FOIA Council Opinion AO-01-14 (January 29, 2014) (opinion attached as Exhibit 2").

In short, the Virginia Freedom of Information Act is purely a creature of statute with specific rules and remedies. It is undisputed that the release of the documents requested in this

case was and is discretionary on the part of the records custodian. The General Assembly provided no standard or mechanism of review for an exercise of discretion in the Act, and none is found in common law. There simply is no legal basis for this court to review the custodian's exercise of his statutory discretion, nor is there any legal basis to provide any remedy for it exercise. Plaintiffs have failed to state a claim upon which relief may be granted. The case should be dismissed with prejudice.

CITY OF VIRGINIA BEACH and
JAMES CERVERA

By _____
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Certificate of Service

I hereby certify that on this 22nd day of June, 2015, a true copy of the foregoing was sent via first class mail and email (martingayle@bischoffmartingayle.com) to Kevin E. Martingayle, Esquire, BISCHOFF MARTINGAYLE, P.C., 3704 Pacific Avenue, Suite 300, Virginia Beach, VA 23451.

_____
Christopher S. Boynton

1 of 2 DOCUMENTS

BENJAMIN B. FITZGERALD v. LOUDOUN COUNTY SHERIFF'S OFFICE

Record No. 141238

SUPREME COURT OF VIRGINIA

771 S.E.2d 858; 2015 Va. LEXIS 48

April 16, 2015, Decided

PRIOR HISTORY: [*1] FROM THE CIRCUIT COURT OF LOUDOUN COUNTY. J. Howe Brown, Judge.
Fitzgerald v. Loudoun County Sheriff's Office, 2014 Va. LEXIS 143 (Va., Oct. 23, 2014)

DISPOSITION: Affirmed.

COUNSEL: Benjamin B. Fitzgerald (Jeanine M. Irving; Sevila, Saunders, Huddleston & White, on briefs), for appellant.

Courtney R. Sydnor, Deputy County Attorney (Leo P. Rogers, County Attorney; Milissa R. Spring, Deputy County Attorney, on brief), for appellee.

JUDGES: OPINION BY JUSTICE D. ARTHUR KELSEY.

OPINION BY: D. ARTHUR KELSEY

OPINION

PRESENT: All the Justices

OPINION BY JUSTICE D. ARTHUR KELSEY

On appeal, Benjamin B. Fitzgerald contends that the circuit court erred in denying his request under the Virginia Freedom of Information Act ("FOIA"), Code § 2.2-3700 et seq., to obtain a copy of a suicide note contained in a criminal investigative file maintained by the Loudoun County Sheriff's Office. Finding no such error, we affirm.

I.

In October 2007, a neighbor found Charles D. Riechers, a senior United States Air Force official, dead at his Loudoun County home. Riechers was sitting in his vehicle in a closed garage. A key was in the ignition, in the "on" position, but the vehicle was not running. A hose appeared to connect the vehicle's exhaust pipe to a rear passenger window.

Firefighters from the Loudoun County Fire and Rescue Department and deputies from the Loudoun County [*2] Sheriff's Office responded to the neighbor's 911 call. The deputies immediately secured the area with a yellow crime scene tape and started a crime scene access log to record their observations, summarize their interviews with witnesses, and inventory their collection of physical evidence. They also conducted a security sweep of the home. The deputies then turned the incident over to the Criminal Investigations Division of the Sheriff's Office.

A crime scene investigator managed the initial investigation and ordered that the decedent be taken to the morgue for an autopsy. A detective in the Sheriff's Criminal Investigations Division coordinated the search

of the residence after obtaining consent from the decedent's wife. In the home, investigators discovered various evidentiary clues suggesting that suicide, rather than homicide, could be the cause of death. Among the items of evidence collected was what appeared to be a suicide note addressed to the decedent's supervisor at the Pentagon.

The detective continued to investigate evidentiary leads and coordinated his investigation with the United States Air Force Office of Special Investigations. The detective also reviewed the coroner's [*3] autopsy report, which concluded that the decedent did not die from any apparent bodily trauma. After receiving the medical examiner's report, the detective filed his final report concluding: "This case is now closed, no further investigation is required at this time." The case file was placed among the closed cases of the Criminal Investigations Division.

In February 2014, Fitzgerald sent a FOIA request to the Sheriff's Office seeking all documents related to the "non-criminal 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, [*4] as did the circuit court on a de novo appeal.

