



A. Hugo Blankingship, Jr.
 John A. C. Keith
 William H. Casterline, Jr.
 Sarah Elizabeth Hall
 Paul B. Terpak
 Peter S. Everett
 David Rust Clarke
 David J. Gogal
 Elizabeth Chichester Morrogh
 Robert J. Stoney
 Wm. Quinton Robinson
 John F. Cafferky
 William B. Porter
 Gifford R. Hampshire

William L. Carey
 Mary McGowan
 Mark A. Towery

 Andrea D. Gemignani
 Jeremy B. Root
 Child L. James
 Daniel E. Ortiz
 Leza Conliffe
 Petula C. Metzler
 Michael L. Chang
 Laurie L. Proctor
 Patricia C. Amberly

FACSIMILE TRANSMISSION SHEET

To: Thomas Woehrle, Esq.
Woehrle & Franklin

Fax Number: 540-548-1704

From: Petula C. Metzler

Date: February 19, 2010

Client/Reference Number:
Number of Pages (including cover): 49

Please check transmission after receipt of last page. If you do not receive all pages, or if you experience transmission problems, please call (703) 365-9945. Our telecopier number is (703) 365-2203.

Message:

Mark D. Hjelm v. Prince William County School Board
 Prince William General District Court
 Case No. GV10000683-00

Attached please find Respondent's Trial Memorandum

Confidentiality Note: The information contained in this facsimile is information intend only for the use of the individual or entity named above and may be privileged and confidential pursuant to the attorney-client privilege and the attorney work-product doctrine. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the below address via the U.S. Postal Service. Thank you. Blankingship & Keith, P.C.

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR PRINCE WILLIAM COUNTY

MARK D. HJELM,)	
)	
Petitioner,)	
v.)	Case No. GV10000683-00
)	
PRINCE WILLIAM COUNTY)	
SCHOOL BOARD,)	
)	
Respondent.)	

RESPONDENT'S TRIAL MEMORANDUM

Respondent, the Prince William County School Board (the "School Board" or "School Division"), respectfully submits this Trial Memorandum summarizing the legal and factual issues to be presented at the February 23, 2010 hearing on the Petition for Mandamus filed by Mark D. Hjelm ("Hjelm"). This Memorandum, particularly Section II, *Chronology & Summary of Respondent's Evidence*, will address each of the FOIA requests at issue in this case, and will refer the Court to each request and the School Division's responses, which are included in attached exhibits.

I. LEGAL ISSUES PRESENTED

- A. Whether Hjelm Can Establish That He was Denied the Rights and Privileges Conferred by FOIA.**
- B. Whether the Security Information Requested by Hjelm Is Exempt From FOIA Under One or More of the Statutory Exemptions Relied Upon by the School Board.**
- C. Whether the Facts Presented Justify the Extraordinary Remedy of Mandamus.**
- D. Whether, If the Court Finds a Violation of FOIA, the Court Should Exercise its Discretion and Not Award Hjelm Reasonable Costs and Attorneys' Fees Because of the "Special Circumstances" of this Case.**

E. Whether Hjelm Can Recover a Civil Penalty Against the Division Superintendent.

II. CHRONOLOGY AND SUMMARY OF RESPONDENT'S EVIDENCE

A. The Raptor Visitor Identification System

In 2007, upon the recommendation of the Prince William County Public Schools' Safe Schools Advisory Council (a committee appointed by the School Board pursuant to Va. Code Section 22.1-279.8 for the purpose of conducting school safety audits) the School Board began the installation of a computerized security system, the Raptor Visitor Identification System ("Raptor" or "VIS"), in all eighty-eight schools. This computer software program, acquired and operated through a vendor, Raptor Technologies, checks visitor identification against a nationwide sex offender registry and a Virginia State Police database for the purpose of preventing access to school buildings by registered sex offenders and other persons prohibited by law from school property. Additionally, information is inputted manually into the system by School Division personnel, regarding persons prohibited by court order or the School Board ("No Trespass Notices") from entering school grounds because they present a risk to the safety or security of staff, students, or buildings.

VIS also allows the PWCPS to monitor visitors to the schools so that information can be used in emergency or security-related situations, such as responding to school shootings, or terrorist or criminal attacks; advising police and rescue departments of the numbers and identity of persons in the building and their location; ensuring that noncustodial parents whose access to their children is limited by court order do not remove children from the school premises, etc. The system also provides school staff with a means of controlling access to those parts of the building where visitors are not authorized to be present, i.e., student bathrooms or locker rooms, secure areas and teacher lounges.

As reflected in School Board Regulation 926-1, "Visitor Identification" (See, **Ex. A**), VIS requires all visitors (with the exception of law enforcement and emergency service providers in uniform and/or displaying a badge) to provide a government-issued ID, which is then scanned into VIS. After VIS clears the visitor, the system issues a visitor identification badge, which the visitor must wear at all times, and which states his or her authorized destination within the building. VIS captures, at a minimum, the name, photograph, date of birth, location in the building, time of admission and time of departure of each visitor to the school. As to visitors whose access is controlled or limited by a no trespass notice or a court order (i.e., custodial disputes, protective orders), a message is also recorded in VIS regarding the reasons for and nature of such limitations. These messages often reference the name of the student, the parents, and/or the student/parent home phone number, and other information related to an identifiable student. (See, **Ex. B**, Redacted Examples of VIS Data.)

Students visiting a school from a different Prince William County school must also be processed under VIS. Any information relating to an identifiable student which is recorded in VIS is "personally identifiable information in education records"¹ deemed confidential under the Family Educational Rights Privacy Act ("FERPA") and its state law counterpart, Va. Code § 22.1-287, and may not be released to third parties without the consent of the parent or pursuant to a lawful subpoena or court order.² To the extent that parental visits are associated with a specific destination—guidance, school psychologist, special education, administration, teachers, etc.—such information may also fall under the protections of FERPA as "information directly related to a student."³ Raptor Technologies has also periodically updated VIS to provide other

¹ 20 USCS § 1232g (b)(1)(J).

² *Id.*

³ 20 USCS § 1232g (a)(4)(A)(i).

security functions implicating FERPA, including the addition of a module which pulls additional information regarding students from the School Division's Student Information System (SASI) into VIS. That information, which includes the names of custodial parents and guardians, is then used to sign out students.

All PWCS parents were advised in advance of the implementation of the Raptor VIS in 2007 through individual letters and the public was further informed of the purpose of the collection of this individual data⁴ through PWCS Regulation 926-1 which states that, "[d]ata generated by the VIS shall not be used for any purpose other than the identification of registered sex offenders, monitoring the security and safety of students and staff, and logging volunteer hours."⁵

B. Hjelm's Interactions With VIS and Subsequent Use of FOIA to Harass the School Division

As noted above, two of the legal issues before the Court are whether the issuance of the extraordinary remedy of mandamus is appropriate under the facts of this case, and whether the "special circumstances" of this case merit an award of attorney's fees and costs under FOIA.

Relevant to those issues are the circumstances surrounding Hjelm's use of FOIA.

In or around November of 2007, Hjelm, upon entering Freedom High School, was asked to submit to VIS at that school. Hjelm balked at doing so and demanded to see the school principal.

⁴ The Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800, *et seq.*, regulates the collection and dissemination of "personal information" contained in information systems, including information managed by computer networks and limits public bodies from collecting, maintaining, using, and disseminating personal information, except as permitted or required by law. "Personal information" is defined as "all information that describes, locates, or indexes anything about an individual, including photographs and the record of his presence in an organization or activity, or admission to an institution. Public agencies must give notice to the persons from whom such data is collected of the purposes for which the data may be used." PWCS has done so through Regulation 926-1.

⁵ See Ex. A.

Much to his displeasure, Hjelm was advised that by School Board regulation, all visitors were required to have their identification checked through VIS.

Hjelm then embarked on a campaign of harassment against the School Division using FOIA as his primary tool.⁶ Over the course of the next six months, Hjelm barraged the School Division with eight FOIA requests, many of which were duplicative (only the first of two of these FOIA requests are at issue in this case).⁷ When those portions of his initial FOIA requests relating to the VIS system were denied by legal counsel for the School Division under applicable FOIA exemptions, Hjelm escalated his harassment by submitting an additional FOIA request demanding attorney's fees bills and statements for legal counsel, broadening the scope of his prior requests, and filing additional requests relating back, or connected to, prior FOIA requests. Hjelm also sought to use FOIA to obtain legal opinions (as opposed to public records) from the School Division relating to the FOIA exemptions relied upon and other laws protecting the security information he sought. Although most of the responses to Hjelm's requests were provided free of charge, on two occasions when Hjelm submitted overbroad requests requiring an excessive amount of staff time and was asked to pay the associated costs, he withdrew those requests (only to submit additional requests). In April of 2008, after Hjelm had failed to pay the bill for his seventh FOIA request, the School Division, in reliance on Va. Code § 2.2-3704 (H) and (I), informed Hjelm that the School Division was not required to honor Hjelm's eighth FOIA request.

⁶ Hjelm had previously used FOIA to retaliate against both the School Division for requiring his daughter to have a parking sticker to park on school grounds and against Prince William County for ticketing her car when she parked in a no-parking zone on a County street instead of on school property.

⁷ From December 2007 to April 2008, Hjelm made eight FOIA requests to the School Division—the two requests at issue in this litigation plus six other requests he has pursued in his two earlier, but failed attempts at suing the School Division.

On two prior occasions (December 2008 and July 2009), Hjelm, by counsel, filed mandamus actions against the School Board relating to the aforementioned FOIA requests including the two FOIA requests at issue in this case. On each of those prior occasions, Hjelm's claim against the School Board was dismissed on procedural grounds. The case at bar represents Hjelm's third attempt to sue the School Board in a matter that has been ongoing for more than two years.

C. Hjelm's FOIA Requests

FOIA Request No. 1 - December 7, 2007 (Ex. C)

On December 7, 2007, Hjelm submitted a FOIA request addressed to School Division Superintendent Steven Walts, in which he requested the following:

- A. A copy, on paper or disk, of all identification that was scanned or manually entered into the P. W.C.P.S. Visitor Identification System at Garfield H.S., Woodbridge H.S. and Freedom H.S. from 12-3-07 to 12-7-07.
- B. Copy of policy for the Visitor Identification System that was sent to Freedom H.S.
- C. Name of all systems that are used to cross-check names that are entered into the Visitor Identification System along with any agreement or guidelines P.W.C.P.S. have with said system.

