



JUNIUS P. FULTON III  
JUDGE

FOURTH JUDICIAL CIRCUIT OF VIRGINIA  
CIRCUIT COURT OF THE CITY OF NORFOLK

April 15, 2020

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NORFOLK, VIRGINIA 23510

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**Re: Gary Harki and The Virginian-Pilot Media Companies, LLC v. VDOC  
Case No.: CL20-2363**

Dear Counsel:

Today the Court rules on Gary Harki's ("Harki") petition for a writ of mandamus and injunctive relief against the Virginia Department of Corrections ("VDOC"). This court held a hearing on March 5, 2020, and after hearing oral argument from counsel, took the matter under advisement to consider the evidence, argument, applicable statutes, and caselaw. The evidence reflects that VDOC ultimately produced the documents responsive to Harki's request after this suit was filed. Consequently, the claims for relief sought by writ of mandamus and injunction are resolved.

Nevertheless, this Court finds that VDOC VIOLATED Virginia's Freedom of Information Act ("FOIA") Virginia Code § 2.2- 3700 *et seq.* by willfully and knowingly failing to provide Harki with the requested documents within the five-day period prescribed by statute.

### **Background**

In December 2019, Gary Harki wrote and published a series of articles for the Virginian-Pilot concerning VDOC's policy of banning people of all ages from visiting their incarcerated loved ones if they did not consent to a strip search. (Pl.'s Hr'g Mem. 2.) The article was widely read, and the Generally Assembly subsequently passed legislation banning the strip searching of minors and placing limitations on the use of bans for adults. (Pl.'s Hr'g Mem. 3.)

On December 9, 2019, and prior to the FOIA requests at issue in this suit, Harki, in an effort to investigate the issue further, submitted an initial FOIA request to VDOC. (Def.'s Dem. Ex. 4, at 8). He requested "any database or other records" of:

1. Strip searches of visitors to Virginia prisons, including but not limited to the reason for the strip search, name of the individual, and date of the search.
2. Visitors refusing strip searches, including but not limited to the name of the individual and date of the refusal.
3. Visitors banned from Department of Corrections facilities, including but not limited to the reason and length of the ban, as well as date it was enacted.
4. Records detailing the type, make, and number of body scanners at all state prisons and other facilities.
5. The data dictionary, database schema, or other log that outlines the databases and information requested above.

Although the response to the December 9th FOIA request was delayed, it was due to reasons which are not subject to this dispute. Ultimately, on December 23, VDOC requested a seven-day extension to process and to respond to Harki's December 9th FOIA request after the conversation via phone. (Def.'s Dem. Ex. 4, at 6.) On December 27, VDOC agreed to provide responsive records to FOIA requests 1-4 of Harki's December 9th request. (Def.'s Dem. Ex. 4, at 5.) VDOC indicated, via a telephone conversation, that the records concerning FOIA request 5 did not exist and could not be provided. (Def.'s Dem. Ex. 4, at 5.) On December 28, Harki again requested an answer to FOIA request 5 by narrowing the scope of his request to the VACORIS system only.<sup>1</sup> (Def.'s Dem. Ex. 4, at 5.) On January 2, 2020, he sent a follow up email concerning FOIA request 5. (Def.'s Dem. Ex. 4, at 3.) On January 3, McCord responded indicating that people would be returning from the holiday and would follow up with him promptly. (Def.'s Dem. Ex. 4, at 3.) On January 6, Harki, again, requested an update on FOIA request 5. (Def.'s Dem. Ex. 4, at 3.) On January 7, Dourafei responded to Harki with the responsive documents for FOIA requests 1-4, but he provided no answer and no documents to FOIA request 5. (Def.'s Dem. Ex. 4, at 2.) On January 8, Harki sent another email seeking a

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<sup>1</sup> His email states the following: "As to item 5 – my recollection is you said no such database exists, but i think the VACORIS data dictionary, database schema or other log that outlines the database information applies to the request and I'd like a copy of that." Email sent December 28, 2019, 10:10 a.m.