The circuit court made a factual finding that the requested document was obtained during a criminal investigation. That the investigation did not lead to a criminal prosecution, the court reasoned, did not change the character of the investigative file from criminal to non-criminal. As the court explained:

> Here, they open[ed] a criminal file and then determined that it was a suicide so you want to go back and in retrospect say, well, that wasn't a criminal file. It was a criminal file by the definition in the Code and if we start saying that we go by what happens later, then I think we open a door that isn't opened by the statute and we create some danger to the community. So I deny the request.

The circuit court entered a final order adopting this reasoning. We granted Fitzgerald's petition for appeal to determine if the circuit court's reasoning is consistent with the provisions of the FOIA.

II.

On appeal, Fitzgerald contends that the circuit court misapplied FOIA principles. On brief, he requests that we reverse and remand with instructions to the circuit court to order the Sheriff's Office "to disclose Mr. Riechers' letter to his business supervisor" [*5] at the Pentagon.[1]

> 1 During oral argument on appeal, Fitzgerald's counsel confirmed that the only document he still seeks is this suicide note. *See* Oral Argument Audio at 1:08 to 1:36.

A.

Standards of Appellate Review

Our analysis begins, as always, by framing the issues before us within the context of the governing standard of appellate review. "Under well-established principles, an issue of statutory interpretation is a pure question of law which we review de novo." *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007). Our de novo review takes into account any informative views on the legal meaning of statutory terms offered by those authorized by law to provide advisory opinions.[2] Even so, in the end, we alone shoulder the duty of interpreting statutes because "pure statutory interpretation is the prerogative of the judiciary." *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 404, 468 S.E.2d 905, 908 (1996). This axiom stems from basic principles of separation of powers. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).

> 2 In this case, we have reviewed the advisory opinions of the Virginia Freedom of Information Advisory Council, particularly Advisory Op. AO-04 (May 22, 2014) and its predecessors. *See*

Code § 30-179(1) (authorizing the Virginia Freedom of Information Advisory Council to issue [*6] advisory opinions).

On the other hand, when the proper construction of a FOIA provision establishes a legal standard governing a factfinding exercise, we give deference to the circuit court's findings of fact and view the facts on appeal "in the light most favorable to the prevailing party." *American Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330, 338-39, 756 S.E.2d 435, 439 (2014) (internal quotation marks and alterations omitted). This appellate deference extends not only to the circuit court's resolution of contested evidence, but also to all reasonable inferences that may be drawn from that evidence. "Where divergent or conflicting inferences reasonably might be drawn from established facts their determination is exclusively for the fact-finding body." *Hopson v. Hungerford Coal Co.*, 187 Va. 299, 308, 46 S.E.2d 392, 396 (1948).

B.

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 § 2.2-3700(B). Disclosure [*7] exemptions must be "narrowly construed" in favor of disclosure. *Id.*

Fitzgerald argues on appeal that this laudable statutory bias in favor of disclosure requires that we construe the FOIA to mandate that the Sheriff's Office disclose a suicide note, which was discovered during an ongoing criminal investigation. Like the circuit court, we do not believe that the statutory language can bear the weight of Fitzgerald's argument.

Code § 2.2-3706 governs the disclosure of criminal records. Subsection (A)(1) requires disclosure of certain specific information, including "[c]riminal incident information." Certain types of criminal records not required to be produced under subsection (A)(1) "may be disclosed" under subsection (A)(2) at the discretion of the custodian, if no other law forbids disclosure. "Criminal investigative files" are among the categories of records subject to the "[d]iscretionary releases" provisions of subsection (A)(2).

Code § 2.2-3706(B) governs the mandatory disclosure of "[n]oncriminal records." Among other things, these records include those "required to be maintained by law-enforcement agencies pursuant to [Code] § 15.2-1722." Code § 2.2-3706(B). A records-retention statute outside the text of FOIA, Code § 15.2-1722(A), requires sheriffs and police chiefs to maintain "adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents [*8] records necessary for the efficient operation of a law-enforcement agency." The failure to do so "shall constitute a misdemeanor." *Id.* Subsection (B) of Code § 15.2-1722 defines "[n]oncriminal incidents records" as "compilations of noncriminal occurrences of general interest to law-enforcement agencies, such as missing persons, lost and found property, suicides and accidental deaths."

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 factfinder, 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 [*9] had the discretion, but not the duty, to disclose documents within this file.

Even so, Fitzgerald argues, the criminal investigative file lost its character as such when the file was closed by the Criminal Investigations Division of the Sheriff's

Office. We find nothing in the statutory text or in its legislative context to support this counterintuitive conclusion.

Suffice it to say, the point of a criminal investigation is to investigate -- to determine whether a crime occurred and, if so, who perpetrated it. A criminal investigation may or may not lead to a prosecution. But that does not mean that the application of FOIA disclosure requirements is dependent upon the outcome of the investigation. In this case, investigators discovered the suicide note during an ongoing criminal investigation. That the investigation was later closed is inconsequential for purposes of FOIA disclosure principles.