On December 11, 2007, within the five working days required by FOIA,⁸ the School Division timely responded to Request No. 1. (Ex. D)⁹

In response to section A of Request No. 1, the School Division advised Hjelm that it was withholding the requested records (identification data from VIS for the three high schools) based

⁸ Upon receipt of a FOIA request, a public body is required to respond within five working days. In the event that it is not practically possible to provide the requested records within five working days or to determine whether they are available, the public body may invoke the right to seven additional working days within which to respond. Va. Code § 2.2-3704(B)(4).

⁹ See Letter from McGowan to Hjelm of 12/11/07, at 1 (hereinafter "First School Division FOIA Response"), a copy of which is attached hereto as Ex. D.

upon specific exemptions to FOIA, namely, § § 2.2-3705.1(6), 2.2-3705.2(6), 2.2-3705.2(7) and 2.2-3705.4(1) (discussed *infra*). The School Division also informed Hjelm that the requested documents were also being withheld "to the extent that disclosure of such information is otherwise prohibited by federal and state law, including the Government Data and Dissemination Practices Act." (Ex. D)

In response to section B of Request No. 1, the School Division provided Hjelm with a copy of Regulation 926-1, which was the School Board "policy" relating to VIS.¹⁰

In response to section C of Request No. 1, the School Division gave Hjelm the name of the software company which installed and operates VIS, Raptor Technologies, and invoked three specific FOIA exemptions, §§ 2.2-3705.2(6), 2.2-3705.2(7), 2.2-3706(7) as the basis for declining to provide the requested documents.¹¹

Hjelm was not charged for this response.

FOIA Request No. 2 - January 22, 2008 (Ex. E)

A month later, on January 22, 2008, Hjelm submitted another FOIA request addressed to the Superintendent, in which Hjelm:

- A. Re-submitted his previous FOIA request of 12-7-07;
- B. Requested a "copy of all attorney fees, in detail, relating to FOIA Request dated 12-7-07;"
- C. Requested "[a] time to inspect all FOIA request [sic] along with responses and all 'public records' 2.2-3701, relating to above FOIAs from 1-1-07 to 1-22-08."

The School Division timely responded to this request on January 25, 2008. (Ex. F.) In response to section A of Request No. 2, the School Division enclosed a copy of its response to

¹⁰ *Id.*

¹¹ *Id.* at 2.

Hjelm's first FOIA request, invoking the statutory exemptions applicable to the requested records.¹²

In response to section B of Request No. 2, the School Division declined to produce the attorney's fees documents because those bills did not exist in a format which would reflect the time and costs attributable to his first FOIA action; "do not reflect the actual time or billing for any specific FOIA request [as requested by Hjelm] and include descriptive information relating to legal matters which are exempt from FOIA under 2.2-3705.1(2)."¹³

In response to section C of Request No. 2, the School Division informed Hjelm that to the extent this request was intended to request those public records previously exempted in the response to Request No. 1, it was denied. Further, counsel for the School Division informed Hjelm that this request for "a time to inspect FOIA response and public records" from 1-1-07 to 1-22-08 was confusing.¹⁴

Hjelm was not billed for the charges associated with responding to this request.

III. ARGUMENT

A. **Hjelm Has Not Been Denied Any Rights or Privileges Under FOIA and Cannot Meet the Burden of Proof to Establish a Violation.**

In order to establish a violation of FOIA, Hjelm must demonstrate that he was denied the rights and privileges due him under the Act. *Lawrence v. Jenkins*, 258 Va. 598, 603, 521 S.E.2d 523, 525 (1999). Under the common law, the burden of proof in a mandamus action lies with the petitioner. *Legum v. Harris*, 205 Va. 99, 103, 135 S.E.2d 125, 128 (1964). Va. Code

¹² See Letter from McGowan to Hjelm of 1/25/08, at 1 (hereinafter "Second School Division FOIA Response"), a copy of which is attached hereto as Ex. F.

¹³ *Id.*

¹⁴ *Id.* at 1-2.

§ 2.2-3713(E) only shifts the burden of proof to the public body to the extent the public body has denied a FOIA request in reliance upon an exemption to the Act.

In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence.

Any failure by the public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

Id. (emphasis added). Otherwise, the burden of proof remains with the petitioner on all other aspects of the action. See *Cartwright v. Commonwealth Transportation Commissioner*, 270 Va. 58, 65, 613 S.E.2d 449, 453 (2005) (noting that the FOIA statutes only shift to the public body the burden to establish an exemption by a preponderance of the evidence) and *RF&P Corp. v. Little*, 247 Va. 309, 440 S.E.2d 908, 915 (1994) (noting that the burden of proof for imposition of a civil penalty under FOIA is the preponderance of the evidence and rests on the petitioner). See also *Albright v. Woodfin*, 68 Va. Cir. 115, 2005 Va. Cir. LEXIS 97 (Cir. Ct Nelson County 2005) (holding that the burden of proof is on the petitioner in a FOIA action to establish attorneys' fees).

Additionally, the rules of statutory construction support this reading of the burden of proof issue raised in § 2.2-3713.

When the legislature adopts a statute that is in derogation of the common law, 'only those parts of the common law directly altered by the statute are deemed to be changed.' The common law *status quo* is protected by a presumption that no change in the common law is intended unless the change is expressly stated or necessarily implied. The General Assembly must 'manifest plainly' its intention for the statute to change the common law, and a statute will alter a common law rule 'only to the extent that its terms are directly and irreconcilably opposed to the rule.'

Lucas v. MFA Inc., 74 Va. Cir. 206, 209 (Cir. Ct Roanoke County, 2007) (citing *Couplin v. Payne*, 270 Va. 129,136, 613 S.E.2d 592 (2005) (first quotation) and *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301 (1988) (second and third quotations)). Therefore, with the exception of the issue of whether the records requested by Hjelm fall into the statutory exemptions claimed by

the School Division, Hjelm has the burden of proving all other aspects of this FOIA action, including his claim for attorney's fees and costs.

There is no evidence in this case that the School Division failed to follow FOIA's procedures, which require a public body to either provide the records requested, provide one of four alternative responses within five working days, or invoke the seven-work-day extension. Va. Code § 2.2-3704(B). As argued below and supported by the facts presented at the hearing, those records which the School Division withheld fell within one or more statutory exemptions to FOIA.

B. The Records Requested by Hjelm Were Either Provided or Fall Within One or More of the Exemptions to FOIA.

FOIA REQUEST NO. 1

In response to Hjelm's requests for "all identification that was scanned or manually entered into the P.W.C.P.S. Visitor Identification System at Gar-Field H.S., Woodbridge H.S., and Freedom H.S. from 12-3-07 to 12-7-07" (section A), a copy of the policy for the Visitor Identification System that was sent to Freedom High School (section B) and the "name of all systems that are used to cross-check names that are entered into the Visitor Identification System along with any agreement or guidelines P.W.C.P.S. have with said system" (section C), it was, and remains, the School Division's position that the records requested have been provided to Hjelm, with the exception of the VIS identification data requested in Section A, which is lawfully exempted from FOIA under one or all of the exceptions relied upon. It is important to note that records requested by Hjelm at section A never existed. The School Division does not actually scan a visitor's license or other identification into the VIS system, just the visitor's photo. Data from the identification is inputted into VIS which then becomes part of the database and is automatically checked against sex offender and criminal registries. Thus, the actual records

requested by Hjelm—"all identification that was scanned or manually entered"—do not exist. However, the data captured by VIS does exist in large part, and falls within the statutory exemptions invoked by the Division in response to Hjelm's FOIA requests.

Response to Section A – Raptor Visitor Identification Records

In response to the request for records at section A of Request No. 1, the School Division claimed several FOIA exemptions. First, the School Division invoked § 2.2-3705.1 (6) which exempts from FOIA "proprietary information software . . . acquired from a vendor for the purpose of processing data for agencies or political subdivisions in the Commonwealth"¹⁵ That statutory exemption further provides that "[f]or purposes of this subdivision, 'vendor proprietary software' means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth."

The identification information scanned into, or manually entered into, the VIS system and maintained there to this day, is part of the VIS "computer program." Once the data is entered into the system, it becomes an integral part of the VIS computer program. That data is integrated into the database of the program and remains accessible to authorized users who can use that information to produce a variety of reports (e.g. all dates when a certain individual entered a school, all individuals entering a school during a specific time frame, all individuals visiting a particular office or employee). Since the data entered into the VIS system becomes an essential component of the computer program, Va. Code § 2.2-3705.1(6) exempts the software itself, as well as the data incorporated into the program. The term "vendor proprietary software" is defined to include "computer programs acquired . . . for purposes of processing data."¹⁶ This language indicates that to the degree the computer program processes "data," that data is part of the program

¹⁵ See First School Division FOIA Response at Ex. D.

¹⁶ Va. Code § 2.2-3705.1(6).

and is therefore exempt under § 2.2-3705.1(6). Thus, all identification that was scanned or manually entered into the VIS is exempt from FOIA under Va. Code § 2.2-3705.1(6).

Virginia Code § 2.2-3705.2 (6), also cited by the School Division in response to subsection A, exempts, in pertinent part, “operational, procedural . . . or other records, the disclosure of which would reveal surveillance techniques, . . . alarm or security systems or technologies, . . . to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.”

This exemption applies to the VIS identification data requested by Hjelm because such data is an operational or procedural record containing the specifics of the technology and security system, which specifics are used to secure the building and the safety of its occupants and the release of which would jeopardize the security of the building and its occupants. If this identification data could be accessed within five (5) working days through FOIA, it could then be used to determine which individuals, other than students and staff, are regularly in the building, the time of their visits and their location. By way of example, someone planning an assault on the school (such as occurred in 2005 at Bull Run Middle School) could then determine the optimum time to storm the school and the preferable point of entry depending upon where adult visitors might be present. Similarly, such information could be used by a disgruntled parent or spouse, or by a stalker, seeking to locate and attack or abduct a visitor (including a student) in the school or on school grounds.