response to FOIA request 5. (Def.'s Dem. Ex. 4, at 1-2.) That same day, Dourafei responded that he had contacted the DOC Research Department to see if he could get that information from them. (Def.'s Dem. Ex. 4, at 1.) On January 9, the FOIA department responded to Harki stating that the database schema is the intellectual property of Abilis Solutions, Inc., which created the CORIS system used for DOC offender records. (Def.'s Dem. Ex. 4, at 1.)<sup>2</sup> As a result, it could not provide that information to Harki. (Def.'s Dem. Ex. 4, at 1.) It should be noted that shortly thereafter, Shumadine, Harki's attorney, sought clarification of the basis for VDOC's failure to provide any response to the request for "data dictionary, database schema or other log that outlines the databases and information requested above." (Def. Dem. Ex. 3) He was told that Harki was not allowed on the call, and that VDOC believed that Harki had abandoned request 5 of his FOIA request. (Pl.'s Hr'g Mem, Ex. 8.) There is no dispute that the discussions at this time were centered around the VACORIS system created by Abilis and utilized by VDOC.

On January 23, Harki, in an attempt to access the same information implicated in the denied request 5 of his December 9, 2019 FOIA request, made the FOIA request at issue in this suit. He listed seven separate requests stated below.

1. Documents sufficient to show the fields included in any computer program or information system monitoring visitor activity at correctional facilities. This is a separate request. To the extent you claim an exemption, we request that an exemption be stated separately for this request.

2. Communications with vendors or potential vendors of information systems describing the capabilities requested by the Department of Corrections in its systems. This is a separate request. To the extent you claim an exemption, we request that an exemption be stated separately for this request.

3. Marketing materials or communications from vendors or potential vendors describing the capabilities of data processing programs being marketed to the Department of Corrections including the identification of information that would be captured by such systems. This is a separate request. To the extent you claim an exemption, we request that an exemption be stated separately for this request.

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<sup>2</sup> See Def.'s Exhibit 5: Affidavit of Eric Le Goff, CEO of Abilis Solutions Corp., February 26, 2020, (stating that "[A]ll the intellectual property related to the built and the usage of CORIS is the sole property Abilis and is protected under the law; and 5. Abilis is neither providing a CORIS data dictionary to its customers nor copies of its product screens, as those are both being part of its protected intellectual property, under copyright laws in Canada, and the United State of America and other countries.")

4. Instructions advising users what information can be obtained on the Department's information system(s) and how to obtain it. This is a separate request. To the extent you claim an exemption, we request that an exemption be stated separately for this request.

5. Reports evaluating data processing systems considered for purchase. This is a separate request. To the extent you claim an exemption, we request that an exemption be stated separately for this request.

6. All correspondence between the Department of Corrections and computer vendors concerning specifications for computer programs purchased or considered to be purchased by the Department of Corrections. This is a separate request. To the extent you claim an exemption, we request that an exemption be stated separately for this request.

7. All training materials describing for the Department of Corrections personnel how to use the information systems and identifying what is available on the systems. This is a separate request. To the extent you claim an exemption, we request that an exemption be stated separately for this request.

(Pl.'s Writ of Mandamus and Injunctive Relief Ex. 1.)

On January 30, VDOC, via its Director of Administrative Compliance, Dean W. Ricks, VDOC responded to each of Harki's seven requests stating: "Pursuant to § 2.2-3704(B) of the Code of Virginia, 'a request for public records shall identify the requested record with reasonable specificity.' Therefore, your request for records is denied." (Pl.'s Writ of Mandamus and Injunctive Relief Ex. 2.) Rick's email ended by stating that "[i]f you would like to re-submit your FOIA requests with a narrowed scope and greater specificity, we will be happy to try and accommodate your request for records." (Pl.'s Writ of Mandamus and Injunctive Relief Ex. 2.) On February 17, Harki, through Shumadine, submitted a letter to VDOC with an attached draft of a writ of mandamus petition. (Def.'s Dem. Ex. 1.) Thereafter, the parties engaged in two separate conference calls on February 12 and February 13. (Hr'g Tr. 57: 11-17.) The conference calls included Ricks, Diane Abato, Ryan McCord, Zach Allen, Wayne Clarke, Yolanda Wyche (visitation manager), Shumadine, Harki, and the editor of the Virginian-Pilot. (Hr'g Tr. 57:20-24.) The evidence established that VDOC requested Harki narrow the scope of the requests. (Hr'g Tr. 58:2-5.) Ricks testified that he believed that at the end of the February 13 conference call, Shumadine would submit a narrowed request which would be sent by letter to VDOC. (Hr'g Tr. 58:8-11.) VDOC received a letter from Shumadine on February 17 summarizing the history of the dispute starting with the request 5 which lay at the genesis of the dispute. (Pl. Hr'g Mem, Ex.8)

Finding further discussions to be unavailing, on February 20, Harki, through his attorney, filed the current writ of mandamus and injunction. After the lawsuit had been filed, VDOC provided the supplemental response on February 25 – six days after Shumadine’s February 17 letter. (Hr’g Tr. 60: 8-15.)<sup>3</sup> They decided that they would draft a letter to him and “attach some of the information that Harki talked about, the policies and visitation.” (Hr’g Tr. 59: 1-10.) On February 28, VDOC sent a second supplemental response to Harki, providing additional responsive material.

