

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

INVISIBLE INSTITUTE and TOM NASH,

Petitioners,

v.

VIRGINIA DEPARTMENT OF CRIMINAL
JUSTICE SERVICES,

Respondent.

Case No. CL24-3925

**RESPONDENT'S RESPONSE TO PETITIONER'S MEMORANDUM IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

After providing records responsive to Petitioners' Virginia Freedom of Information Act ("FOIA") request, Respondent the Virginia Department of Criminal Justice Services ("DCJS") withheld the full name, department or agency of employment, date of birth, city or zip code of residence, and previous employment history of every active and inactive law enforcement officer and jailer in Virginia. DCJS maintains a database to monitor compliance by criminal justice professionals and agencies with certification and training requirements. Law enforcement agencies across the Commonwealth, which are the primary custodians of the information, enter the information sought by Petitioners into DCJS's database.

In the past year, two Virginia circuit court judges have ruled that law enforcement agencies can withhold the names of certain officers when the officers could be assigned to undercover operations or protective details at any time. DCJS withheld the names of the criminal justice professionals under the same FOIA exemptions successfully relied upon by the law enforcement agencies in those two cases.

The remaining information that Petitioners seek is protected by the exemption for personnel information because it relates to an identifiable criminal justice professional, is in the possession of DCJS because of the individual's employment with a criminal justice agency, and releasing the information would be an unwarranted invasion of the privacy of the criminal justice professional.

For these reasons, Petitioners' Petition for Writ of Mandamus ("Petition") should be denied.

FACTUAL BACKGROUND

In Virginia, law enforcement and jail officers ("criminal justice professionals") must complete certain training programs to be certified and eligible for employment. Va. Code §§ 9.1-102(2), (9), 15.2-1706(A). By law, DCJS establishes requirements for the certification process and is responsible for certifying and decertifying officers. Va. Code §§ 9.1-102(36), 15.2-1706(A).

Employers of law enforcement and jail officers are required to submit to DCJS information about trainings completed by its criminal justice professionals. Va. Code §§ 9.1-102(2), (9), 15.2-1706(A). To fulfil its obligation to monitor compliance with training requirements, DCJS maintains a database known as Training and Certification Electronic Records ("TRACER").

The individual agencies employing criminal justice professionals enter the information into the TRACER database. Pet'rs' Ex. B. There are hundreds of employing agencies that enter data into the TRACER database. *Id.* DCJS use the TRACER database to monitor compliance with the certification and training requirements set out in the Code of Virginia. DCJS cannot, and does not, assure the accuracy of information in the TRACER database that is input by the employing agencies. *Id.* Each criminal justice professional is assigned a unique identification number in the TRACER database. *Id.*

Not all information fields in the TRACER database are mandatory. *Id.* For example, information regarding the rank of a criminal justice professional is not required to be entered into the TRACER database because such information is not necessary to monitor training and certification. *Id.*, see Pet'rs' Exs. C, D. Of the agencies that voluntarily enter rank information into the TRACER database, they do not all uniformly update such information.

This litigation arises from Petitioners' FOIA request to DCJS for records containing, among other things, the full name, department or agency of employment, date of birth, city or zip code of residence, and previous employment history of every active and inactive law enforcement and jail officer in Virginia. Pet. ¶¶ 7, 23. In all, Petitioners requested 16 information fields. Pet'rs' Ex. A.

On May 13, 2024, DCJS made a supplemental response to Petitioners' FOIA request. Pet'rs' Ex. B. DCJS informed Petitioners what records it was producing, what records were being withheld pursuant to an exemption, and what requests had no responsive records. Pet'rs' Ex. B. That same month, DCJS provided Petitioners with responsive non-exempt information from the TRACER database in spreadsheet format. Pet'rs' Exs. B, C, D.

