VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

TRANSPORTATION DISTRICT COMMISSION OF HAMPTON ROADS, T/A HAMPTON ROADS TRANSIT

Plaintiff,

v. **Docket No.: CL24-2180**

SALEEM RAJA,

Defendant.

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND SUSTAINING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The matter comes before the Court on Respondent's motion for summary judgment with supporting authority, filed on September 12, 2024; Petitioner's cross-motion for partial summary judgment, filed on October 22, 2024; and Respondent's objection to the hearing on Petitioner's cross-motion as untimely. The Court addresses the arguments in turn.

PROCEDURAL BACKGROUND

The Virginia Freedom of Information Act ("VFOIA") "requires 'public records' to be 'open to inspection and copying by any citizens of the Commonwealth during the regular hours of the custodian of such records." *Daily Press, LLC, v. Office of the Exec. Sec'y*, 293 Va. 551, 557 (2017) (quoting Va. Code § 2.2-3704(A)). The Transportation District Commission of Hampton Roads, or Hampton Roads Transit (HRT), has filed an action under the Declaratory Judgment Act, Va. Code §§ 8.01-184–8.01-191, seeking a ruling respecting its obligations under VFOIA, Va. Code § 2.2-3700 *et. seq.* In February 2024, Respondent submitted a request for records to HRT via email, requesting "copies of any cell phone text messages between any of the following people: [named five HRT employees]" Request. Pet'r's Pet. for Declaratory J., Ex. B.

HRT has a written policy, promulgated in June of 2019, prohibiting its employees from using private personal cell phones to conduct HRT business: "Employees may not use any third-party

messaging system (personal email or text messaging) to conduct Hampton Roads Transit business." HRT has issued company cell phones to the five employees named in Respondent's Request. *See* Decl. of Michael A. Price, Sr. (Oct. 21, 2024). In its VFOIA response to the Request, HRT searched the five HRT-leased-cellular phones issued to the Five HRT employees and provided all cell phone text messages between them.

Respondent, by email dated February 12, 2024, confirmed that he was not "limiting [his] request to just work phones but rather to any phones from which [he is] entitled to make a Freedom of Information Act request." Br. in Supp. of Resp't's Mot. for Summ. J. [Resp't's Br.], Ex, D.

With its Petition, HRT pled that it did not consider that FOIA requires it to search the private personal cellular phones of the Five Employees or that it has the legal authority to compel any employee to turn over his private device so that HRT can search it:

> 41. HRT is entitled to a declaration that the Act does not require that it search the private personal cellular phones of the Five HRT employees.
> 42. HRT is entitled to a declaration that it does not have the legal authority to compel any of the Five HRT Employees to turn over their private personal cellular phones to HRT so that HRT can search them.

Pet. at 41–42.

I. RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Respondent moves for summary judgment, arguing that HRT has not and cannot rebut the "clear legal authorities . . . showing that HRT must produce all public records requested by Raja, no matter the ownership of the device storing or used to create the records." Resp't's Br. 11. He relies extensively on Advisory Opinions from the FOIA Council clarifying that public records are subject to FOIA even when housed on private email servers.

He cites no legal authority, however, that sheds any light on HRT's question about how extensively it must search for records where those records would not be expected to be found. Rather, Respondent cites several opinions from the VFOIA Advisory Council, which, while instructive, are not binding on the Court. *Transparent GMU v. George Mason Univ.*, 298 Va. 222,

243 (2019). The multiple Advisory Council Opinions that Respondent cites—addressing emails, not text messages—instruct public bodies that they should establish protocols to ensure that public records do not end up in private email accounts. HRT has enacted the very procedures recommended:

> From a FOIA perspective, it would be ideal if all email transactions of public business would be conducted on government accounts that could then be easily searched, archived, and maintained by public bodies and their staff, thus facilitating both record retention and retrieval. However, the reality is that not all public bodies provide email accounts to their officials, and some public officials (and employees) who do have government email accounts still use their personal accounts, even though it is not legally required. As a practical matter those who use personal email accounts would be well advised to send a courtesy copy of any email from a personal account that is a public record (i.e., any email that is in the transaction of public business) to staff so that it may be archived and retained, as one step toward facilitating both record retention by the public body and responding to future FOIA requests.