### **Positions of the Parties**

#### Gary Harki’s Position

Harki alleges that VDOC acted in bad faith by refusing to comply with his FOIA request and asserting that his requests were not sufficiently specific. (Pl.’s Hr’g Mem. 6.) He argues that the requests were clear, specific, and should have been easy to produce. (Pl.’s Hr’g Mem. 3-6.) Harki maintains that he requested “the simplest document” that would provide information on the capacity and capability of its VACORIS system and the information available from the system. (Pl.’s Hr’g Mem. 8.) He further asserts that rather than indicating any confusion regarding the nature of his request, VDOC refused to produce anything unless Harki narrowed the request. (Pl.’s Hr’g Mem. 8.)

Harki alleges that “[t]he notion that the Department could provide nothing was a manifest example of bad faith.” (Pl.’s Hr’g Mem. 6.) Harki notes that the thousands of pages of supplemental response provided by VDOC after he refused to narrow his response demonstrate that VDOC knew from the initial December FOIA request what was requested but simply stonewalled, resulting in the current litigation. (Pl.’s Hr’g Mem. 7.) Harki emphasizes that: “in conversations it was made clear to the Department that the information requested involved the capacity of the system to determine what information would be available to the public.” (Pl.’s Hr’g Mem. 8.) He asserts that he requested the database, because that is something that other public agencies have provided to make it easier and less expensive for people to tailor future FOIA requests to public agencies. (Pl.’s Hr’g Mem. 8.) It allows the public agency to clearly understand and process the request. (Pl.’s Hr’g Mem. 8.) He argues that “if the Department can respond to simple, easily-understood requests saying they lack specificity and then refuse to produce anything until the request is narrowed, the Freedom of Information Act has no meaning” (Pl.’s Hr’g Mem. 7.) Although Harki admits that the requests are broad, he insists that they are not lacking in specificity. (Pl.’s Hr’g Mem. 7.) Arguing that a newspaper should not have to

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<sup>3</sup> Apparently, Ricks, Allen, and Abato decided to draft a letter response to Shumadine on February 18. (Hr’g Tr. 59: 1-10).

resort to expensive litigation to receive information that it is entitled to receive under FOIA. (Pl.'s Hr'g Mem. 7.) He asks that this court find that VDOC violated FOIA, and as the prevailing party, he is entitled to reasonable attorney's fees in pursuing this case. (Pl.'s Hr'g Mem. 9.) The parties agree that if Harki prevails, the amount of costs and attorney fees will either be stipulated or a future hearing held.

#### VDOC's Position

VDOC asserts that: "[T]his case presents the novel question of whether, and to what extent, an agency is required to self-tailor vague and generally overbroad FOIA requests that are served upon a public body, particularly where negotiations with the requester fail to yield any narrowing or clarification of the records sought." (Def.'s Dem. 4.) Unlike Civil Discovery, FOIA is silent on the "obligation to substantively process a request that is so vague and overbroad that the agency cannot even assess the potential volume of material encompassed by that request." (Def.'s Dem. 4.) Virginia Code §2.2-3704(C) states that a public body may request an extension to substantively respond to a request, but it does not clarify whether the public body can invoke its provisions to challenge the format of the request in the first instance. (Def.'s Dem. 4.)

VDOC argues that when a FOIA request is so vague and overbroad that a public body cannot begin to process it, the public body complies with FOIA by communicating with the requester and attempting to narrow and clarify the documents sought. (Def.'s Dem. 4.) If the requester refuses to narrow the request, the agency has no obligation under FOIA to go any further. (Def.'s Dem. 4.) A FOIA request must be made with "reasonable specificity." (Def.'s Dem. 5.) Harki's requests were not reasonably specific; therefore, VDOC complied with FOIA by sending one of the four required responses to a FOIA request as detailed in Va. Code § 2.2-3704(B). (Def.'s Dem. 5.) VDOC cites to the FOIA Advisory Opinion 07-11 (Nov. 9, 2011), which states that reasonable specificity is "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." (Def.'s Dem. 5-6.) FOIA Advisory Opinion 03-08 (Mar. 19, 2008) explains that a request is not reasonably specific where it is "vague and easily susceptible to multiple interpretations." (Def.'s Dem. 6.)