DCJS withheld the full names of the certified criminal justice professionals responsive to Petitioners' requests, and cited the exemptions set out in Virginia Code §§ 2.2-3706(B)(8), (10), which relate to undercover operations and protective details. Pet'rs' Ex. B. DCJS also cited the Hanover Circuit Court's December 20, 2023 decision in *Minium v. Hines*, No. CL23-3560-00. *Id.*

DCJS also withheld the following requested information about criminal justice professionals pursuant to the exemption for personnel information set out in Virginia Code § 2.2-3705.1(1): date of birth, or, alternatively, year of birth or current age; city and/or zip code of residence; last/current department or agency start date; employment history at other criminal

justice agencies with start and end dates; positions and/or ranks at previous departments or agencies; social security number; education; phone number; home address; and driver's license number. Pet'rs' Ex. B.

In total, DCJS withheld approximately 100,000 names of criminal justice professionals while providing a unique identification number for each individual. Pet'rs' Ex. B.

Minium v. Hines is a FOIA case in which the petitioner sued the sheriff of Hanover County and Hanover County (collectively "Hanover") over their refusal to release all of the full names of sheriff deputies below the rank of captain. Pet'rs' Ex. M. Hanover withheld the names pursuant to the exemptions contained in Virginia Code §§ 2.2-3706(B)(8), (10), and cited "staffing concerns for undercover operations." *Id.* Hanover did not withhold the names of deputies below the rank of captain who hold "public facing positions." *Id.* After receiving evidence regarding how Hanover staffs its undercover operations and protective details, including that any deputy in a non-public facing position below the rank of captain may be assigned to serve in an undercover operation at any time, the Hanover Circuit Court found that Hanover properly withheld the names of the sheriff deputies. *Id.* On January 25, 2024, the petitioner noted her appeal to the Court of Appeals. *Minium v. Hines*, No. 015724, is currently awaiting oral argument in the Court of Appeals.¹

The Chesterfield Circuit Court resolved this same legal issue the same way in *Minium v. Chesterfield County*, No. CL23W-2798 (Chesterfield Cnty. Cir. Ct.). Pet'rs' Ex. N. The petitioner filed a FOIA lawsuit after Chesterfield County and the Chesterfield Police Department (collectively "Chesterfield") withheld the names of police officers with a rank of lieutenant or below "due to the structure and operational logistics of the [police department] and its undercover

¹ Respondent has filed a motion to stay these proceedings, either in whole or in part, until there is a decision in *Minium v. Hines*, No. 015724 (Ct. of Appeals of Va.).

operations.” *Id.* Chesterfield cited the exemptions in Virginia Code §§ 2.2-3706(B)(8), (10), to support the withholding of the names. *Id.* Chesterfield offered uncontroverted evidence that its police department is structured so that officers with the rank of lieutenant and below are all utilized as undercover officers. *Id.* In a letter opinion dated August 29, 2024, the Chesterfield Circuit Court found that Chesterfield established that withholding the names of officers that are used as undercover officers was proper pursuant to Virginia Code §§ 2.2-3706(B)(8), (10). *Id.*

The records of the full names of the Hanover and Chesterfield law enforcement officers found to be exempt from mandatory disclosure under FOIA in *Minium v. Hines* and *Minium v. Chesterfield County* are also requested by the Petitioners in the instant case. Pet’rs’ Ex. A.

DCJS does not maintain records in the TRACER database, or elsewhere, regarding the practices of each employing agency for staffing undercover operations and protective details, or whether a certain employee is assigned to an undercover operation or protective detail. DCJS also does not maintain records showing which agency employees are in public facing positions.

Inactive law enforcement and jail officers in the TRACER database can be inactive for a variety of reasons and can become active law enforcement officers and active jailers if hired by a new agency.

LEGAL STANDARD

In a VFOIA enforcement action, “a writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right but in the exercise of a sound judicial discretion” only when the petitioner “was denied clearly established rights and privileges under FOIA.” *Lawrence v. Jenkins*, 258 Va. 598, 602–03 (1999).

The public body bears the burden of establishing an exclusion by a preponderance of the evidence. Va. Code § 2.2-3713(E).