Likewise, Va. Code § 2.2-3705.2 (7), also invoked by the School Division, exempts “[s]ecurity plans and specific assessment components of school safety audits, as provided in § 22.1-279.8.” Section 22.1-279.8 is a provision of the Virginia Code enacted in response to the Federal Safe Schools Act which authorizes local school boards to establish school safety audit

committees, such as the Prince William County Public Schools Safe Schools Advisory Council.

Such committees conduct "school safety audits," which are defined as

a written assessment of the safety conditions in each public school to (i) identify, and if necessary, develop solutions for physical safety concerns, including building security issues and (ii) identify and evaluate any patterns of student safety concerns occurring on school property or at school-sponsored events. Solutions and responses shall include recommendations for structural adjustments, changes in schools safety procedures, and revisions to the school board's standards for student conduct.

Id. Per Va. Code § 22.1-279.8(B), the results of such school safety audits are to be made public, except that the school board has the right to "withhold or limit the release of any security plans and specific vulnerability assessment components as provided in subdivision 7 of § 2.2-3705.2"—the FOIA exemption for such records.

Here, the PWCS Schools Safety Council recommended in 2007 that the School Board implement VIS in all schools. The School Board has chosen to withhold the specific vulnerability assessment components of VIS under this section. Thus, the School Division properly invoked the FOIA exemption at Va. Code § 2.2-3705.2(7) as the basis for withholding the records sought by Hjelm at subsection A of Response No. 1.

Also cited by the School Division in its response to Hjelm, Va. Code § 2.2-3705.4 (1) exempts from FOIA "[s]cholastic records containing information concerning identifiable individuals." The definitions section of FOIA, § 2.2-3701, defines "scholastic records" as "those records containing information directly related to a student and maintained by a public body that is an educational agency or institution." Thus, to the extent that the records requested by Hjelm relate to a student (i.e. identifying information concerning a student who visited one of the referenced high schools or whose parent a guardian visited one of the referenced high schools), those records are exempt from FOIA under Va. Code § 2.2-3705.4(1).

Finally, FOIA does not apply to public records whose disclosure is otherwise prohibited by law. See introductory paragraphs of §§ 2.2-3705.1 through 2.2-3705.1(7) and § 2.2-3704(A). The School Division in its response to Hjelm invoked these protections by withholding the documents requested “to the extent that disclosure of such information is otherwise prohibited by federal and state law.”¹⁷ FERPA prohibits the disclosure of any information relating to an identifiable student, as does Va. Code § 22.1-287 which also governs access to student records. Both laws clearly protect the identity, photos, names, and date of birth of those PWCS students who go through VIS, as well as any other information relating to identifiable students. VIS data includes the name, date of birth, and destination of parents within schools and could easily be linked to identifiable students. In addition, information obtained from court orders and no trespass notices relating to prohibitions on contact with specific students also falls under FERPA and Va. Code § 22.1-87. Finally, there are over 77,000 students in PWCS, many of whom have frequent reasons to visit other schools—to assist in teaching lower grades, to make presentations, to drive siblings home from school, for extracurricular events, to attend clubs or meetings under the Equal Access act or a myriad of other reasons—and whose identifying information is recorded in VIS.

Neither the federal nor the state statute contains an exemption for FOIA, and the strict confidentiality protections of these statutes would be worthless if anyone could access this otherwise confidential student information through FOIA. Thus, any records relating to student information within VIS are also exempt from FOIA based upon federal and state law in addition to the standard FOIA exemptions.

¹⁷ See First School Division FOIA Response at Ex. D.

Response to Section B – PWCPS Policy

Hjelm was provided with School Board Regulation 926-1.

Response to Subsection C – Names of Systems and Agreement and Guidelines

In reference to Hjelm's request for the "[n]ame of all systems that are used to cross-check names that are entered into the Visitor Identification System," Hjelm was informed that the School Division has a contract with Raptor Technologies to cross-check visitor names against registered sex offender databases,¹⁸ even though it is well-established that FOIA pertains only to requests to review or copy public records not requests for "information." Thus, this aspect of Hjelm's request was fully met.

In response to Hjelm's request for any "agreement or guidelines" between PWCPS and the "system," Hjelm was given, in response to subsection B of Request No. 1, the School Division's guidelines for the Raptor system as set forth in Regulation 926-1. The School Division withheld its agreement with Raptor at that time because it believed that the Raptor contract contained proprietary information about specific aspects of the VIS security program which is exempt under Va. Code §§ 2.2-3705.2(6) and 2.2-3705.2(7) for the reasons stated above and as stated in the timely letter from the School Division's counsel to Hjelm. Notwithstanding, the School Division did provide a copy of the contract with Raptor to Hjelm in response to a subsequent FOIA request, after obtaining information from Raptor indicating that the contract information was not deemed proprietary. Therefore, Hjelm has been provided with all records responsive to section C.

FOIA REQUEST NO. 2

Response to Section A – Resubmission of First FOIA Request

Section A of Request No. 2 was a resubmission of Request No. 1 for which Hjelm had already been given a proper and timely response. The exemptions claimed by the School

¹⁸ *Id.* at 2.

Division in response to Request No. 1 have been explained above. (See pp. 10-15). The School Division, therefore, incorporates its response to Request No. 1 above, in response to section A of Response No. 2.

Response to Section B – Certain Attorney’s Fees Records

Section B of Request No. 2 sought “copy of all attorney fees, in detail, relating to FOIA Request dated 12-7-07” (i.e. Request No. 1). In response, the School Division timely and properly explained to Hjelm that the requested records did not exist because

any attorney’s fees which might have been incurred by the Division relating to such request are not separately billed to the Division but are included in “block billing,” which does not break out the time related to a FOIA request from other legal matters. There are, therefore, no documents reflecting the amount of time and/or the amount of attorney’s fees incurred by the Division for work performed by legal counsel relating to any particular FOIA request.¹⁹ (Ex. F.)

This response was both appropriate under the facts and permissible under Va. Code § 2.2-3704(B)(3) which provides that a response noting that the “requested records could not be found or do not exist” is a proper response to a FOIA request. This response was also permissible under Va. Code § 2.2-3704(D) which states that “no public body shall be required to create a new record if the record does not already exist.”

In further response to this particular request, the School Division’s counsel cited, in regard to legal bills generally, the exemption at Va. Code 2.2-3705.1(2) which protects “[w]ritten advice of legal counsel . . . and any other records protected by the attorney-client privilege.”

Specifically, counsel for the School Division informed Hjelm that “legal bills reflecting attorney’s fees incurred by the Division in relation to FOIA requests contain identifiable information relating to such request [sic] and to numerous other legal matters which are protected from disclosure under the attorney-client and attorney work product privileges and are therefore, exempt from

¹⁹ See Second School Division FOIA Response at Ex. F.

FOIA under Va. Code § 2.2-3705.1(2)²⁰ Accordingly, even if the records sought existed in the form requested by Hjelm, they would nevertheless be exempt from production under the FOIA exemption applicable to records protected by the work product and attorney-client privilege.

Response to Section C -- Assorted 'Public Records'

Section C of Request No. 2 sought “[a] time to inspect all FOIA request along with responses and all ‘public records’ 2.2-3701, relating to above FOIA’s from 1-1-07 to 1-22-08.” In response thereto, the School Division’s counsel first referenced the First School Division FOIA Response to Hjelm, which had cited certain FOIA exemptions applicable to the VIS identification records, and reiterated the denial of Hjelm’s FOIA requests for those reasons. This earlier response was referenced because the request was vague and it was unclear whether Hjelm was requesting the same records yet again or something different. Further, counsel for the School Division informed Hjelm that his request for “‘a time to inspect FOIA responses and public records’ from 1-1-07 to 1-22-08 is confusing.”²¹ Under FOIA, the party seeking public records has a duty to “identify the requested records with reasonable specificity.” Va. Code § 2.2-3704(B). In this instance, counsel could not discern what records were being requested and informed Hjelm of that fact. Hjelm, however, never clarified section C of Request No. 2 to identify the requested records with reasonable specificity as required by Va. Code § 2.2-3704(B). Therefore, Hjelm cannot claim that the School Division failed to properly respond to his FOIA request when he abdicated his duty to state his request with reasonable specificity.

²⁰ *Id.*

²¹ *Id.*

C. The Court Should Exercise Its Discretion and Deny the Relief Sought.

Even in the event the Court were to find a violation of FOIA arising out of the School Division's responses to any of Hjelm's FOIA requests, the Court should, nonetheless, decline to grant the relief sought by Hjelm because any such relief would be unjust under the facts of this case.

1) Mandamus Should Not Issue Because Hjelm Had No Clear Right to the Relief Sought.

Assuming, *arguendo*, that Hjelm were to meet his burden of proof by demonstrating that a violation of FOIA did occur, he still cannot meet the prerequisites for a writ of mandamus. As observed by the Virginia Supreme Court in *Lawrence*, "[o]ne of the elements necessary before a writ of mandamus issues is the clear right of the petitioner to the relief being sought."²²

Hjelm has no clearly established right under FOIA to the documents for which the School Division has claimed exemptions. There is no statute, case law or Attorney General's opinion addressing the application of these exemptions to the relatively novel security system at issue here. The letter Hjelm requested from an employee of the FOIA Advisory Council is not binding upon this Court. That letter, which contains the hearsay opinion of an attorney who has not been qualified as an expert, states on its face that it is "based solely upon the information presented in the correspondence and other materials [Hjelm] provided on January 16 and February 19, 2008."²³ It is not known what information Hjelm provided in his request for that opinion. However, it is certain that the opinion contained in that letter was not based upon the facts presented to this Court. Further, the FOIA Advisory Council's own "litigation policy" advises that "[t]he opinions of the Council are not binding on any court as precedent; therefore once litigation is commenced, the

²² 258 Va. at 603, 521 S.E.2d at 525.

²³ See Letter from Everett to Hjelm of 3/19/08, at 1, a copy of which is attached hereto as Ex. G.

court and not the Council, is the appropriate body to decide and settle a dispute as a matter of law.²⁴ More importantly, the issue of whether, on the facts presented to this Court, the cited FOIA exemptions apply to the records requested by Hjelm, is the ultimate issue of law in the case, a determination reserved solely for the Court.