2. *Noncriminal Records*

Fitzgerald next relies upon Code § 2.2-3706(B), which requires the mandatory release of certain records, including those "required to be maintained by law-enforcement agencies pursuant to [Code] § 15.2-1722." As noted earlier, this non-FOIA records-retention statute requires sheriffs and police chiefs to maintain [*10] "adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents records necessary for the efficient operation of a law-enforcement agency." Code § 15.2-1722(A). According to Fitzgerald, documents related to a suicide (including the decedent's suicide note) should be considered "noncriminal incidents records" subject to disclosure under Code § 15.2-1722.

We first address the assumption underlying Fitzgerald's argument. He seeks a broad construction of Code § 15.2-1722 on the ground that the General Assembly has prescribed that the "provisions" of the FOIA "shall be liberally construed" in favor of disclosure. Appellant's Brief at 18-19 (quoting Code § 2.2-3700(B)). We find this argument problematic for several reasons.

Code § 15.2-1722 is incorporated by reference in the FOIA but is not codified as a stand-alone provision of the FOIA. That seemingly semantic point unmasks a distinction with a significant difference. Code § 15.2-1722 is a records-retention statute that carries a criminal sanction. If there were any textual ambiguities in Code § 15.2-1722, the rule of lenity would direct us to adopt a narrow construction, thus reducing exposure to criminal liability. That necessarily narrow construction would run contrary to the broad construction required by the FOIA, which [*11] expands the scope of disclosure.[3] We need not resolve this conundrum, however, because Code § 15.2-1722 has a plain meaning inconsistent with Fitzgerald's interpretation.

> 3 Only when a "penal statute is unclear" do Virginia courts apply the rule of lenity and strictly construe the statute in the criminal defendant's favor. *Waldrop v. Commonwealth*, 255 Va. 210, 214, 495 S.E.2d 822, 825 (1998) (footnote omitted); *see also Holsapple v. Commonwealth*, 266 Va. 593, 598, 587 S.E.2d 561, 564 (2003) ("We do not agree that the statutory language is ambiguous. Hence, we construe the language according to its plain meaning without resort to rules of statutory interpretation."). The rule of lenity serves only to resolve genuine ambiguities and "does not abrogate the well recognized canon that a statute . . . should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language." *Cartwright v. Commonwealth*, 223 Va. 368, 372, 288 S.E.2d 491, 493 (1982) (omission in original) (quoting *Gough v. Shaner*, 197 Va. 572, 575, 90 S.E.2d 171, 174 (1955)).

Subsection (B) of Code § 15.2-1722 defines "[n]oncriminal incidents records" as "compilations of noncriminal occurrences of general interest to law-enforcement agencies, such as missing persons, lost and found property, suicides and accidental deaths." In ordinary terms, a compilation is something that has been compiled. *See generally* Webster's Third New International Dictionary 464 (2002) (defining [*12] "[c]ompilation" as "the act or action of gathering together written material esp. from various sources" or "something that is the product of the putting together of two or more items"). A compilation of poems, for example, is a collection of different poems.[4] It is not a single poem or even a collection of background materials related to a single poem.

> 4 *See* Black's Law Dictionary 344 (10th ed. 2014) (defining "compilation" in the context of copyright law as "[a] collection of literary works arranged in an original way"); *accord* 17 U.S.C. § 101 (2014) (defining "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected,

> coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship").

The suicide note, standing alone, cannot constitute a compilation under Code § 15.2-1722(B). The pertinent language requires that "compilations of noncriminal occurrences" be maintained and lists suicides as an example of such occurrences. Code § 15.2-1722(B). A compilation of suicides is a record of more than one suicide. The suicide note may be a compilation of words, but not a compilation of suicides.

We similarly reject the assertion that the entire criminal [*13] investigative file maintained by the Sheriff's Office could be deemed a compilation of suicide records. Code § 15.2-1722(B) addresses "[n]oncriminal incidents records," specifically defined as "compilations of noncriminal occurrences . . . such as . . . suicides." (Emphasis added.) A file containing reports concerning a single incident, later determined to be a suicide, is not a compiled collection of information concerning multiple suicides. The criminal investigative file in this case -- protected against mandatory disclosure by Code § 2.2-3706(A)(2)(a) -- did not become, and never was, a compilation of suicides.

