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

KEVIN MCCARTHY
and BISCHOFF MARTINGAYLE, P.C.,

Plaintiffs,

v. CASE NO.: CL15-2332

CITY OF VIRGINIA BEACH
and JAMES CERVERA, in his capacity
as Chief of the Virginia Beach Police Department
and custodian of the records at issue,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF VERIFIED COMPLAINT AND PETITION

NOW COME the plaintiffs, and submit this memorandum of law for consideration by this Honorable Court.

I. INTRODUCTION, PROCEDURAL POSTURE, AND SCOPE OF MEMORANDUM

The Verified Complaint and Petition ("Complaint") in this Virginia Freedom of Information Act ("FOIA") dispute was filed June 11, 2015. Defendants - - the City of Virginia Beach and its Chief of Police - - filed a demurrer in response.

A court hearing was held on June 29, 2015, during which the demurrer was overruled, a briefing schedule was outlined, and another hearing was set for July 20, 2015 at 2:15 p.m. Additionally, at the June 29 hearing, the Court received the "Amicus Brief" filed on behalf the Virginia Coalition for Open Government.

Based upon certain arguments advanced by the City during the June 29 hearing, the plaintiffs feel it appropriate to file this short memorandum of law focused on one particular question. Specifically, does the City of Virginia Beach and/or its chief of police have the right to exercise "discretion", pursuant to Code of

Virginia §2.2-3706(A)(2)(a), in a manner that is standardless, arbitrary or capricious? During oral argument, counsel for the defendants seemed to suggest that unless criminal prosecution or punishment is involved, discretion may be limitless and still pass constitutional muster. Counsel for the plaintiffs disagreed, and the Court invited counsel for the parties to supply authority on this subject.

Accordingly, this memorandum is presented and is focused on this issue. The plaintiffs remain willing and able to brief any other issue as directed or requested by the Court, and reserve the opportunity to make further arguments based upon the evidence that is developed leading up to and including the evidentiary hearing to be conducted on July 20.

II. QUESTION PRESENTED

Is the "discretion" described in Code of Virginia §2.2-3706(A)(2)(a) subject to any constitutional limitations, or is it permissible for local government officials (and the defendants in this matter) to exercise it in a manner that is standardless, arbitrary or capricious?

III. LAW AND ARGUMENT

Municipalities and their officials are never entitled to unlimited, standardless discretion.

The City appears to concede that it the context of criminal ordinances and free speech rights, there are always limitations on discretion. To the extent that the defendants ever had any doubts on this subject, those were answered in Tanner v. City of Virginia Beach, 277 Va. 432 (2009), cert. denied, 2010 U.S. LEXIS 749 (January 19, 2010). In that case, the Supreme Court of Virginia invalidated the

Virginia Beach noise ordinance because its language granted law enforcement officials the "unfettered individual discretion to make enforcement decisions." Id. at 436. Ordinances "cannot rest on subjective standards." Id. at 441.

However, the defendants continue to question whether there are any rules or limitations pertaining to "discretion" in other legal contexts. The lesson from cases spanning many decades is that there is no such thing as constitutionally permissible unfettered, unbridled discretion in local government officials. Public officials derive their authority from laws, laws have structure, and laws must comply with due process and equal protection principles. No public official is above the law,[1] and no law may violate fundamental constitutional guarantees.

In Volkswagen of America, Inc. v. Smit, 279 Va. 327 (2010), the Supreme Court agreed with an "as applied" challenge to a statute relating to automobile dealer franchises, Code §46.2-1569(7). On the subject of "discretion", the Supreme Court agreed that "the legislature may delegate discretion to an administrative officer to determine the specifics of how a statute is to be enforced, but the legislature must declare the policy of the law and fix the legal principles which are to control in given cases." Id. at 340, citing and quoting Thompson v. Smith, 155 Va. 367, 381 (1930). Elaborating, the Supreme Court stated that "the legislature is not required to delve into the minutiae of the standards to be applied in every case, but may delegate...rulemaking authority to set specific procedures for applying the

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[1] "All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." Davis v. Passman, 442 U.S. 228, 246 (1979) (internal quotation omitted).

general standards established by the laws the body is charged with enforcing so long as the rules it adopts are not inconsistent with the authority of the statutes that govern it or **with principles of due process**." (emphasis added). Id., citing and quoting Judicial Inquiry & Review Commission v. Elliott, 272 Va. 97, 115 (2006). The Supreme Court concluded that due process "is not satisfied" where there is "an arbitrary exercise of discretion by the administrative official charged with enforcing the statute." Id. at 341.