Mandamus will only lie where there is a clear and specific legal right to be enforced or a duty which ought to be and can be perfected, and it is never granted in doubtful cases. *May v. Whitlow*, 201 Va. 533, 111 S.E.2d 804 (1960); *Gilliam v. Harris*, 203 Va. 316, 124 S.E.2d 188 (1962). In this case, the applicability of the FOIA exemptions claimed by the School Division is at least fairly debatable. Given the lack of any court cases or opinions of the Attorney General to the contrary, there is no clear and specific legal right under FOIA entitling Hjelm to the VIS identification data sought here.

2) Mandamus Does Not Lie Where There is no Likelihood Future Violations Will Occur.

Mandamus is an extraordinary remedy within the discretion of the Court, which will only be applied prospectively and will not be granted to undo an act already done. *Richlands Medical Ass'n v. State Health Commissioner*, 230 Va. 384, 337 S.E.2d 737 (1985). For that reason, mandamus is inappropriate here since the School Division timely responded to the two FOIA requests that are at issue. Indeed, the School Division also timely and fully responded to Hjelm's six subsequent FOIA requests, as evidenced by the fact that Hjelm has chosen not to make those six other FOIA responses part of this litigation. There being no evidence that a FOIA denial is likely to occur in the future, the writ should be denied.

²⁴ The FOIA Council's "Litigation Policy" can be found at the Council's website, "<http://foiacouncil.dls.virginia.gov>." For ease of reference, a copy of the "Litigation Policy" is attached hereto as **Ex. H**.

3) **Mandamus is Barred by the Doctrine of Laches.**

Finally, equitable relief should be denied where the petitioner is guilty of laches or unclean hands. Hjelm is challenging the actions of the School Division relative to FOIA requests dating from December 2007 and January 2008. If equitable relief was needed to remedy the alleged FOIA violations, it should have been timely invoked. Over two years have passed since the two FOIA requests at issue here were submitted to the School Division. Hjelm waited almost a year to file his first FOIA action in this Court, another six months to file the second one, and another six months to file this action.

Additionally, the harassing and retaliatory nature of Hjelm's eight FOIA requests and the circumstances of his filing and serving what now totals three Petitions, constitute deliberate and improper conduct which should not be rewarded.²⁵ The Court should invoke the unclean hands doctrine to deny the Petition.

4) **There is no Legal Basis for a Civil Penalty Against Dr. Walts**

Among other relief sought, Hjelm also seeks a civil penalty against the School Division Superintendent, Dr. Steven Walts. No legal basis exists for that relief.

First, Dr. Walts has not been named as a defendant in this action. The only defendant is the Prince William County School Board.

Second, Va. Code § 2.2-3714 permits a civil penalty in limited circumstances "[i]n a proceeding commenced against members of public bodies." Dr. Walts is not a member of the

²⁵ On his First Petition, Hjelm failed to give the School Division prior notice of his intent to file the Petition as then required by Va. Code § 8.01-644. The first Petition was dismissed for failure to give the statutorily-required notice. Hjelm's Second Petition was dismissed because Hjelm named a non *sui juris* party as the defendant. On this Third Petition, Hjelm, who has been represented by the same counsel on all three petitions, gave the School Division notice of the action by himself delivering to counsel's office a copy of the Petition lacking a return date, while supplying a copy of the Petition with the return date to the press the same day.

Prince William County School Board—the public body against whom this action has been brought.

Third, even if Dr. Walts had been named as a defendant in this action and even if he were a member of the School Board, there would still be no legal basis upon which to seek a civil penalty against him. As prescribed in Va. Code § 2.2-3714, the court shall impose a civil penalty only if it “finds that a violation was willfully and knowingly made.” There is no evidence here that Dr. Walts committed any violation whatsoever, much less a willful and knowing violation. Indeed, there is no evidence that Dr. Walts played any role in responding to Hjelm’s FOIA requests, only that Hjelm’s requests were addressed to the Superintendent. PWCS processes all FOIA requests through its FOIA officer, William Reid, and/or legal counsel. Here the FOIA responses at issue were clearly generated by counsel. A public official who violates a FOIA statute while acting on the advice of counsel does not commit a willful and knowing violation. See *Nageotte v. Bd. of Supervisors of King George County*, 223 Va. 259, 269, 288 S.E.2d 423, 428 (1982) (holding that although the Board of Supervisors “while acting in good faith on the advice of counsel, failed to comply with the provisions of the Act . . . since there were no willful and knowing violations, there could be no imposition of civil penalties.”) and *Burton v. Mann*, 74 Va. Cir. 471, 479 (Loudoun County 2008) (holding that although the FOIA statute had been violated “no civil penalty shall be assessed, as the actions of [the Board member] were not willful, they being upon advise [sic] of counsel. . .”).

For these reasons, the request for a civil penalty against Dr. Walts should be dismissed.

5) Should Petitioner Substantially Prevail, the Special Circumstances of This Case Do Not Support An Award of Costs and Attorneys’ Fees.

Under Va. Code § 2.2-3713(D), if the petitioner “substantially prevails on the merits of the case,” he is entitled to recover from the public body reasonable costs and attorneys’ fees “unless

special circumstances would make such an award unjust (emphasis added).” The School Board contends that it would be manifestly unjust to award Hjelm costs and attorneys’ fees in this case for the following reasons.

In determining whether the exemptions invoked in regard to the requested VIS information were proper, the School Division relied in good faith upon the advice of legal counsel. Va. Code § 2.2-3713(D) states that, in making a determination of whether special circumstances exist which mitigate against an award of costs and attorney’s fees, “a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body’s position.” In this instance, there are no Attorney General opinions or court decisions addressing whether or not information relating to security systems such as VIS are exempt under the FOIA provisions relied upon by the School Division. That said, it was entirely reasonable for the School Division to rely in good faith upon legal counsel’s determination, particularly since counsel was familiar with the nature, operation and use of VIS in Prince William County Schools.

Technology is always ahead of the law. The VIS system is a novel security system and the legislature has not yet fashioned an exemption specific to such a system. Thus, to the extent a FOIA exemption applies to the VIS system, that exemption must be found within the existing FOIA statutes—none of which specifically include or exclude the VIS system. Therefore, legal counsel’s determination that certain FOIA exemptions apply is reasonable under the circumstances.

The School Division has promptly responded to Hjelm’s numerous FOIA requests and Hjelm has not alleged otherwise.

Hjelm has no clear need for the documents requested. Otherwise he would have sought relief (1) when the exemptions were first invoked in December 2007 or January 2008 or (2) when he received the FOIA advisory opinion in March 2008; or (3) he would have refiled this third Petition following the dismissal of his two previous petitions before so much time had elapsed. In sum, this matter has been “pending” and the School Division forced to expend resources to deal with Hjelm for well over two years.

As noted above, Hjelm’s requests were intended to harass the School Division, particularly as those requests escalated to retaliate against the School Division’s counsel for invoking the statutory exemptions. Hjelm has also engaged in gamesmanship and ambush tactics. Hjelm filed his first petition without giving the statutorily required prior notice and then served the School Division right before the winter break—when he knew or should have known that the School Division offices would be closed and employees unavailable, effectively giving the School Division less than a week’s notice of a unilaterally scheduled hearing. On his second petition, Hjelm waited until after July 1, 2009 (when a statutory amendment—requested by Hjelm through his local delegate—no longer requiring prior notice of the filing of mandamus action took effect) and then filed that second petition on July 2, 2009 to avoid having to give the School Division prior notice of the filing. Hjelm did not serve the School Division, but through counsel, faxed that second petition to the School Division’s counsel on the day before the July 4th holiday, effectively giving the School Division only three days’ notice before the unilaterally scheduled hearing date. School Division counsel was not properly served with the second Petition until the afternoon after the hearing when the Sheriff delivered a copy of the Petition to her office. In the instant case, Hjelm again improperly served the School Division by himself delivering to counsel’s office a copy of the Petition which lacked a hearing date while the same day providing the press with a

copy of the Petition which contained a hearing date. Under the unclean hands doctrine, Hjelm should be denied equitable relief. FOIA is not intended as a vehicle by which disgruntled citizens may retaliate against public bodies for perceived slights.

CONCLUSION

WHEREFORE, on the foregoing grounds, and upon such evidence and further arguments as may be presented at the hearing on this matter, the School Board respectfully requests that the Court deny the Petition for Mandamus and other relief and dismiss this matter with prejudice.

Respectfully Submitted,
PRINCE WILLIAM COUNTY
SCHOOL BOARD
By Counsel

Dated: February 19, 2010

BLANKINGSHIP & KEITH, P.C.
9300 West Courthouse Road, Suite 201
Manassas, VA 20110
Telephone (703) 365-9945
Facsimile (703) 365-2203

By:

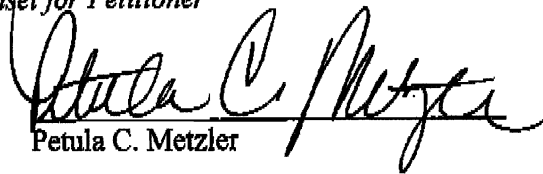


Mary McGowan, VSB # 22722
Petula C. Metzler, VSB # 70202
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2010, a true copy of the foregoing was faxed and mailed, first-class, postage prepaid to:

Thomas Woehrle, Esq.
WOEHRLE & FRANKLIN
4036 Plank Road
Fredericksburg, VA 22407
Telephone: (540) 548-1090
Facsimile: (540) 548-1704
Counsel for Petitioner



Petula C. Metzler

Regulation 926-1
COMMUNITY RELATIONS
December 3, 2007

COMMUNITY RELATIONS

Visitor Identification

I. Visitor Identification Badges

- A. Visitors to schools or other School Division facilities are expected to report promptly to the appropriate office to discuss the purpose of the visit and to obtain a date-sensitive, impermanent identification badge.
- B. The only visitors to schools or other School Division facilities that are not required to obtain a visitor's identification badge are noted below.
1. Law enforcement officers and other emergency service providers (e.g., fire fighters, EMS), when in uniform and/or displaying their badge of authority prominently, are not required to obtain a visitor's badge or surrender an ID, as their identity is clear. Law enforcement officers and other emergency service providers must sign in on the visitor's log, except in emergency situations.
 2. Prince William County School Division's Supply Services delivery personnel that are not going past the main office or loading dock are not required to sign in on the visitor's log.
- C. Visitors may include parents or relatives of students, citizens, invited speakers, salespersons, news media representatives, students not enrolled in school, observers from colleges and universities, volunteers, business partners, coaches from other schools, and tutors. School Division employees not regularly assigned to a given facility are also considered visitors and shall report to the appropriate office and follow all sign-in procedures (see section II. B.).
- D. Visitors shall be required to report to the main office of the school or School Division facility, provide and leave valid government photo identification, and state the nature of their visit to the School Division facility.
- E. The visitor identification badge or the PWCS employee photo-identification badge must be worn in a manner that makes them readily visible to students and staff in the School Division facility.
- F. Upon completion of business in the School Division facility, the visitor shall report to the office to turn in the visitor identification badge, and collect their photo identification before exiting the facility.
- G. Each School Division facility shall have a procedure to inform visitors and staff of the visitor identification badge requirement.