Finally, VDOC argues that Federal case law states that a public agency does not have to respond to overly broad requests. (Def.'s Dem. 6.) It is the requester's responsibility to frame the request with reasonable specificity. (Def.'s Dem. 7.) FOIA Advisory Opinion 09-18 (Oct. 23, 2018) states that the public body needs to work to clarify any ambiguities in a request with clear and concise communication, but it has not discussed what one should do if those discussions fail. (Def.'s Dem. 5.)

## Analysis

### Legal Standard

The General Assembly enacted FOIA to give “the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted.” Va. Code Ann. § 2.2-3700. The statute emphasizes that “the affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.” *Id.* When interpreting the statute, the General Assembly noted that “[t]he provisions of this chapter 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.” *Id.* All exemptions listed in FOIA are to be narrowly construed, and “all 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.” *Id.*

“A request for public records shall identify the requested records with reasonable specificity.” Va. Code Ann. § 2.2-3704(B). “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.” FOIA Advisory Opinion 03-08 (Mar. 19, 2008). A request is deemed to fail the “reasonable specificity requirement if “it is vague and easily susceptible to multiple interpretations.” *Id.* After receiving such request, a public body must respond within five days after receiving the request, or it must make one of the following responses:

1. The requested records are being entirely withheld. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.
2. The requested records are being provided in part and are being withheld in part. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code Section that authorizes the withholding of the records.
3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the

requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.

Va. Code Ann. § 2.2-3704(B). “[A] public body must respond to even vague FOIA requests within five days, and a request for further specificity does not toll the five-day time limit within which the public body must provide one of [these] . . . statutorily required responses.” *Hurst v. City of Norfolk*, 97 Va. Cir. 158, 2017 WL 9917196, at \*8 (2017). A public body may request additional time to respond to a request only after engaging in reasonable efforts with a requester concerning the production of the requested information. Va. Code Ann. § 2.2-3704(C). “[N]o public body shall be required to create a new record if the record does not already exist: However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.” Va. Code Ann. § 2.2-3704(D).

If a public body fails to respond to a request, this failure shall be deemed a violation of FOIA. Va. Code § 2.2-3704(E). A court may award a civil penalty “if it finds that a violation was willfully and knowingly made” by an employee of a public body. Va. Code Ann. § 2.2-3714(A). A plaintiff “must prove the alleged violations of the Freedom of Information Act by the greater weight of the evidence.” *Shenandoah Pub. House, Inc. v. The Winchester City Council*, 37 Va. Cir. 149, 1995 WL 1055895, at \*2 (1995) (citing *R. F. & P. Corporation v. Little*, 247 Va. 309, 440 S.E.2d 908 (1994)). The “court shall consider mitigating factors, including reliance of members of the public body on (i) opinions of the Attorney General, (ii) court cases substantially supporting the rationale of the public body, and (iii) published opinions of the Freedom of Information Advisory Council” when determining if civil penalties are appropriate. Va. Code Ann. § 2.2-3714(C). If an employee of a public body is accused of committing a “willful and knowing violation . . . [he] may introduce at any proceeding a copy of a relevant advisory opinion . . . as evidence that he did not willfully and knowingly commit the violation if the . . . violation resulted from his good faith reliance on the advisory opinion.” Va. Code § 2.2-3715. Courts have declined to extend civil penalties even when a public body violated FOIA when it was determined that the public body “act[ed] in good faith with the advice of counsel,” holding that reliance on the erroneous advice of council demonstrated a lack of a “knowing and willful violation.” *Nageotte v. Bd. of Sup'rs of King George County*, 223 Va. 259, 269, 288 S.E.2d 423, 428 (1982). A plaintiff must demonstrate that more than the “letter of the law” was violated – he must show that the “spirit or the substance” of the law was violated.



*Shenandoah Pub. House, Inc. v. The Winchester City Council*, 37 Va. Cir. 149, 1995 WL 1055895, at \*4 (1995).