Advisory Council Op. AO-03-12 (Apr. 24, 2012).

The instant controversy involves text messages and not emails—neither party cited any Advisory Opinions relating to text messages—but HRT has enacted the equivalent of what the Advisory Council described as "ideal" by issuing government phones and requiring its employees to use them and not personal devices for the conduct of public business.

The Advisory Opinions that Respondent cites arise out of requests where the parties knew or understood that public business had been conducted by officials on private email accounts. Thus, the public body should have reasonably expected that a review of those accounts could yield responsive documents.

In contrast, the Court notes that Respondent has not proffered information that additional public records in fact are located on the Five Employees' personal devices or that HRT has reason to know or suspect that to be the case. He complains instead that HRT limited its response to those text messages in its custody, i.e., those found on the HRT-issued devices. HRT correctly observes that it has no custody of any data or messages on private cell phones of its employees. Respondent argues

that VFOIA requires a more comprehensive search than what HRT conducted, but he cites no authority to support that proposition. The authorities upon which he relies describe that emails can be public records even if stored on a private server – a point that HRT does not dispute, but one that does not address the issues raised by the Petition.

In an analogous case from the United States District Court for the District of Columbia, the Court addressed a similar argument by a plaintiff who demanded that the public body search employees' personal email accounts for responsive materials or provide sworn declarations that they had not used personal email, instant messaging, or text accounts to conduct official business. *Wright v. Admin. for Children & Families*, 2016 U.S. Dist. LEXIS 140314 (D.D.C. 2016). The Court agreed that the federal FOIA statute did not impose this requirement. It noted the controlling regulations that prohibited agency employees from creating or sending a record using a non-official email account, and stated:

> In view of this requirement, the presumption applies that agency employees comply with applicable law and, consequently, that agency records responsive to a FOIA request would unlikely be located solely in their personal email accounts, rendering a search of those accounts unnecessary. *See, e.g., Bracy v. Gramley*, 520 U.S. 899, 909 (1997)("Ordinarily, we presume that public officials have 'properly discharged their official duties.") (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996); Stone v. Stone, 136 F.2d 761, 763 (D.C. Cir. 1943)("In an action which challenges the conduct of a public officer, a presumption of law is indulged in his favor that his official duties were properly performed.")

*Id.at *26.*

HRT has demonstrated that the agency prohibits employees from using private cell phones to transact HRT business, and this supports a presumption that its employees have properly performed that official duty. Just as "there is a presumption that public officials will obey the law," *Hinderliter v. Humphries*, 224 Va. 439, 448 (1982), so too is the Court willing to recognize a presumption that public agency's employees will follow the agency's VFOIA procedures. The presumption may be rebutted, but Respondent has pleaded no facts indicating that it would be in this case. Respondent

asks the Court to articulate a positive statutory duty on behalf of HRT to search employees' devices for text messages even with no reason to believe that they will be found there. The Court is unable to locate any such duty in FOIA. Without clear legislative guidance that the General Assembly wishes to impose this requirement, or some controlling case authority, the Court is unwilling to create this duty.

Respondent advances other arguments in support of summary judgment that the Court finds unpersuasive. He emphasizes that he "takes no position as to how HRT is to go about collecting and providing responsive records [that may or may not exist on employees' cell phones]." Resp't's Br. 11. Because he did not, in so many words, demand that HRT compel the employees to turn over their phones for a search or otherwise prove to HRT what text messages they do or do not contain, he claims that HRT is not entitled to a declaratory judgment: the controversy misstates his position and is thus nonjusticiable.