Nothing in our reasoning, however, implies that a compilation can only be a spreadsheet of raw data points or statistics. Although it can certainly be that, the statutory meaning of compilation is not necessarily so limited. In *Tull v. Brown*, 255 Va. 177, 494 S.E.2d 855 (1998), for example, we treated a 911 tape recording of multiple channels of radio traffic and telephone calls as a

> grouping of electronically gathered information and thus a "compilation." The tape at issue in this case is not just a recording of the conversation between the 911 caller and the dispatcher. Rather, it is a recording on multiple channels of all radio traffic handled through the . . . dispatch office [*14] in addition to conversations occurring on . . . four telephone lines and conversations between individuals physically in the dispatcher's office. In short, all activity occurring in the dispatch office as well as that on the four telephone lines is compiled on this tape.

Id. at 184, 494 S.E.2d at 858-59. In *Tull*, the 911 tape aggregated voice data from multiple sources (radio and telephonic) into a single audio record. It was this gathering of the many into one that made it a compilation.[5]

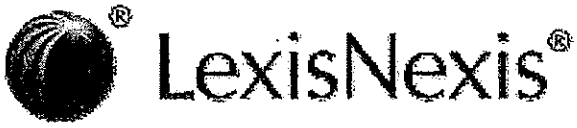
> 5 The reasoning in *Tull* that the 911 tape was a compilation led to the conclusion that the tape need not be disclosed under former Code § 15.1-135.1. That statute provided that "records required to be maintained by this section shall be exempt" from the FOIA. Former Code § 15.1-135.1(A) (1989 Repl. Vol.). The General Assembly repealed former Code § 15.1-135.1 in 1997 and reenacted it without the FOIA exemption, recodifying it as Code § 15.2-1722. *See* 1997 Va. Acts ch. 587. In 1999, the legislature added the records kept pursuant to Code § 15.2-1722 to the mandatory disclosure requirements of former Code § 2.1-342.2, the precursor to Code § 2.2-3706(B). *See* 1999 Va. Acts chs. 703, 726.

For these reasons, both the text and the syntax of Code § 15.2-1722(B) render Fitzgerald's interpretation of it implausible. Neither the suicide note requested by Fitzgerald nor the investigative [*15] file in its entirety was a compilation of records of multiple suicides. The circuit court, therefore, correctly rejected Code § 15.2-1722(B) as a basis for ordering the disclosure of the suicide note contained in the criminal investigative file.

III.

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.

Affirmed.



BENJAMIN B. FITZGERALD v. LOUDOUN COUNTY SHERIFF'S OFFICE

Record No. 141238

SUPREME COURT OF VIRGINIA

771 S.E.2d 858; 2015 Va. LEXIS 48

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COUNSEL: Benjamin B. Fitzgerald (Jeanine M. Irving; Sevila, Saunders, Huddleston & White, on briefs), for appellant.

Courtney R. Sydnor, Deputy County Attorney (Leo P. Rogers, County Attorney; Milissa R. Spring, Deputy County Attorney, on brief), for appellee.

JUDGES: OPINION BY JUSTICE D. ARTHUR KELSEY.

OPINION BY: D. ARTHUR KELSEY

OPINION

PRESENT: All the Justices

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I.

In October 2007, a neighbor found Charles D. Riechers, a senior United States Air Force official, dead at his Loudoun County home. Riechers was sitting in his vehicle in a closed garage. A key was in the ignition, in the "on" position, but the vehicle was not running. A hose appeared to connect the vehicle's exhaust pipe to a rear passenger window.

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of the residence after obtaining consent from the decedent's wife. In the home, investigators discovered various evidentiary clues suggesting that suicide, rather than homicide, could be the cause of death. Among the items of evidence collected was what appeared to be a suicide note addressed to the decedent's supervisor at the Pentagon.

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> Here, they open[ed] a criminal file and then determined that it was a suicide so you want to go back and in retrospect say, well, that wasn't a criminal file. It was a criminal file by the definition in the Code and if we start saying that we go by what happens later, then I think we open a door that isn't opened by the statute and we create some danger to the community. So I deny the request.

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A.

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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 § 2.2-3700(B). Disclosure [*7] exemptions must be "narrowly construed" in favor of disclosure. *Id.*

Fitzgerald argues on appeal that this laudable statutory bias in favor of disclosure requires that we construe the FOIA to mandate that the Sheriff's Office disclose a suicide note, which was discovered during an ongoing criminal investigation. Like the circuit court, we do not believe that the statutory language can bear the weight of Fitzgerald's argument.

Code § 2.2-3706 governs the disclosure of criminal records. Subsection (A)(1) requires disclosure of certain specific information, including "[c]riminal incident information." Certain types of criminal records not required to be produced under subsection (A)(1) "may be disclosed" under subsection (A)(2) at the discretion of the custodian, if no other law forbids disclosure. "Criminal investigative files" are among the categories of records subject to the "[d]iscretionary releases" provisions of subsection (A)(2).