Regulation 926-1
COMMUNITY RELATIONS
December 3, 2007
Page 2

II. Visitor Identification Systems

- A. The School Division has implemented a Visitor Identification System (VIS) for the purpose of identifying registered sex offenders. This system also allows the School Division to monitor visitors to the schools for emergency and security purposes.**
- B. PWCS employees, Retirement Opportunity Program staff (ROPers), and law enforcement authorities will continue to sign in at schools on a paper log, Attachment 1, maintained at the school's visitor sign-in location.**
- C. Visitor identification systems cross-reference information against states' sex offender registries. All visitors must produce one of the following forms of valid government issued identification, containing a full name, date of birth, and photograph:**
- U.S. or foreign driver's license
 - U.S. or foreign government ID
 - Military ID
 - Department of Motor Vehicles photo ID
 - Passport
 - Permanent Resident Card (Green Card)
 - Re-entry permit
- D. Visitors who are unable to produce identification acceptable to the VIS must meet with a building administrator or school security immediately. Visitors with a legitimate educational purpose in the building will be granted access for such purpose subject to any conditions imposed by the school.**
- E. All state and federal laws will be adhered to for any individual positively identified as a registered sex offender.**
- F. Data generated by the VIS shall not be used for any purpose other than the identification of registered sex offenders, monitoring the security and safety of students and staff, and logging volunteer hours.**

The Associate Superintendent for Finance and Support Services, or designee, shall be responsible for implementing and monitoring this regulation.

The Associate Superintendent for Finance and Support Services, or designee, shall be responsible for reviewing this regulation in 2010.

PRINCE WILLIAM COUNTY PUBLIC SCHOOLS

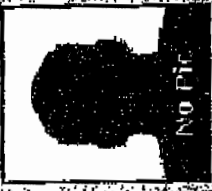
Volkswagen Argyle Cabell

Possible offender photos

DO THE PHOTOS MATCH?

A search of multiple states' offender database has provided the following record.

Records Found: 2



NO PIC
SCANNED ID

Name:	[REDACTED]
Address:	[REDACTED]
State:	VA
Date of Birth:	[REDACTED]
Year of Birth:	33
Age:	Male
Gender:	WHITE
Race:	BROWN
Eyes:	BLACK
Hair:	5'05"
Height:	160
Weight:	
SSN:	
Comments:	

BEFORE CONFIRMING: PLEASE VERIFY A MATCH ON THE PHOTOS, ADDRESS AND THE APPEARANCE OF THE PERSON

Is this the person registering?

Yes No

SEARCHED INDEXED SERIALIZED FILED MAR 19 2010 FBI - MEMPHIS

SEARCHED INDEXED SERIALIZED FILED MAR 19 2010 FBI - MEMPHIS

SEARCHED INDEXED SERIALIZED FILED MAR 19 2010 FBI - MEMPHIS

SEARCHED INDEXED SERIALIZED FILED MAR 19 2010 FBI - MEMPHIS

Running low on supplies? 1-877-TRAPTOR or 713-880-8902

Internet

tabler


EXHIBIT

B

Known As	Known As	Known As	Known As
<p>NO CONTACT WITH NO EXCEPTIONS WITH</p> <p>Wed Mar 04, 2009 07:18 AM</p> <p>(usamama1 stavenr)</p> <p>Forest Park High School</p>	<p>Notify Security</p> <p>Thu Apr 23, 2009 03:09 PM</p> <p>(usamama1 stavenr)</p> <p>Forest Park High School</p>	<p>Notify Security</p> <p>Wed May 27, 2009 07:48 AM</p> <p>(usamama1 stavenr)</p> <p>Forest Park High School</p>	<p>GET ADMINISTRATOR II DO NOT ALLOW HER TO PICK UP</p> <p>STUDENT</p> <p>perched</p> <p>783-639-7874. GET ADMINISTRATOR.</p> <p>Thu Jun 02, 2009 11:43 AM</p> <p>(usamama1 stavenr)</p> <p>Mountain View Elementary</p>
<p>Name:</p> <p>Date Of Birth:</p> <p>Notes:</p>	<p>Name:</p> <p>Date Of Birth:</p> <p>Notes:</p>	<p>Name:</p> <p>Date Of Birth:</p> <p>Notes:</p>	<p>Name:</p> <p>Date Of Birth:</p> <p>Notes:</p>
<p>Name:</p> <p>Date Of Birth:</p> <p>Notes:</p>	<p>Name:</p> <p>Date Of Birth:</p> <p>Notes:</p>	<p>Name:</p> <p>Date Of Birth:</p> <p>Notes:</p>	<p>Name:</p> <p>Date Of Birth:</p> <p>Notes:</p>

Congratulations. You will be upgraded to the newest version of Y-Soft 5.0 on July 16, 2009. For more information, email support@eptaware.com

Need technical support 1-877-7RACTOR or 714-880-8002

	<p>Name: [REDACTED]</p> <p>Known As: [REDACTED]</p> <p>Date Of Birth: [REDACTED]</p> <p>Comments: [REDACTED]</p> <p>Date/Time Logged: [REDACTED]</p> <p>Logged By: [REDACTED]</p> <p>Building: [REDACTED]</p>	<p>Name: [REDACTED]</p> <p>Date Of Birth: [REDACTED]</p> <p>Comments: [REDACTED]</p> <p>Date/Time Logged: [REDACTED]</p> <p>Logged By: [REDACTED]</p> <p>Building: [REDACTED]</p>	<p>Name: [REDACTED]</p> <p>Date Of Birth: [REDACTED]</p> <p>Comments: [REDACTED]</p> <p>Date/Time Logged: [REDACTED]</p> <p>Logged By: [REDACTED]</p> <p>Building: [REDACTED]</p>	<p>Name: [REDACTED]</p> <p>Date Of Birth: [REDACTED]</p> <p>Comments: [REDACTED]</p> <p>Date/Time Logged: [REDACTED]</p> <p>Logged By: [REDACTED]</p> <p>Building: [REDACTED]</p>	<p>Name: [REDACTED]</p> <p>Date Of Birth: [REDACTED]</p> <p>Comments: [REDACTED]</p> <p>Date/Time Logged: [REDACTED]</p> <p>Logged By: [REDACTED]</p> <p>Building: [REDACTED]</p>	<p>Name: [REDACTED]</p> <p>Date Of Birth: [REDACTED]</p> <p>Comments: [REDACTED]</p> <p>Date/Time Logged: [REDACTED]</p> <p>Logged By: [REDACTED]</p> <p>Building: [REDACTED]</p>	<p>Name: [REDACTED]</p> <p>Date Of Birth: [REDACTED]</p> <p>Comments: [REDACTED]</p> <p>Date/Time Logged: [REDACTED]</p> <p>Logged By: [REDACTED]</p> <p>Building: [REDACTED]</p>
---	---	---	---	---	---	---	---

This parent must be asked where she is going in the building. Alert Administrator to her being in the building.
 Fri Nov 14, 2008 02:10 PM
 [REDACTED] (username: pearsonr)
 Ashland Elementary School

This parent must be asked where she is going in the building. Alert Administrator to her being in the building.
 Fri Dec 09, 2008 10:03 AM
 [REDACTED] (username: pearsonr)
 Ashland Elementary School

This parent must be asked where she is going in the building. Alert Administrator to her being in the building.
 Thu Jan 15, 2009 01:13 PM
 [REDACTED] (username: pearsonr)
 Ashland Elementary School

Oswaldo Perillo

Contact Security Protocol Issued!!
 Thu Jan 29, 2009 11:21 AM
 [REDACTED] (username: quachern)
 Garfield High School

Congratulations. You will be upgraded to the newest version of V-Soft 3.0 on July 16, 2009. For more information, email support@vsoftware.com

Need technical support? 1-877-7RAPTOR or 713-880-6902

MISSIONS AND VISIONS EXPLORE

File Edit View Favorites Tools Help

Back Search Favorites

Address <http://www.apps.raptorware.com/schools/Frames.cfm?6825>

Home Students Faculty Administrators

* PROFILE *
 * CLOSE * ADMIN

Welcome Ron Browe

Date Of Birth	07/19/1989	Custom 01	Date/Time In	04/14/2009 01:09 PM
Company	attendance	Custom 02	Date/Time Out	04/14/2009 01:10 PM
Notes		Custom 03	Total Time	0:08
		Custom 04		

Building: Bettlerfield High School

Date Of Birth	10/10/1981	Custom 01	Date/Time In	04/14/2009 01:02 PM
Company	Attendance	Custom 02	Date/Time Out	04/14/2009 01:00 PM
Notes		Custom 03	Total Time	2:00
		Custom 04		

Building: Bettlerfield High School

Date Of Birth	07/19/1989	Custom 01	Date/Time In	04/14/2009 01:09 PM
Company	attendance	Custom 02	Date/Time Out	04/14/2009 01:10 PM
Notes		Custom 03	Total Time	0:00
		Custom 04		

Building: Bettlerfield High School

Date Of Birth	10/10/1981	Custom 01	Date/Time In	04/14/2009 01:02 PM
Company	Attendance	Custom 02	Date/Time Out	04/14/2009 01:00 PM
Notes		Custom 03	Total Time	2:00
		Custom 04		

Building: Bettlerfield High School

Congratulations. You will be upgraded to the newest version of V-Soft 5.0 on July 16, 2009. For more information, email support@raptorware.com
 Need more supplies? 1-877-RAPTOR or 713-880-8932

Home | About Us | Contact Us | Privacy Policy | Terms of Service | Site Map

12-7-07

To Superintendent Waltz


Under the Freedom of Information Act I request the following.