### Discussion

#### *A. Harki's FOIA Requests were Reasonably Specific*

To reiterate, FOIA was enacted to give “the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees.” Va. Code Ann. § 2.2-3700. The statute emphasizes that “the affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.” *Id.* Harki wrote and published an article criticizing VDOC’s strip search policy, which has resulted in legislation changing the policy. (Pl.’s Hr’g Mem. 2 – 3.) After the publication of the article, Harki sent his December 9, 2019 FOIA request with five different specifically bulleted requests. (Def.’s Dem. Ex. 4, at 8.) Until the beginning of January, Harki and VDOC engaged in discussions concerning his December 9th request, attempting to provide the appropriate responsive documents. (Def.’s Dem. Ex. 4.) Although there was some delay due to the holidays and technical difficulties, Harki received responsive documents to the first four bullets in his December 9 Request on January 7, 2020. (Def.’s Dem. Ex. 4, at 2.) However, VDOC did not provide the information responsive to bullet five of his FOIA request, specifically the data dictionary and database schema. (Def.’s Dem. Ex. 4, at 1.) Harki stated in a previous email that although VDOC took the position that a “data dictionary, database schema, or other log that outlines the database and information” requested in the first four bullets did not exist, he would be happy to receive one for the VACORIS system only. (Def.’s Dem. Ex. 4, at 5.) This clearly shows that he wanted a general log of the information and capabilities of the VACORIS system – a clear, narrow, and specific request. (Def.’s Dem. Ex. 4, at 5.) On January 9, 2020, he received an email stating that this information was the intellectual property of Abilis Solutions, Inc. and could not be produced. (Def.’s Dem. Ex. 4, at 1.)

Consequently, he sent the supplemental request on January 23, 2020, which attempted to detail the information that he was seeking, which would not be considered the intellectual property of Abilis; rather, it should be general information that VDOC would possess. (Pl.’s Writ of Mandamus and Injunctive Relief Ex. 1).

When interpreting the statute, the General Assembly noted that “[t]he provisions of this chapter 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.*” Va. Code Ann. § 2.2-3700 (emphasis added). All exemptions listed in FOIA are to be narrowly construed, and “all 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.” Va. Code Ann. § 2.2-3700 (emphasis added): As stated above, Harki made several attempts to clarify the information that he was seeking from the VDOC from December until January. (Def.’s Dem. Ex. 4; Pl.’s Writ of Mandamus and Injunctive Relief Ex. 1.) On January 30, VDOC, via its Director of Administrative Compliance, Dean W. Ricks, responded to each of Harki’s seven requests stating: “Pursuant to § 2.2-3704(B) of the Code of Virginia, ‘a request for public records shall identify the requested record with reasonable specificity.’ Therefore, your request for records is denied.” (Pl.’s Writ of Mandamus and Injunctive Relief Ex. 2.) Ricks’ email ended by stating that “[i]f you would like to re-submit your FOIA requests with a narrowed scope and greater specificity we will be happy to try and accommodate your request for records.” (Pl.’s Writ of Mandamus and Injunctive Relief Ex. 2.)

In light of the many emails and telephone conversations between VDOC and Harki in December and January, the January 23rd FOIA request is reasonably specific. The requirement for reasonable specificity means that a request must be “specific enough to enable a public body to begin to process the request.” FOIA Advisory Opinion 03-08 (Mar. 19, 2008). Given the volume of emails and number of phone calls from December to January, VDOC was capable of processing the request. (Def.’s Dem. Ex. 4.) Attempting to state otherwise is disingenuous. It should be further noted that Ricks’ response is not one of the approved responses to a FOIA Request as prescribed by Va. Code Ann. § 2.2-3704(B).<sup>4</sup> Importantly, “a public body must respond to even vague FOIA requests within five days, and a request for further specificity does not toll the five-day time limit within which the public body must provide one of [these] . . .

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<sup>4</sup> After receiving a FOIA request, Va. Code Ann. § 2.2-3704(B) requires a public body to respond within five days after receiving the request, stating one of the following responses:

1. The requested records are being entirely withheld. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code Section that authorizes the withholding of the records.
2. The requested records are being provided in part and are being withheld in part. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code Section that authorizes the withholding of the records.
3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.
4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.

statutorily required responses.” *Hurst v. City of Norfolk*, 97 Va. Cir. 158, 2017 WL 9917196, at \*8 (2017). A public body may request additional time to respond to a request only after engaging in reasonable efforts with a requester concerning the production of the requested information. Va. Code Ann. § 2.2-3704(C).