ARGUMENT

I. DCJS properly withheld the names of the criminal justice professionals

DCJS, which lacks information about how the hundreds of employing agencies conduct undercover operations and protective details, properly relies on the exemptions in Virginia Code §§ 2.2-3706(B)(8), (10), and the circuit court decisions in *Minium v. Hines* and *Minium v. Chesterfield County* to withhold the names of criminal justice professionals requested by Petitioner.

Virginia Code § 2.2-3706 addresses the disclosure of law-enforcement records and the limitations thereon. It applies to “[a]ll public bodies engaged in criminal law-enforcement activities.” Va. Code § 2.2-3706(A). Certain records are excluded from the mandatory disclosure provisions of FOIA. Va. Code § 2.2-3706(B). Relevant to the Petition are the two following categories of excluded records:

8. 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.

10. The identity of any victim, witness, or undercover officer, or investigative techniques or procedures.

Virginia Code §§ 2.2-3706(B)(8), (10).

For law enforcement agencies, such as Chesterfield and Hanover, that have undercover operations and protective details that can be staffed at any time by officers below a certain rank, the names of the officers below that rank will necessarily reveal the staffing of undercover operations and protective details. Accordingly, withholding their names is permissible pursuant to Virginia Code § 2.2-3706(B)(8). Similarly, the release of the names of officers below the cutoff rank would reveal the identity of undercover officers in that jurisdiction, which is a separate exclusion from mandatory disclosure pursuant to Virginia Code § 2.2-3706(B)(10).

Hanover’s Brief of Appellee in *Minium v. Hines* sets out in greater detail why, under the facts of that case and the plain language of FOIA, the withheld names of deputies are both “related to undercover operation or protective details” and why their disclosure would “reveal” the staffing of such operations. Resp’t’s Ex. 1 – Br. of Appellee 12-14, *Minium v. Hines*.

Here, DCJS properly relied on the Hanover Circuit Court’s decision in *Minium v. Hines* in withholding the names of the requested criminal justice professionals, and the subsequent decision in *Minium v. Chesterfield County* underlines that this reliance was proper. At this time, the two courts that have addressed this specific issue have ruled that law enforcement agencies can, if they offer sufficient supporting evidence, properly withhold the names of officers they employ pursuant to Virginia Code §§ 2.2-3706(B)(8), (10).

Petitioners have not identified any authority to the contrary—instead they insist that these two circuit courts got it wrong. Pet’rs’ Mem. 12-15. Until there is authority to the contrary, DCJS has chosen to withhold the requested names to avoid unknowingly interfering with the undercover operations and protective details of the criminal justice agencies required to use the TRACER database.

As Petitioners note, DCJS has withheld the names of individual law enforcement officers that Hanover and Chesterfield disclosed, such as officers above a certain rank and public facing individuals. Pet’rs’ Mem. 15. Because rank is not a required field in the TRACER database, and not uniformly maintained by agencies that employ it, and DCJS does not maintain records of what criminal justice professionals are public facing, DCJS has withheld all responsive names. Without running the risk of interfering with the arrangements made by hundreds of employing agencies for their undercover operations and protective details, DCJS can, and has, provided the unique identifying number used to track criminal justice professionals in the TRACER database. Pet’rs’

Exs. B, C, D. This does not leave Petitioners, and other potential FOIA requestors, without a remedy—requestors can submit FOIA requests to the employing agencies that actually provide the information in the TRACER database. Those employing agencies, not DCJS, are the primary custodians of their employees’ information and are in the best position to assert appropriate exemptions and/or provide the requested information.

Petitioners’ requested relief, an order for DCJS to release approximately 100,000 names of criminal justice professionals employed by hundreds of agencies across the Commonwealth, would deprive agencies of the right to assert the exemptions set out in Virginia Code § 2.2-3706(B)(8), (10), despite two circuit courts having ruled that such exemptions can be properly invoked. Such a decision would be contrary to the exemptions provided by the General Assembly in FOIA, and for that reason, the Petition should be denied.