- A. A copy, on paper or disk, of all identifications that was scanned or manually entered into the P.W.C.P.S. Visitor Identification System at Gar-Field H.S., Woodbridge H.S. and Freedom H.S. from 12-3-07 to 12-7-07
- B. Copy of policy for the Visitor Identification System that was sent to Freedom H.S.
- C. Name of all systems that are used to cross-check names that are entered into the Visitor Identification System along with any agreement or guidelines P.W.C.P.S. have with said system

Mark Hjelm
1902 Richmond Ave
Woodbridge Va 22191
703 401 8508

EXHIBIT

C

Blankingship  **Keith** ^{pc}

A. HUGO BLANKINGSHIP, JR.
 JOHN A.C. KEITH
 WILLIAM E. CASTELLINE, JR.
 SARAH ELIZABETH HALL
 PAUL B. TERPAC
 PETER S. EVERETT
 DAVID RUBY CLARK
 DAVID J. GOGAL
 ELIZABETH CHECHESTER MORROGH
 ROBERT J. STONEY
 WM. QUINTON ROBINSON
 JOHN F. CAFFERY
 WILLIAM E. PORTER
 GIFFORD R. HAMPSHIRE

WILLIAM L. CARRY
 MARY MCGOWAN
 MARK A. TOWERS, OWNER
 ANDREA D. GRONIGRAM
 JEREMY A. EGGT
 CHIDI L. KAMBE
 DANIEL E. DEITZ
 LEZA GONLINE
 ELIZABETH VOZATOS
 PETULA C. METZLER
 MICHAEL L. CHANG

December 11, 2007

Via Regular and Certified Mail
Return Receipt Requested

Mr. Mark Hjelm
 1902 Richmond Avenue
 Woodbridge, Virginia 22191

7003 1010 0001 9519 1583

Re: *FOIA Request to PWCPS regarding Raptor*

Dear Mr. Hjelm:

As legal counsel to the Prince William County Public Schools "PWCPS", I am providing this response to your December 7, 2007 request under Virginia's Freedom of Information Act.

Request A. "A copy, on paper or disk, of all identification that was scanned or manually entered into the P.W.C.P.S. Visitor Identification System at Gar-Field High School, Woodbridge High School, and Freedom High School from 12-3-07 to 12-7-07."

Response: The requested records are being entirely withheld on the grounds that such records are excluded from FOIA, under § 2.2-3705.1(6) "proprietary information software ... acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth;" § 2.2-3705.2(6), "operational, procedural, or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building, or structure, or the safety of persons using such facility, building, or structure;" § 2.2-3705.2(7) "security plans and specific assessment components of school safety audits, as provided in § 22.1-279.8 ("essential procedures ... required to prevent, manage and respond to a critical event or emergency ... including ... the presence of unauthorized persons or trespassers ... or other incidents posing a serious threat of harm to students, personnel, or facilities"), § 2.2-3705.4(1) "scholastic records containing information concerning identifiable individuals;" and, to the extent that disclosure of such information is otherwise prohibited by federal and state law, including the Government Data and Dissemination Practices Act."

Request B. "Copy of policy for the Visitor Identification System that was sent to Freedom High School."

Response: No "policy" was sent to Freedom High School regarding the Visitor Identification System. Attached is a copy of Regulation 926-1.



1-22-08

To Superintendent Waltz

Under the Freedom of Information Act, I request the following

- A. Resubmitting FOIA request dated 12-7-07 (see attached)
- B. Copy of all attorney fees, in detail, relating to FOIA Request dated 12-7-07
- C. A time to inspect all FOIA request along with responses and all "public records" 2.2-3701, relating to above FOIA's from 1-1-07 to 1-22-08

Your personal attention is needed on this matter. Mary's response was in violation (2.2-3704. E). There was no "reasonable particularity the volume and subject matter" response, along with Mary's other responses, I suggest you look into this yourself.

Mark D. Hjelm
 1902 Richmond Ave
 Woodbridge, Va 22191

C) 703-401-8508



Blankingship
Keith^{PC}

A. RUGO BLANKINGSHIP, JR.
JOHN A.G. KEITH
WILLIAM R. CASTERLINE, JR.
SARAH ELIZABETH HALL
BRIJ R. THIRAK
PETER S. EVERETT
DAVID RUST CLANCE
DAVID J. GUGAL
ELIZABETH CHESTER MORROW
ROBERT J. STONEY
WOL. QUINTON MORRISON
JOHN E. CASPERY
WILLIAM R. PORTER
GIFFORD R. HAMPHIRE

WILLIAM L. GARY
MARY MCGOWAN
MARK A. TOWERY, counsel
ANDREA D. HEMINGWAY
JEREMY E. ROOT
CHIDI I. JAMES
DANIEL E. ORTIZ
LEZA CONLIFFE
ELIZABETH VOZATZIS
PETULA C. METZLER
MICHAEL L. CHANG

January 25, 2008

Mr. Mark Hjelm
1902 Richmond Avenue
Woodbridge, Virginia 22191

Re: *January 23, 2008 FOIA Request to PWCS*

Dear Mr. Hjelm:

As legal counsel to the Prince William County Public Schools "PWCS", I am providing this response to your January 22, 2008 FOIA letter, which was received by the Division on January 23, 2008. Your specific requests and the Division's response thereto, are as follows:

Request A. "Resubmitting FOIA request dated 12-7-07 (see attached)."

Response: Enclosed is my letter of December 11, 2007 which set forth the Division's response to your previous FOIA request, and which was mailed to you on December 11, 2007.

Request B. "Copy of all attorney's fees, in detail, relating to FOIA dated 12-7-07."

Response: The Division does not pass through to a citizen who makes a FOIA request any attorney's fees associated with that request. Moreover, any attorney's fees which might have been incurred by the Division relating to such request are not separately billed to the Division but are included in a "block billing," which does not break out the time related to a FOIA request from other legal matters. There are, therefore, no documents reflecting the amount of time and/or the amount of attorney's fees incurred by the Division for work performed by legal counsel relating to any particular FOIA request. Finally, legal bills reflecting attorney's fees incurred by the Division in relation to FOIA requests contain identifiable information relating to such request and to numerous other legal matters which are protected from disclosure under the attorney-client and attorney work product privileges and are, therefore, exempt from FOIA under Va. Code § 2.2-3705.1(2).

Request C. "A time to inspect all FOIA requests along with responses and all (public records) 2.2-3701, relating to above FOIAs from 1-1-07 to 1-22-08."

Response: As noted above and in the FOIA response dated December 11, 2007, your FOIA requests seek documents which are exempt from disclosure under Virginia FOIA and, therefore, your request to inspect such documents is denied. Moreover, this particular request, i.e. "a time to inspect FOIA responses and public records" from 1-1-07 to 1-22-08 is confusing,

EXHIBIT
F

Blankingship
Keith^{PC}

Mr. Mark Hjelm
January 25, 2008
Page 2

inasmuch as the Division did not receive a FOIA request from you between January 1, 2007 and January 22, 2008.

Finally, your letter dated January 22, 2008 alleges that the previous response provided on December 11, 2007 to your earlier FOIA request was in violation (2.2-3704.E), i.e., there was no "reasonable particularity of the volume and subject matter response . . ." The letter of December 11, 2007 cited the specific exemptions under which the Division declined your FOIA request, and referred to the "requested records." Since your request, repeated in that letter, delineated the documents that you were seeking, and the Division as not declining to produce the records due to the volume of those records, there was no issue regarding the volume and subject matter of the records being withheld.

Very truly yours,



Mary McGowan

MM:sw

cc: Steven L. Walts, Superintendent of Schools
Keith Imon, Associate Superintendent for Communications and Technology Services
Donald R. Mercer, Jr., Director, Risk Management & Security
Jim Hite, Director, Information Technology Services
William Reid, III, Administrator on Special Assignment, Dept. of Human Resources



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

Senator R. Edward Housck, Chair

Maria J.K. Everett, Esq., Executive Director
Alan Gerhardt, Esq., Staff Attorney
foiacouncil@leg.state.va.us

General Assembly Building - 910 Capital Street, Second Floor - Richmond, Virginia 23219
804-225-3028 - (Toll Free) 1-866-448-4100 - (Fax) 804-371-0189 - <http://lrs.state.va.us/foiacouncil.htm>

March 19, 2008

Mark Hjelm
1902 Richmond Avenue
Woodbridge, Virginia 22191

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 the correspondence and other materials you provided on January 16 and February 19, 2008.

Dear Mr. Hjelm:

You have asked whether Prince William County Public Schools (the School) complied with the Virginia Freedom of Information Act (FOIA) in its responses to two requests for public records you made on December 7, 2007 (the December request), and January 22, 2008 (the January request), respectively. As background, the December request was made in three parts, all of which concern different aspects of a visitor identification system recently adopted by the School. Briefly summarized, the December request asked for three things: (1) copies of identifications entered into the system; (2) a copy of the policy sent to Freedom High School regarding the visitor identification system; and (3) the name of all systems used to cross-check information entered into the visitor identification system, along with any relevant agreements or guidelines. You also provided several newspaper accounts describing this visitor identification system. In brief, it appears that as of December, 2007, the School requires all visitors to present government-issued photo identification which is then checked against sex-offender databases nationwide. The new visitor identification system keeps a record of visitors and replaces the sign-in visitors log formerly used by the School. The January request was also made in three parts: (1) it reiterated the December request; (2) it asked for records showing attorney's fees paid in relation to the December request; and (3) it asked to inspect FOIA requests, responses, and public records from January 1, 2007 to January 22, 2008. In both cases, you received response letters from the School's attorney. Each request and response is addressed separately below, with further facts presented as appropriate.

Subsection A of § 2.2-3704 of the Code of Virginia provides that *[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and*

EXHIBIT

tabbies
G

Mr. Mark Hjelm
March 19, 2008
Page 2 of 10

copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. The relevant policy of FOIA regarding access to public records as set forth in § 2.2-3700 requires that

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. Any exemption from public access to records ... shall be narrowly construed and no record shall be withheld ... unless specifically made exempt pursuant to this chapter or other specific provision of law.

In following these provisions, therefore, all exemptions allowing records to be withheld are to be given a narrow construction, and any doubts regarding the application of any exemption are to be resolved in favor of public access.