Code § 2.2-3706(B) governs the mandatory disclosure of "[n]oncriminal records." Among other things, these records include those "required to be maintained by law-enforcement agencies pursuant to [Code] § 15.2-1722." Code § 2.2-3706(B). A records-retention statute outside the text of FOIA, Code § 15.2-1722(A), requires sheriffs and police chiefs to maintain "adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents [*8] records necessary for the efficient operation of a law-enforcement agency." The failure to do so "shall constitute a misdemeanor." *Id.* Subsection (B) of Code § 15.2-1722 defines "[n]oncriminal incidents records" as "compilations of noncriminal occurrences of general interest to law-enforcement agencies, such as missing persons, lost and found property, suicides and accidental deaths."

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 factfinder, 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 [*9] had the discretion, but not the duty, to disclose documents within this file.

Even so, Fitzgerald argues, the criminal investigative file lost its character as such when the file was closed by the Criminal Investigations Division of the Sheriff's

Office. We find nothing in the statutory text or in its legislative context to support this counterintuitive conclusion.

Suffice it to say, the point of a criminal investigation is to investigate -- to determine whether a crime occurred and, if so, who perpetrated it. A criminal investigation may or may not lead to a prosecution. But that does not mean that the application of FOIA disclosure requirements is dependent upon the outcome of the investigation. In this case, investigators discovered the suicide note during an ongoing criminal investigation. That the investigation was later closed is inconsequential for purposes of FOIA disclosure principles.

2. *Noncriminal Records*

Fitzgerald next relies upon Code § 2.2-3706(B), which requires the mandatory release of certain records, including those "required to be maintained by law-enforcement agencies pursuant to [Code] § 15.2-1722." As noted earlier, this non-FOIA records-retention statute requires sheriffs and police chiefs to maintain [*10] "adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents records necessary for the efficient operation of a law-enforcement agency." Code § 15.2-1722(A). According to Fitzgerald, documents related to a suicide (including the decedent's suicide note) should be considered "noncriminal incidents records" subject to disclosure under Code § 15.2-1722.

We first address the assumption underlying Fitzgerald's argument. He seeks a broad construction of Code § 15.2-1722 on the ground that the General Assembly has prescribed that the "provisions" of the FOIA "shall be liberally construed" in favor of disclosure. Appellant's Brief at 18-19 (quoting Code § 2.2-3700(B)). We find this argument problematic for several reasons.

Code § 15.2-1722 is incorporated by reference in the FOIA but is not codified as a stand-alone provision of the FOIA. That seemingly semantic point unmasks a distinction with a significant difference. Code § 15.2-1722 is a records-retention statute that carries a criminal sanction. If there were any textual ambiguities in Code § 15.2-1722, the rule of lenity would direct us to adopt a narrow construction, thus reducing exposure to criminal liability. That necessarily narrow construction would run contrary to the broad construction required by the FOIA, which [*11] expands the scope of disclosure.[3] We need not resolve this conundrum, however, because Code § 15.2-1722 has a plain meaning inconsistent with Fitzgerald's interpretation.

> 3 Only when a "penal statute is unclear" do Virginia courts apply the rule of lenity and strictly construe the statute in the criminal defendant's favor. *Waldrop v. Commonwealth*, 255 Va. 210, 214, 495 S.E.2d 822, 825 (1998) (footnote omitted); *see also Holsapple v. Commonwealth*, 266 Va. 593, 598, 587 S.E.2d 561, 564 (2003) ("We do not agree that the statutory language is ambiguous. Hence, we construe the language according to its plain meaning without resort to rules of statutory interpretation."). The rule of lenity serves only to resolve genuine ambiguities and "does not abrogate the well recognized canon that a statute . . . should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language." *Cartwright v. Commonwealth*, 223 Va. 368, 372, 288 S.E.2d 491, 493 (1982) (omission in original) (quoting *Gough v. Shaner*, 197 Va. 572, 575, 90 S.E.2d 171, 174 (1955)).

Subsection (B) of Code § 15.2-1722 defines "[n]oncriminal incidents records" as "compilations of noncriminal occurrences of general interest to law-enforcement agencies, such as missing persons, lost and found property, suicides and accidental deaths." In ordinary terms, a compilation is something that has been compiled. *See generally* Webster's Third New International Dictionary 464 (2002) (defining [*12] "[c]ompilation" as "the act or action of gathering together written material esp. from various sources" or "something that is the product of the putting together of two or more items"). A compilation of poems, for example, is a collection of different poems.[4] It is not a single poem or even a collection of background materials related to a single poem.