Not only did VDOC not engage in “reasonable efforts” with Harki to ascertain the information requested, VDOC did not request additional time to produce the documents. See Va. Code Ann. § 2.2-3704(C). Furthermore, VDOC did not provide a statutorily required response under Va. Code Ann. § 2.2-3704(B). When a public body denies a FOIA request, it must “identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.” Va. Code Ann. § 2.2-3704(B)(1). VDOC failed to follow any of these requirements in the statute. Finally, even if VDOC had made “a request for further specificity” that would not have tolled the five-day time limit. *Hurst v. City of Norfolk*, 97 Va. Cir. 158, 2017 WL 9917196, at \*8 (2017). By failing to produce a statutorily prescribed response with the five working day period, VDOC is in violation of FOIA. Va. Code Ann. § 2.2-3704(E).

*B. Harki Substantially Prevails on the Merits, because VDOC Willfully and Knowingly Violated FOIA*

The Court finds that VDOC acted in bad faith by refusing to provide Harki with the requested records from December until February. In a FOIA violation “[a] single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein.” Va. Code Ann. § 2.2-3713(D). A FOIA violation is considered “‘willful’ when it is intentional, and the term ‘knowingly’ imports knowledge of the essential acts from which the law presumes knowledge of legal consequences arising therefrom.” *RF&P Corp. v. Little*, 247 Va. 309, 320, 440 S.E.2d 908, 915 (1994). If the petitioner substantially prevails on the merits of the case, he is “entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorney fees from the public body.” Va. Code Ann. § 2.2-3713(D). When determining if a petitioner “substantially prevails on the merits” of his case, “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.” Va. Code Ann. § 2.2-3713(D).

In *Hurst v. City of Norfolk*, a reporter submitted two FOIA requests to the City seeking information about an investigation by the *Virginian-Pilot*. *Hurst v. City of Norfolk*, 97 Va. Cir. 158, 2017 WL 9917196, at \*1 (2017). There were extensive discussions between *Hurst* and the City about the contents of his request, and although several days late, the City produced

responsive documents. *Hurst v. City of Norfolk*, 97 Va. Cir. 158, 2017 WL 9917196, at \*2 (2017). The court held that although the response was produced late, it appeared that the City “did not intentionally delay producing responsive documents or otherwise act in bad faith,” and since the City produced the responsive documents, there was no injury. *Hurst v. City of Norfolk*, 97 Va. Cir. 158, 2017 WL 9917196, at \*12 (2017). The court considered the extensive discussions between the reporter and the city and the production of the responsive documents to the first FOIA request as evidence of good faith. *Id.* The City produced the first FOIA request documents and agreed to produce the documents for the second FOIA request prior to the filing of the lawsuit, demonstrating a good faith effort to comply with FOIA. *Id.* Therefore, the court refused to award a civil penalty or attorney’s fees. *Id.*

Although the facts in *Hurst* are similar to the case at bar, there are several key differences. As in *Hurst*, Harki submitted two FOIA requests. By December 28, 2019, Harki received responsive documents for four of the five requests in his first FOIA request. (Def.’s Dem. Ex. 4, at 2.) Harki attempted to clarify and narrow his fifth request in the first FOIA request, but he was ultimately told that although VDOC understood his request, it did not own the information requested. (Def.’s Dem. Ex. 4, at 1-2.) Thereafter, Shumadine contacted VDOC to discuss the request and try and resolve the matter. (Pl.’s Hr’g Mem. Ex. 8, at 1.) In *Hurst*, the plaintiff was able to continue discussions with the City without the need for an attorney. *Hurst v. City of Norfolk*, 97 Va. Cir. 158, 2017 WL 9917196, at \*1-2 (2017). VDOC refused to allow Harki on the call and would only speak with Shumadine. (Pl.’s Hr’g Mem. Ex. 8, at 1.) Conversely, although the plaintiff in *Hurst* threatened a lawsuit, he was always able to speak directly with the City and City Council members regarding his concerns about transparency. *Hurst v. City of Norfolk*, 97 Va. Cir. 158, 2017 WL 9917196, at \*1-2 (2017). The City properly requested an extension of time for responding when it could not fully understand the plaintiff’s request. *Id.* When Shumadine asked about the fifth request, he was told that Harki had narrowed and abandoned the request. (Pl.’s Hr’g Mem. Ex. 8, at 1.) However, there is no evidence supporting the assertion that Harki ever intended to abandon his initial request, nor does the correspondence between the parties indicate an abandonment of the request. (Pl.’s Hr’g Mem. Ex. 8, at 1-2.) This behavior is markedly different from the City in *Hurst*. Although there were issues in determining the exact documents requested, communication was open, proper statutory extensions were requested, the City never refused to speak with the plaintiff; requiring representation by an attorney, and the City never insinuated that the plaintiff abandoned his FOIA requests when it appeared too broad. Delays occurred, but they were due to good faith attempts to answer the FOIA request and cut the cost of production rather than reluctance towards production of the documents.