The initial part of your December request asked for a copy of all identification that was scanned or manually entered into [the School's] Visitor Identification System at Gar-Field High School, Woodbridge High School, and Freedom High School from 12-3-07 to 12-7-07. The School denied this request in its entirety. The School cited four exemptions in this denial, each of which is considered separately below.

First, the School cited subdivision 6 of § 2.2-3705.1, which exempts from FOIA the following records: *Vendor proprietary information software that may be in the official records of a public body. For the purpose of this subdivision, "vendor proprietary software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.* While this is a valid exemption that would allow the School to withhold copies of any such proprietary software used in the visitor identification system, it does not appear to be relevant to your request. You asked for a copy of the identifications scanned into the system over a certain time period, but did not request any copies of software or computer programs. Therefore this exemption for proprietary software would not appear to apply to the type of records you requested.

Second, the School cited subdivision 6 of § 2.2-3705.2, which exempts from FOIA the following records:

Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.

Mr. Mark Hjelm
March 19, 2008
Page 3 of 10

Again, it does not appear that you requested records to which the cited exemption would apply. For purposes of this opinion it is presumed that the visitor identification system itself and its components could be considered a *security system or technologies*. This exemption would apply to records such as manuals showing how to operate the visitor identification system, as disclosure of such records might also reveal means of defeating the system and thus jeopardize the security of the schools or safety of persons therein. However, identifications entered into the system are not the same thing as manuals showing how to operate the system. Also, the fact that visitors are required to present identification that is then checked by the system has been widely publicized in newspaper accounts¹ as well as in the School's own regulations.² Records of the identifications entered into the system would appear to be the equivalent of a visitor log in paper format. In other words, the requested identification records would reveal who has visited the schools, but would not reveal anything about the visitor identification system itself that would jeopardize the security of the school or the safety of persons using the school. The requested records therefore do not appear to fall within the terms of this exemption.

The third exemption cited was subdivision 7 of § 22-3705.2, which exempts from FOIA *[s]ecurity plans and specific assessment components of school safety audits, as provided in § 22.1-279.8*. The use of this exemption was addressed in a prior opinion issued to you by this office.³ As stated therein, the exemption applies only to portions of the audit itself, a very specific document defined in § 22.1-279.8, and not to any and all records that may reference the School's security or security procedures. The discretion to withhold security plans and vulnerability assessments from the audit must be construed narrowly, and may only be applied to portions of the audit whose release would present a security threat or make public the portions of an analysis that uncover weaknesses in existing plans. It does not appear that the identification records you requested fall within the definition of *school safety audit* set forth in § 22.1-279.8.⁴ While it is possible that a *school safety audit* would contain records regarding the visitor identification system that would be exempt from disclosure, it does not necessarily follow that all records related to visitor identification system are part of a *school safety audit*. In this instance, it does not

¹ See, e.g., *The sign-in for the 21st century*, Potomac News, December 3, 2007, at A6; Genz, *Sex-offender checks in schools*, D.C. Examiner, Dec. 1, 2007 (available at http://www.examiner.com/a-1079707-Sex_offender_checks_in_schools.html).

² Subsection I D of Regulation 926-1 states that visitors shall be required to report to the main office of the school or School Division facility, provide and leave valid government photo identification, and state the nature of their visit to the School division facility. Subsection II C of the same Regulation states that all visitors must produce one of the several forms of valid government issued identification, containing a full name, date of birth, and photograph that the visitor identification system will cross-reference against states' sex offender registries.

³ Freedom of Information Advisory Opinion 09 (2004).

⁴ Subsection A of § 22.1-279.8 defines *school safety audit* to mean a written assessment of the safety conditions in each public school to (i) identify and, if necessary, develop solutions for physical safety concerns, including building security issues and (ii) identify and evaluate any patterns of student safety concerns occurring on school property or at school-sponsored events. Solutions and responses shall include recommendations for structural adjustments, changes in school safety procedures, and revisions to the school board's standards for student conduct.

Mr. Mark Hjelm
March 19, 2008
Page 4 of 10

appear that the identification records you requested fall within the ambit of the exemption cited for *school safety audits*.

The fourth exemption cited was subdivision 1 of § 2.2-3705.4, which permits the School to withhold *[scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student]*. The term *scholastic records* is defined in § 2.2-3701 to mean *those records containing information directly related to a student and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution*. Because your request asked for identifications, such records clearly contain *information concerning identifiable individuals*. It appears the records are kept by the School, and therefore are *maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution*. If such identification records also contain *information directly related to a student*, then these records are *scholastic records* to which the exemption applies. In other words, this exemption would allow student identifications entered into the visitor identification system to be withheld from disclosure. To the extent this exemption was used to withhold such student identifications, that use was in compliance with FOIA.

The second part of your December request sought a *copy of policy for the Visitor Identification System that was sent to Freedom [High School]*. The school responded by stating that no "policy" was sent to that high school, and included a copy of Regulation 926-1 concerning visitor identification. You pointed out that a different regulation numbered 501.06-1 is posted on the high school's website, which also addresses visitor monitoring and identification.⁵ Regulation 926-1 does not appear to be published on Freedom High School's website. Given the phrasing of your request and the School's reply, it would appear that Regulation 926-1 is what was sent to Freedom High School regarding the Visitor Identification System. Notably, Regulation 501.06-1 carries the subheading *HUMAN RESOURCES* and is dated November 14, 2007. Regulation 926-1 carries the subheading *COMMUNITY RELATIONS* and is dated December 3, 2007. Much of Regulation 926-1 is identical to the language of Regulation 501.06-1 concerning visitor badges and the visitor identification system. However, it appears that the older regulation, 501.06-1, contains references to visitor logs that have been removed from 926-1. Considering both Regulations together, it appears that Regulation 926-1 may be an updated version of Regulation 501.06-1, and that the School provided it as the Regulation that was sent to Freedom High School and that reflects current School policy. You noted, however, that Regulation 926-1 is not on the Freedom High School website, while Regulation 501.06-1 is posted there. It may be that the website has not been updated to reflect changes in the Regulations. On the other hand, noting that the two regulations have different subheadings (*HUMAN RESOURCES* and *COMMUNITY*

⁵ Available at <http://freedom.groupfusion.net/modules/cms/pages.phtml?pageid=32352&sessionid=f51a03e608bb6cbec8b6be7156ec3756> (last accessed March 7, 2008).

Mr. Mark Hjelm
March 19, 2008
Page 5 of 10

RELATIONS, respectively), it may be that they are meant to apply concurrently to different areas of concern. In any case, FOIA does not impose any requirement for a public body to post its regulations on its website, or to provide an explanation of why one regulation is posted and another is not. Such postings are voluntary, and efforts to voluntarily increase the transparency of government operations are fully in compliance with the purposes and spirit of FOIA. Freedom High School and other public bodies are to be commended for such efforts, and encouraged to continue them. In summary, there does not appear to be any violation of FOIA in this response by the School.

The third aspect of the December request asked for the name of all systems used to cross-check names entered into the visitor identification system and any agreement or guidelines between the School and any named system. The School indicated it has a contract with Raptor Technologies to provide the software system to cross-check visitor names with the Registered Sex Offender Database. As a general rule, a contract with a public body is an open public record once it has been awarded, although various exemptions may apply to portions of the contract, depending on the exact circumstances involved.⁶ In such instances, subdivision B 2 of § 2.2-3704 provides that *[w]hen a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.* However, the School declined to provide a copy of this contract, citing three exemptions as bases for withholding it, each of which is considered separately below.

First, the School again cited subdivision 6 of § 2.2-3705.2, quoted in full above. To reiterate the scope of this exemption, it would apply to certain records the disclosure of which *would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.* While it is not clear how disclosure of the contract between the School and Raptor Technologies would cause such jeopardy, the contract may contain technical details or other information that would do so. If that is the case in fact, then it would be appropriate to redact those portions of the contract to which the exemption applies. However, other terms of the contract, the release of which would not jeopardize security or safety, would not fall within the terms of this exemption.⁷

Second, the School again cited subdivision 7 of § 2.2-3705.2 concerning school safety audits, also quoted above. The same reasoning that applied with regard to the identification records would also apply in this situation. A school safety audit is a very specific document defined by statute; the contract at issue does not appear to be part of a

⁶ See, e.g., subdivision 12 of § 2.2-3705.1 (records related to the negotiation and award of specific contracts); subdivision 10 of § 2.2-3705.6 (referring to trade secrets or proprietary information protected under § 2.2-4342 of the Virginia Public Procurement Act); subdivision 11 of § 2.2-3705.6 (referring to similar protections under the Virginia Public-Private Transportation Act of 1995 and the Virginia Public-Private Educational Facilities and Infrastructure Act of 2002).

⁷ For example, terms such as the named parties to the contract, the duration of any services provided, the costs involved, and any other terms that would not affect safety or security if publicly revealed.

Mr. Mark Hjelm
March 19, 2008
Page 6 of 10

written assessment of safety conditions as set forth in that definition.⁸ Because the contract does not meet the definition of *school safety audit*, that exemption may not be used to withhold the contract.

Third, the School cited subdivision F 7 of § 2.2-3706, which permits the withholding of *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 ... the general public*. This exemption by its own terms applies to records of law enforcement agencies. At first blush, it appears self-evident that the School is not a law enforcement agency. However, the Code of Virginia does not define *law enforcement agency*. Section 9.1-101 defines the terms *law-enforcement officer* and *criminal justice agency*, neither of which appear to include schools or school officers or employees. The same section also defines *school resource officer* to mean *a certified law-enforcement officer hired by the local law-enforcement agency to provide law-enforcement and security services to Virginia public elementary and secondary schools*. It also defines *school security officer* to mean

an individual who is employed by the local school board for the singular purpose of maintaining order and discipline, preventing crime, investigating violations of school board policies, and detaining students violating the law or school board policies on school property or at school-sponsored events and who is responsible solely for ensuring the safety, security, and welfare of all students, faculty, staff, and visitors in the assigned school.