II. The remaining information Petitioner seeks about criminal justice professionals is exempt under Virginia Code § 2.2-3705.1(1) as personnel information

DCJS properly withheld the remaining information sought by Petitioners because it is personnel information that would otherwise be private and is only in the possession of DCJS because of the relationship between the employing agency and the criminal justice professional. FOIA exempts from mandatory disclosure “[p]ersonnel information concerning identifiable individuals.” Va. Code § 2.2-3705.1(1). This is a “privacy-based exemption, designed to protect the subject of the record from the dissemination of personal information.” *Hawkins v. Town of South Hill*, 301 Va. 416, 426-427, 432 (2022) (quoting Virginia Freedom of Information Advisory Council, Advisory Op. AO-04-03 (Feb. 14, 2003)). To qualify as exempt “personnel information,” information in a public record must relate to a specific individual, be “tied to the employment of the individual in some way,” and would not otherwise be disclosed to the employer. *Id.* at 426-427, 431.

“[D]ata, facts, and statements are private if their disclosure would constitute an unwarranted invasion of personal privacy to a reasonable person under the circumstances.” *Id.* at 432 (citation omitted). Courts should determine what content qualifies as private “in the context of each case.” *Id.* (citation omitted).

The date of birth, or even the age or year of birth, of a criminal justice professional is exempt as personnel information because it is quintessential piece of private information. A reasonable criminal justice professional in Virginia would feel that the release of her date of birth, or even her age or year of birth, would be an “unwarranted invasion of personal privacy.” *Id.* at 432. A criminal justice professional’s exact age is only known by her employer, who then enters it into the TRACER database, because of the employment relationship and would not otherwise be disclosed. For privacy concerns, worries about identify theft, and personal preference, people often decline to publicize their date of birth or age. Notably, Virginia’s online case information system does provide complete dates of birth or years of birth for criminal defendants. This Court should not rule that criminal justice professionals give up their right to privacy surrounding their date of birth or age simply because of their choice of profession.

A criminal justice professional’s city and/or zip code of residence is equally private information and was properly withheld as personnel information. For a variety of reasons, criminal justice professionals, and other employees of public bodies, may prefer to keep private details about the city and/or zip code of their residence. Once a city and/or zip code of residence is known, it is much easier to determine someone’s home address through property records or other people search functions. Because such information is generally considered private and only known because of the employment relationship, this Court should rule that DCJS properly withheld the

city and/or zip code of residence of the criminal justice professionals contained in the TRACER database.

A criminal justice professional's entire employment history, including positions held and start and end dates, which could span decades and multiple employing agencies, is beyond the basic information that a public employee would expect to be released to the public by accepting public employment. As such, it is properly withheld pursuant to the personnel exemption.

The training history of a criminal justice professional, including additional certifications, which can also cover decades, is not the type of information that an employee would expect to be made public. In the TRACER database, an individual law enforcement professional can have hundreds of entries detailing basic, in-service, and advanced trainings that the professional has obtained. Pet'rs' Ex. B. Such information, which could reveal details about a particular training focus by an individual criminal justice professional, is private and should not be released.

Because the additional information sought by Petitioners would reasonably be expected to be private by a criminal justice professional, this Court should find that DCJS properly invoked the personnel exemption.

CONCLUSION

For the reasons set out above, this Court should deny the Petition and grant Respondent any other relief that it deems appropriate.

October 15, 2024

Respectfully submitted,

**VIRGINIA DEPARTMENT OF CRIMINAL
JUSTICE SERVICES**

By: /s/ Christopher Bernhardt
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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2024, a true and correct copy of the foregoing was filed by VJEFS and sent by electronic mail to Counsel for Petitioner at the following addresses: Lin Weeks, lin.weeks@law.virginia.edu, Ian Kalish, zjt2hh@lawschool.virginia.edu.

/s/ Christopher Bernhardt
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