VDOC’s behavior towards the second FOIA request further supports the conclusion that VDOC acted in bad faith. Shumadine’s second letter of February 17, 2020, presented another

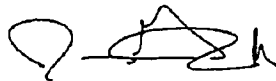
attempt to reiterate the documents requested. (Pl.'s Hr'g Mem. Ex. 8, at 2.) That second letter, sent after the second denial and after participating in a second and third round of conference calls, clearly stated Harki's request: "We request the fields and definitions of the field for all modules of the Department of Corrections' VACORIS database." (Pl.'s Hr'g Mem. Ex. 8, at 1.) Harki refused to narrow the request due to the behavior of VDOC but stated that he would "accept the simplest and cheapest and easiest to understand document that describes what we are looking for." (Pl.'s Hr'g Mem. Ex. 8, at 2.) Throughout this three-month process, Harki attempted to work with VDOC, so that the request would be clear enough for VDOC to understand and produce. At the hearing, Ricks testified that VDOC did not need Harki to clarify his request; rather, they wanted him "to narrow the request." (Hr'g Tr. 58:8-11.) Although VDOC claims it did not understand and could not process Harki's request, Harki's testimony, emails, and letters repeatedly stated that he would "accept the simplest, shortest thing that would satisfy the request" for information regarding the VACORIS system only. (Hr'g Tr. 63: 8-11.) Given the context of Harki's FOIA requests, Ricks' testimony that he believed Harki's second FOIA request "asked for every system" controlled by VDOC making it impossible for VDOC to begin to process the request, is difficult to believe. (Hr'g Tr. 63:19-20.) By January, Harki individually and through his attorney, had repeatedly said he wanted the information about the VACORIS system's capabilities.

For a plaintiff to prevail in a FOIA suit, he must demonstrate that both the letter and the spirit of the law was violated. *Shenandoah Pub. House, Inc. v. The Winchester City Council*, 37 Va. Cir. 149, 1995 WL 1055895, at \*4 (1995). VDOC failed to produce the requested documents to Harki within the statutory period, and it acted in bad faith by refusing to answer his request. Harki only received the thousands of responsive documents after retaining a lawyer to advocate for both of his FOIA requests. (Pl.'s Hr'g Mem. Ex. 8.) Although VDOC cites to various Virginia FOIA Advisory Council Opinions, claiming to rely on them in good faith, the history of this case evidenced through emails, letters, and testimony showcase VDOC's attempts to stonewall Harki and to refuse to relinquish the documents. FOIA was enacted to give citizens of the Commonwealth access to public records and to ensure that "the affairs of the government" are not conducted in secrecy. Va. Code Ann. § 2.2-3700. VDOC willfully and knowingly violated FOIA by its repeated attempts to refuse to comply and insist that he narrow his request. VDOC's actions violated both the letter and spirit of FOIA. *See Shenandoah Pub. House, Inc. v. The Winchester City Council*, 37 Va. Cir. 149, 1995 WL 1055895, at \*4 (1995). Therefore, Harki substantially prevails on the merits of his case, and this Court finds VDOC in violation of FOIA.

### Conclusion

Given the context of the two separate FOIA requests and clarifying discussions between Harki, his attorney, and VDOC from December until suit was filed, Harki's January FOIA request was reasonably specific and not vague requiring "self-tailoring" by VDOC. VDOC should have responded accordingly before suit was filed. VDOC's failure to properly process the request, properly deny the request, failure to properly request for more time, violated both the letter and spirit of FOIA. Consequently, I find that VDOC VIOLATED FOIA by failing to timely reply to Harki's request. Mr. Shumadine will prepare an order consistent with the foregoing.

Sincerely,



Junius P. Fulton, Judge

April 15, 2020

Junius P. Fulton, III  
Circuit Court Judge

JPF/BGG/ms