> 4 *See* Black's Law Dictionary 344 (10th ed. 2014) (defining "compilation" in the context of copyright law as "[a] collection of literary works arranged in an original way"); *accord* 17 U.S.C. § 101 (2014) (defining "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected,

> coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship").

The suicide note, standing alone, cannot constitute a compilation under Code § 15.2-1722(B). The pertinent language requires that "compilations of noncriminal occurrences" be maintained and lists suicides as an example of such occurrences. Code § 15.2-1722(B). A compilation of suicides is a record of more than one suicide. The suicide note may be a compilation of words, but not a compilation of suicides.

We similarly reject the assertion that the entire criminal [*13] investigative file maintained by the Sheriff's Office could be deemed a compilation of suicide records. Code § 15.2-1722(B) addresses "[n]oncriminal incidents records," specifically defined as "compilations of noncriminal occurrences . . . such as . . . suicides." (Emphasis added.) A file containing reports concerning a single incident, later determined to be a suicide, is not a compiled collection of information concerning multiple suicides. The criminal investigative file in this case -- protected against mandatory disclosure by Code § 2.2-3706(A)(2)(a) -- did not become, and never was, a compilation of suicides.

Nothing in our reasoning, however, implies that a compilation can only be a spreadsheet of raw data points or statistics. Although it can certainly be that, the statutory meaning of compilation is not necessarily so limited. In *Tull v. Brown*, 255 Va. 177, 494 S.E.2d 855 (1998), for example, we treated a 911 tape recording of multiple channels of radio traffic and telephone calls as a

> grouping of electronically gathered information and thus a "compilation." The tape at issue in this case is not just a recording of the conversation between the 911 caller and the dispatcher. Rather, it is a recording on multiple channels of all radio traffic handled through the . . . dispatch office [*14] in addition to conversations occurring on . . . four telephone lines and conversations between individuals physically in the dispatcher's office. In short, all activity occurring in the dispatch office as well as that on the four telephone lines is compiled on this tape.

Id. at 184, 494 S.E.2d at 858-59. In *Tull*, the 911 tape aggregated voice data from multiple sources (radio and telephonic) into a single audio record. It was this gathering of the many into one that made it a compilation.[5]

> 5 The reasoning in *Tull* that the 911 tape was a compilation led to the conclusion that the tape need not be disclosed under former Code § 15.1-135.1. That statute provided that "records required to be maintained by this section shall be exempt" from the FOIA. Former Code § 15.1-135.1(A) (1989 Repl. Vol.). The General Assembly repealed former Code § 15.1-135.1 in 1997 and reenacted it without the FOIA exemption, recodifying it as Code § 15.2-1722. *See* 1997 Va. Acts ch. 587. In 1999, the legislature added the records kept pursuant to Code § 15.2-1722 to the mandatory disclosure requirements of former Code § 2.1-342.2, the precursor to Code § 2.2-3706(B). *See* 1999 Va. Acts chs. 703, 726.

For these reasons, both the text and the syntax of Code § 15.2-1722(B) render Fitzgerald's interpretation of it implausible. Neither the suicide note requested by Fitzgerald nor the investigative [*15] file in its entirety was a compilation of records of multiple suicides. The circuit court, therefore, correctly rejected Code § 15.2-1722(B) as a basis for ordering the disclosure of the suicide note contained in the criminal investigative file.

III.

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.

Affirmed.

VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

AO-01-14

January 29 , 2014

Frederick Kunkle
The Washington Post
Washington, D.C.

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your letter dated December 13, 2013.

Dear Mr. Kunkle:

You have asked several questions regarding the denial of your request for records of the Virginia Economic Development Partnership (VEDP) under the Virginia Freedom of Information Act (FOIA). As background, you indicated you requested documents from VEDP concerning Governor Terence "Terry" McAuliffe, who was a candidate for Governor at the time of your initial request in April, 2013, and certain related businesses and projects.[1] You stated that VEDP denied your request and initially cited exemptions for economic development records,[2] working papers and correspondence,[3] and contract negotiation records.[4] You then requested that VEDP reconsider its denial and "use its discretion to release some documents in part or with redactions." The response to this request for reconsideration was a second denial, which cited only the economic development records exemption. You stated that you renewed your request again after Governor McAuliffe's victory in the general election in November, but were again denied. That third denial stated that since the status of the project had not changed, the response was the same. You also indicated that various interviews with Mr. McAuliffe and others suggest there may have been some confusion regarding the underlying business transactions at issue. Further details will be set forth as needed below.