The Court finds this to be a disingenuous position. Respondent demands that HRT conduct a search that includes text messages on its employees' personal devices but "takes no position" on how HRT might do that. He argues that such a search would not necessarily require either a confirmation that HRT has the legal authority to compel employees to surrender their phones or to search those phones – the two questions that HRT presents to the Court for declaratory adjudication. The Court concludes otherwise and rules that HRT is entitled to such a declaration. It should not be expected to navigate this terrain with no guidance from the Court: it would find itself between the rock of potentially violating VFOIA with attendant exposure for attorneys' fees, and the hard place of violating its employees' privacy.

The Court does not conclude that HRT serves as the custodian of the contents of any employee's personal cell phone. Further, the Court notes the sensitivity that other courts have recognized over the privacy that these devices should be accorded. *See Riley v. California*, 573 U.S. 373, 394–96 (2014) ("It is no exaggeration to say that many of the more than 90% of American

adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."); *Harvey v. Commonwealth*, 76 Va. App. 436, 467 (2023) ("Computers, cell phones, and the like are 'unique possessions . . . in which individuals may have a particularly powerful possessory interest,' due to the quantity of both business and personal data typically stored on such devices.") (quoting *United States v. Laist*, 702 F.3d 608, 614 (11th Cir. 2012).

Respondent's remaining arguments—that FOIA precludes declaratory judgment actions, that the Petition seeks an impermissible advisory opinion, that his own counterclaim for a writ of mandamus deprives the Court of jurisdiction to decide the issues raised in the declaratory judgment action—all lack supporting authority.

The Court DENIES Respondent's Motion for Summary Judgment as to Count One of the Petition for Declaratory Judgment.

II. Cross-Motions for Partial Summary Judgment on Respondent's Writ of Mandamus

Respondent correctly notes that Petitioner filed its Cross-motion for partial summary judgment on October 22, just one week before the October 29 hearing date. Counsel asked the Court not to hear that motion as untimely. He has himself asked, however, that the Court grant summary judgment to him on his writ of mandamus, seeking an adjudication that HRT has violated his rights and privileges to access public documents:

The legal issues raised and comprehensively briefed in Respondent's motion are essentially the same as those raised by Petitioner. The material facts are not in dispute: this controversy requires the Court to identify any legal duty that HRT might owe to the public relating to a search of its employees' private devices. Thus, despite the late filing of Petitioner's motion, the Court can identify no prejudice to Respondent in addressing these legal issues at the same time rather than requiring counsel to make an additional trip to Norfolk and an additional court appearance to resolve these issues.

With its denial of Respondent's Motion for Summary Judgment as to Count One, the Court has already ruled that FOIA imposes no duty on HRT to compel its employees to make their personal cell phones available to be searched for any responsive records. Therefore, the relief that Respondent seeks in his writ of mandamus will not be awarded. Respondent's motion for summary judgment on the counter-claim is DENIED and Petitioner's cross motion is GRANTED. The Counterclaim is DISMISSED.

Given the Court's ruling on Count I of the Petition, the Court RULES that Count II—seeking additional time to provide whatever additional materials might be ordered—is moot.

CONCLUSION

The Court FINDS that HRT's Petition for Declaratory Judgment states a justiciable controversy between the parties that is not disallowed by FOIA and that is mature and ripe for consideration.

The Court SUSTAINS Petitioner's Motion for Summary Judgment as to Count I of the Petition, OVERRULES Respondent's Motion for Summary Judgment as to the same, and DISMISSES Count II of the Petition as moot.

The Court OVERRULES Respondent's Motion for Summary Judgment on the Counterclaim for Writ of Mandamus, SUSTAINS Petitioner's Motion for Summary Judgment as to the same, and DISMISSES the counterclaim.

Counsel are DIRECTED to file written objections to this Order within fourteen days. Further endorsements by counsel are waived.

The Clerk is DIRECTED to mail a copy of this Order to counsel of record.

Enter: November 4, 2024

[redacted]

Mary Jane Hall, Judge