In a land use case, Andrews v. Board of Supervisors of Loudon County, 200 Va. 637 (1959), the Supreme Court observed that "zoning is a legislative power residing the State, which may be delegated to cities, towns and counties." Id. at 639. In turn, a municipality may engage in further delegation of authority, but in doing so, "it must establish standards for the exercise of the authority delegated. There must be provided uniform rules of action, operating generally and impartially, for enforcement cannot be left to the will or unregulated discretion of subordinate officers or boards." Id., numerous internal citations omitted. To meet constitutional requirements, laws/ordinances and decisions based thereon must have a "sufficient basic standard - - a definite, certain policy and uniform rule of action - - for the guidance of the agency organized to administer the law." Id. at 640.

In a case involving a successful challenge to an alcohol interdiction statute, Booth v. Commonwealth, 197 Va. 177 (1955), the Supreme Court found that the ability to prohibit an "improper person" from possessing alcohol threatened "such arbitrary interpretation as to make the provision unconstitutionally vague and indefinite. The interpretation placed on the phrase by one judge may seem the

rankest injustice to another, depending entirely upon the prohibition philosophy of the particular judge." Id. at 179 (internal citations omitted).

As for equal protection, a particularly instructive case is Village of Willowbrook v. Olech, 528 U.S. 562 (2000), which states that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Id. at 564, internal quotations and citations omitted.

There are several important lessons to be learned from the cases cited above. First, it is permissible for the Commonwealth of Virginia to delegate certain discretionary authority to local governments, and, in turn, they may delegate a certain degree of authority to local government officials. But in each instance, the rules and standards controlling the discretionary decision-making to be done must be guided by meaningful standards. In Code §2.2-3706(A)(2)(a), the Virginia legislature has not described rules for the "discretion" to be exercised. Assuming, *arguendo*, that this does not create a vagueness problem in this particular part of the FOIA statutory scheme, it is evident from controlling authority that standards to guide discretion must be developed and implemented at some level. Currently, no such standards exist. The General Assembly has not dictated any discretion standards, the City of Virginia Beach has not created any, and the chief of police has done nothing besides, apparently, developing an "unwritten policy" of always saying "no" to the release of investigatory file materials relating to suicide cases. That cannot be reconciled with the logic and holdings of the cases cited above.

Second, the defendants' position applies Code §2.2-3706(A)(2)(a) in such a way that offends due process and equal protection principles. The arbitrary denial of any good faith consideration of the plaintiffs' request for a copy of the subject closed investigative file materials violates the animating policy behind the Freedom of Information Act and, in essence, constitutes a convenient way for the defendants to avoid performing any discretionary analysis. The blanket refusal to release all such materials is particularly perplexing in light of City Code of Ordinances §27-3(a), which specifically authorizes the release of "forensic photographs after all criminal charges are resolved and when such release is provided by law", as well as the release of certain other information. At least implicitly, the City Council has signaled an expectation that such information may be of interest to the public, and once "criminal charges are resolved", it makes no sense to have blanket ban in place.

Further, it is worth noting that City Ordinance §27-2(a) authorizes the "chief of police, with the approval of the city manager" to "make rules and regulations concerning the operation of the department of police, the conduct of the officers and employees thereof and their uniforms, arms, other equipment and training." Based upon the communications and court filings before the Court thus far, there is little reason to believe that the city manager has approved of the subject "unwritten policy", or the use of any "unwritten policy" in matters dealing with the public. To the extent that the chief of police has truly implemented an "unwritten policy" relating to the "discretion" set forth in Code §2.2-3706(A)(2)(a), there appears to be no authority for it, which compounds the due process and equal protection violations.

Finally, the opportunity to have good faith consideration of closed investigative file materials cannot be controlled by the whims of a local official. FOIA is a state law scheme, and access to information cannot be controlled by the personalty or preferences of the police chief in a particular locality. No constitutional authority suggests otherwise.

IV. CONCLUSION

Any argument made by the defendants that the chief of police - - or any subordinates - - has unlimited, standardless and unfettered discretion to perform actions under color of law that impact citizens rights is simply wrong. The reasons provided for refusing to provide the plaintiffs with the requested closed investigative file materials are legally infirm, as is the entire decision-making process that the defendants have been using. Accordingly, the Court should rule that the plaintiffs are entitled to receive the materials that have been requested.

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By _____
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CERTIFICATE

I hereby certify that a true copy of the foregoing was sent via electronic mail this 1st day of July, 2015, and via first class mail on the 2nd day of July, 2015, to Christopher S. Boynton, Deputy City Attorney.

Kevin E. Martingayle