The general policy of FOIA is expressed in § 2.2-3701: *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....All public records and meetings shall be presumed open, unless an exemption is properly invoked.* As a preliminary matter we must establish that VEDP is a public body and that the records you seek are public records. The definition of public body in § 2.2-3701 includes *any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth.* There is no question that VEDP is a public body subject to the provisions of FOIA under this definition.[5] The definition of *public records* includes *all writings and recordings...regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.* VEDP confirmed in its initial denial of your request that it was "working on an ongoing economic development project" involving two of the companies named in your request. That denial further described the documents being withheld as including

> business plans, project plans, information gathered in written documents or powerpoint slides in preparation for confidential project meetings, prospect data sheets, notes from confidential project meetings, maps and other information regarding potential project sites, including utility infrastructure and environmental

> issues, internal and external emails regarding the status of the project and the company's plans for visiting certain project sites, drafts of incentive applications and incentive proposals, return on investment analyses, and drafts of unreleased news releases and internal and external emails concerning such news releases.

Based upon VEDP's characterization there is no question that the records you requested from VEDP are public records subject to FOIA, as they are records prepared, owned, or possessed by VEDP in the transaction of its public business.

In your inquiry it appears that you assert that the requested records should be disclosed on two separate grounds, one factual, and one based on the exercise of discretion. As to the factual matter, it appears that there may have been some confusing statements regarding the sale of a certain plant, which VEDP clarified in its second response by stating that the plant was never for sale. You stated that interviews with Mr. McAuliffe, his business partners, and public officials had suggested uncertainty about the issue and that there may have been records of inquiries about buying the plant. You then asserted that any communications regarding attempts to purchase the plant would not be subject to exemption, given the statement by VEDP that the plant was never for sale. However, you based this assertion on the language of the contract negotiation records exemption. That exemption allows *[r]ecords relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body* to be withheld, but also states that *[s]uch records shall not be withheld after the public body has made a decision to award or not to award the contract.*[6] Based on this language and VEDP's assertion that the plant was not for sale, you contend that any communications about purchasing the plant would be open, because such a purchase "had been ruled out." I would agree that if a contract had been under negotiation and a decision not to award had been made, then related records would not be subject to this exemption. However, note that the response to your renewed request did not say that a purchase had been "ruled out," it stated that the plant at issue was never for sale. In other words, it appears from the later clarification that there was in fact no contract being negotiated for the sale of the plant at any time.

Instead, it appears from VEDP's response that there may be records related to repurposing the plant and that the release of those records would have "a deleterious impact on their current and ongoing discussions with financiers and off-take providers" and the company that owns the plant. If the deleterious impacts at issue were solely on the third party business entities, then the contract negotiation records exemption would not apply, as that exemption by its own terms is limited to records where release *would adversely affect the bargaining position or negotiating strategy of the **public body.*** [Emphasis added.] However, VEDP specifically stated in this second denial that not only were the companies

> competing for success in their markets, we are competing with other states to ensure that as much of their business as possible is developed in the Commonwealth....Disclosing our public records at this point would bring an unwelcome public light (and possible political frenzy) to their confidential negotiations and may cause them to take their business interests elsewhere or may cause them to be unable to execute their business plan. In these events, the financial interest of the Commonwealth would be adversely affected by the loss of the tax base, the employment base and the resulting indirect and spin-off opportunities for our business community.

Additionally, observe that VEDP cited only the economic development records exemption in its response to your request for reconsideration.[7] That exemption addresses two different types of documents. The first part of the exemption allows a public body to withhold *[c]onfidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade and*

tourism development or retention. Among other records, this part of the exemption would appear to apply to documents submitted to VEDP *pursuant to a promise of confidentiality* concerning the repurposing or proposed purchase of a plant where there may have been no contract under negotiation, but the records would be used by VEDP for *business, trade and tourism development or retention*. The second part of this exemption allows a public body to withhold *memoranda, working papers or other records related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where, if such records are made public, the financial interest of the public body would be adversely affected*. This part of the exemption would appear to cover the relevant records prepared by VEDP concerning these transactions. Note that the language of VEDP's denial, as quoted above, clearly tracks the language of this part of the economic development exemption in asserting that competition is involved and that the financial interests of the Commonwealth would be adversely affected if the records were released. Therefore it appears based on the facts presented, including the denial by VEDP quoted above, that the economic development records exemption was relied upon in the response to your request for reconsideration. FOIA provides in subsection B of § 2.2-3700 that any exemption from public access *shall be narrowly construed*. Even applying this narrow construction rule, when the response is analyzed in the context of the two clauses of the economic development records exemption, it appears that the records at issue were properly withheld because the records as described fall within the terms of the exemption.