Given this context, particularly the fact that officers who work at schools are separately defined, it appears that the School is not a law enforcement agency, but that law enforcement officers, especially *school resource officers*, may work at the School. It would logically follow that such officers are likely involved in the visitor identification program as part of their duties. However, the exemption is still limited to *records of law enforcement agencies*, which would not include a contract by a school for software that might be used by law-enforcement officers. Additionally, it is still not clear that the contract contains any *specific tactical plans* or how disclosure of the contract *would jeopardize the safety or security of ... the general public*. Given the narrow construction rule of FOIA, it seems too great a stretch to call the School a *law enforcement agency* and to characterize a contract as a *specific tactical plan*. Without those elements, this exemption cannot apply.

The first part of your January request simply reiterated your December request. The School provided the same response letter in reply as it did to your original December request. No additional factual or legal considerations were presented. The analysis of

⁸ See n.4, *supra* (quoting the statutory definition of *school safety audit* in full).

Mr. Mark Hjelm
March 19, 2008
Page 7 of 10

your December request and response given above therefore covers the first part of your January request and the School's reply to it as well.

The second part of your January request asked for a *copy of all attorney fees, in detail, relating to [the December request]*. The School's response explained that its attorney's fees are not separately billed but use "block billing," and therefore it has no records showing the amount of time spent or amount of fees incurred by its attorneys for any specific FOIA request. Particularly, the School stated that *any attorney's fees which might have been incurred ... are not separately billed and the bill does not break out the time related to a FOIA request from other legal matters. There are, therefore, no documents reflecting the amount of time and/or the amount of attorney's fees incurred ... for work performed by legal counsel relating to any particular FOIA request.* Following the School's explanation, it would appear that while there is a record of attorney's fees billed to the School, that record is not responsive to your request because it does not differentiate between charges for work related to the December request and other charges. Subdivision B 3 of § 2.2-3704 requires a public body to inform a requester when records responsive to a request *do not exist*. Subsection D of § 2.2-3704 provides that *no public body shall be required to create a new record if the record does not already exist*. Given that the existing billing record is not responsive to this request, and no other responsive record exists, it appears that the School properly informed you of these facts in compliance with FOIA.⁹

The third part of your January request asked for *a time to inspect all FOIA request along with responses and all "public records" 2.2-3701 relating to above FOIA's from 1-1-07 to 1-22-08 [sic]*. Subsection B of § 2.2-3704 requires that requests for public records *shall identify the requested records with reasonable specificity*. That requirement means that a request needs to be specific enough to enable a public body to begin to process the request and, if clarification is required, to ask relevant questions to understand the scope of the request.¹⁰ The language of this request on its face appears to ask for copies of all FOIA requests made from January 1, 2007 to January 22, 2008, along with all responses to those requests and all public records relating to those requests. However, it is not readily apparent what you meant by *all "public records" 2.2-3701 relating to above FOIA's*. This phrasing could mean all public records that were provided in response to FOIA requests made during the stated time period; it could mean all public records that were related to the responses made, such as internal memoranda or policy statements regarding how the FOIA requests would be addressed; it could

⁹ The School also referred to the exemptions for attorney-client privilege and work-product, subdivisions 2 and 3 of § 2.2-3705.1, respectively. It is unnecessary to address those exemptions under these facts because if no responsive records exist, there are no records to which exemptions might apply. However, I note that the use of these and other exemptions has been examined previously in the context of attorney billing statements. Generally, it was concluded that such billing statements are open to disclosure, but that portions might be redacted pursuant to specific exemptions. See Freedom of Information Advisory Opinions 10 (2004) and 25 (2003); 1987-1988 Op. At'y Gen. Va. 30.

¹⁰ Freedom of Information Advisory Opinions 01 (2008) and 01 (2000).

Mr. Mark Hjelm
March 19, 2008
Page 8 of 10

encompass records created after the requests were made and answered that were related to the topic of older FOIA requests; it could mean all of these things, or any combination of them. As it is written, this aspect of your request does not *identify the requested records with reasonable specificity* because it is vague and easily susceptible to multiple interpretations.

In considering the School's response, first note that the General Assembly has stated in § 2.2-3700 the policy of FOIA that *[a]ll 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*. This office has advised that when a request is unclear, then following the policy of FOIA, a public body should contact the requester to clarify the matter. In this instance, the School replied to your request as follows:

As noted above and in the FOIA response dated December 11, 2007, your FOIA requests seek documents which are exempt from disclosure under Virginia FOIA and, therefore, your request to inspect such documents is denied. Moreover, this particular request, i.e. "a time to inspect FOIA responses and public records" from 1-1-07 to 1-22-08 is confusing, inasmuch as the [School] did not receive a FOIA request from you between January 1, 2007 and January 22, 2008.

Therefore the School denied your request, first on the basis that your FOIA requests asked for exempt records, and second, because the request *is confusing, inasmuch as the [School] did not receive a FOIA request from you between January 1, 2007 and January 22, 2008*. Addressing the second basis first, the initial facts and documentation you provided, as described above, indicate that the School did, in fact, receive a FOIA request from you on December 7, 2007, and replied to that request by letter December 11, 2007. The statement that the School *did not receive a FOIA request from you between January 1, 2007 and January 22, 2008* therefore appears to be contradicted by the facts you have presented. If there is a factual dispute, then a court is the proper forum to resolve such a dispute, and so this issue will not be addressed further in this opinion.

Rather than a factual dispute, however, it appears the primary problem regarding this aspect of your request may be a misunderstanding and failure to communicate regarding the scope of your request. It appears that the School may have interpreted your request as a repetition of prior records requests you made during the stated time period. In other words, it appears that the School may view this third part of your January request as merely repeating the substance of prior requests already denied by the School, rather than as a new request seeking copies of those prior requests, responses, and any related public records. Additionally, the School's response indicates that it views the third aspect of your January request as asking only about requests you made, while the language of your letter asked for *all FOIA request[s]*, which would also include requests made by other persons as well. On its face, the request appears to seek all public records requests made of the School, responses thereto, and related public records for a period of just over

Mr. Mark Hjelm
March 19, 2008
Page 9 of 10

a year. This would seem to me at first blush to be asking for documentation of FOIA requests, responses, and other records such as memoranda regarding how FOIA requests would be handled. However, as evidenced by the School's own statement that the request was *confusing*, it is not entirely clear what was the intended scope of your request. Given the apparent confusion regarding this third part of your January request, the School should have contacted you to clarify what records you sought.

As previously quoted, requesters are required to *identify the requested records with reasonable specificity, and [a]ll 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.* It does not appear that either occurred in this instance. The request was confusing, yet the School acted by denying it rather than attempting to clarify what you sought. Once again, I am compelled to reiterate that the practical perspective of dealing with the application of FOIA on a daily basis has taught me that clear and concise communication between a requester and a government official is often the best way to successfully resolve any concerns about a FOIA request.¹¹ I would suggest that you rephrase your request to clarify exactly what records you seek. The School would be well-advised in the future to seek additional clarification from the requester whenever there is confusion about the scope of a request.

As a final matter, in your January letter you noted that you felt that the School's denials of your December request were deficient in that they failed to *identify with reasonable particularity the volume and subject matter of withheld records*, as required by subdivision B 1 of § 2.2-3704. The School responded as follows: *Since your request, repeated in [the December letter], delineated the documents that you were seeking, and [the School is] not declining to produce the records due to the volume of those records, there was no issue regarding the volume and subject matter of the records being withheld.* The volume of a records request may be the cause of increased charges for production,¹² and may be grounds for a public body to seek additional time to respond.¹³ However, volume alone is not grounds for denial of a request. Subdivision B 1 of § 2.2-3704 requires an identification of the volume and subject matter of withheld records any time records are withheld in their entirety, regardless of why the records have been withheld. In its December response, the School did quote each of your requests before responding to them, and those December requests did identify the subject matter of the records you sought. Therefore by repeating your requests in its response, the School is

¹¹ Freedom of Information Advisory Opinions 02 (2008), 25 (2004), and 16 (2004).

¹² It is presumable that charges allowed under subsection F of § 2.2-3704 in *accessing, duplicating, supplying, or searching for* a greater volume of records often will be correspondingly higher than the equivalent charges for a lesser volume of records.

¹³ For example, a sufficiently large volume of records could constitute a condition that makes it *not practically possible to provide the requested records or to determine whether they are available within the five-work-day period* under subdivision B 4 of § 2.2-3704. Similarly, in cases where a public body and a requester cannot reach agreement on the production of records after making reasonable efforts to do so, subsection C of § 2.2-3704 provides that *a public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records.*

Mr. Mark Hjelm
March 19, 2008
Page 10 of 10

correct that it satisfied its obligation to identify the subject matter of the withheld records. However, the School's response did not identify the volume of the withheld records in any way, and therefore failed to meet that requirement of subdivision B 1 of § 2.2-3704.

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

Sincerely,



Maria J.K. Everett
Executive Director

VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

Senator R. Edward Houck, Chair
Esq., Executive Director
Delegate S. Chris Jones, Vice Chair
folacouncil@leg.state.va.us

Maria J.K. Everett,

General Assembly Building ~ 910 Capitol Street, Second Floor ~ Richmond, Virginia 23219
804-225-3056 ~ (Toll Free) 1-866-448-4100 ~ (Fax) 804-371-0169 ~ <http://dls.state.va.us/folacouncil.htm>

Litigation Policy

1. Issuing Opinions During or After Litigation

The Freedom of Information Advisory Council and its staff ("the Council") issues advisory opinions interpreting the provisions of the Virginia Freedom of Information Act ("FOIA") upon request by citizens, public officials and the media. However, if the requester is involved in FOIA litigation, either as plaintiff or defendant, the Council will decline to issue a new advisory opinion concerning issues to be settled in the case. The Council may also decline to issue an advisory opinion where the same issues that are the subject of a request for an opinion have been decided by a court of competent jurisdiction. The opinions of the Council are not binding on any court as precedent; therefore, once litigation is commenced, the court and not the Council, is the appropriate body to decide and settle a dispute as a matter of law.

In addition, if an issue of first impression (i.e., a controversy which generates or raises a new question of law) concerning FOIA has been accepted on appeal to the Supreme Court of Virginia, the FOIA Council will decline to issue any opinions on that issue.

2. Testifying as a Witness

The Executive Director of the Council will not accept a request by a citizen, public official or reporter to testify as an expert witness in any lawsuit involving FOIA issues. If subpoenaed to testify by either party, the Council delegates authority to the Executive Director to file, in her discretion, a motion to quash the subpoena.