In your inquiry to this office, you also suggest that the denial by VEDP is overbroad, and that at least some portions of the records sought should be released because the exemptions cited by VEDP are discretionary. You are correct that each of the exemptions cited is discretionary, as each is preceded by the statement that *[t]he 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*.[8] Therefore a custodian may choose to release records which are exempt from mandatory disclosure under FOIA, unless another law prohibits such release. If another law prohibits release, then the prohibition is controlling and there is no discretion to be exercised.[9] Additionally, subdivision B 1 of § 2.2-3704 provides that if *the custodian has exercised his discretion to withhold the records* in their entirety, as was done in this instance, then the response *shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records*.[10] FOIA is a procedural law, and so long as the response follows the statutory procedure, nothing more than noted above is required under FOIA when a custodian exercises the discretion to withhold requested records in their entirety.

You contend that "where the records relate to a public-private development involving the governor-elect, the public interest in disclosure far outweighs whatever asserted harm would result from disclosure." While we do appreciate the public interest represented and the value of transparency in government, FOIA itself contains no such balancing test for exemptions. Instead, the General Assembly has set the default rule that all public records are subject to mandatory disclosure unless exempt or prohibited from release, and then chosen by statute which records are so exempt or prohibited from release. Once a record is determined to be exempt, it does not have to be disclosed, but it still may be disclosed in the discretion of the custodian, unless some other law prohibits its release. Assuming no such prohibition applies, FOIA does not set forth any standards or limitations guiding the use of discretion to disclose exempt records, nor does it establish what might constitute an abuse of that discretion.[11] The statutory remedy to a FOIA violation is to bring a petition for mandamus or injunction.[12] Among other provisions, subsection E of § 2.2-3714 states that *the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence*. However, the remedy provisions likewise do not address the use or abuse of discretion by a records custodian. Reading these provisions together, it appears that all that is required is for a public body to establish that an exemption applies and to so inform the requester in its response; no further justification or explanation is required. Therefore an argument balancing the public interest

versus the harm in disclosure might help persuade a custodian to exercise his discretion to release exempt records, but it is not mandatory for a public body to engage in such a balancing test.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett
Executive Director

[1]Governor McAuliffe won the November election and has since taken office.

[2]Subdivision 3 of § 2.2-3705.6, which provides an exemption for *[c]onfidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade and tourism development or retention; and memoranda, working papers or other records related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where, if such records are made public, the financial interest of the public body would be adversely affected.*

[3]Subdivision 2 of § 2.2-3705.7, which provides an exemption for *[w]orking papers and correspondence of the Office of the Governor; Lieutenant Governor; the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates and the Senate of Virginia; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia. However, no record, which is otherwise open to inspection under this chapter, shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.*

[4]Subdivision 12 of § 2.2-3705.1, which provides an exemption for *[r]ecords relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of records relating to such transactions shall be governed by the Virginia Public Procurement Act.*

[5]See subsection C of § 2.2-2234 establishing the Virginia Economic Development Partnership Authority *(there is created a political subdivision of the Commonwealth to be known as the Virginia Economic Development Partnership Authority).*

[6]*Subdivision 12 of § 2.2-3705.1.*

[7]Note that VEDP did not disclaim or withdraw its earlier citations to the contract negotiations and working papers exemptions, but in its response to your request for reconsideration it only cited the economic development exemption. FOIA does not prohibit public bodies from citing multiple exemptions, nor does a public body waive an exemption even if it fails to specify it in its response. See *Lawrence v. Jenkins*, 258 Va. 598 (1999) (failure to cite a specific exemption within the five working day time limit did not violate requester's FOIA rights, because requester had no right to exempt records).

[8]The same prefatory language concerning the discretion of the custodian is used repeatedly in §§ 2.2-3705.1 through 2.2-3705.7, and again in subdivision A 2 of § 2.2-3706.

[9]Note that there is an exception to this general rule in the context of certain law-enforcement records not at issue here due to the conflict resolution provision in § 2.2-3706. See Freedom of Information Advisory Opinion 07 (2005).

[10]Note that similar language concerning the exercise of discretion to withhold records is used in subdivision B 2 of the same section for responses that provide the requested records in part and withhold in part.

[11]See Freedom of Information Advisory Opinions 9 (2008) and 28 (2004)("The question of whether the Board has abused its discretion is beyond the statutory authority of this office, as 'abuse of discretion' is a legal standard outside the scope of FOIA.").

[12]§§ 2.2-3713 and 2.2-3714.