



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

DAVID W. LANNETTI
JUDGE

150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

November 20, 2017

Terry R. Hurst
104 E. Severn Road
Norfolk, Virginia 23505

Adam D. Melita, Esquire
Office of the City Attorney, City of Norfolk
810 Union Street, Suite 900
Norfolk, Virginia 23510

Re: Terry R. Hurst v. City of Norfolk
Civil Docket No.: CL17-11119

Dear Mr. Hurst and Mr. Melita:

Today the Court rules on the petition ("Petition") filed by Plaintiff Terry R. Hurst alleging that Defendant City of Norfolk (the "City") violated his rights under the Virginia Freedom of Information Act, *Virginia Code* Section 2.2-3700 *et seq.* ("FOIA"), and the City's corresponding motion to strike.

Hurst submitted two FOIA requests to the City seeking information related to and contained in an article that appeared in the *Virginian-Pilot*, a daily newspaper based in Norfolk, Virginia. The issues before the Court are as follows: (1) whether Hurst's failure to provide an affidavit of "good cause" supporting the Petition procedurally bars his claim; (2) whether the City violated FOIA as to Hurst's two requests; (3) whether declaratory relief is an available remedy under FOIA; and (4) whether Hurst is entitled to recover his costs associated with the Petition.

In accordance with the analysis below, the Court rules as follows: (1) the Court grants leave for Hurst to append his affidavit to the Petition, and the affidavit otherwise meets FOIA requirements; (2) the City did not comply with FOIA timeliness requirements in responding to Hurst's two requests; (3) declaratory relief is not an available remedy under FOIA; and (4) Hurst is not entitled to recover his costs because he did not "substantially prevail" on his claim.

For the reasons stated herein, the Court SUSTAINS the City's motion to strike and DENIES Hurst's petition.

Background

The First FOIA Request

On Tuesday, August 1, 2017, Hurst submitted a FOIA request (the “First FOIA Request”) to the City asking for information related to a July 28, 2017, article written by Tim Eberly and printed in the *Virginian-Pilot* titled “Norfolk Shreds Records Related to Investigation into Ex-Sheriff Bob McCabe” (the “Article”). (Pet’r’s Exs. A, C.) Specifically, the request asked for “[w]ritten communication between the City of Norfolk and The *Virginian-Pilot* between November 30th and December 21st, January 26th and February 25th, and June 26 [sic] to July 31st, relating to the subject matters discussed in The *Virginian-Pilot* article” and “written communication between city staff, elected officials, and/or appointed officials relating to the preparation and dissemination of the July 31st statement” in the Article. (Pet’r’s Ex. C; Trial Tr. (“Tr.”) 91–93.)

At 9:28 a.m. on Monday, August 7, 2017, Michelle Washington—the public relations manager for the City’s FOIA office—sent Hurst an email in which she asserted that his request for “subject matter discussed in The *Virginian-Pilot* article” was too vague for the City to respond appropriately and asked for clarification. (Pet’r’s Ex. D.) At 2:54 p.m. that afternoon, Hurst responded by email with a timeline of the newspaper’s investigation as represented in the Article and stated, “In essence what I am asking for are copies of the responses [the City] made to the Pilot in response to the Pilot’s FOIA requests. Nothing should be easier to provide in response to a FOIA request than copies of responses that were previously made to the FOIA requests of others.” (Pet’r’s Ex. E; Tr. 43–44.) At 3:50 p.m., Hurst emailed Norfolk City Council members to express his concerns with the City’s transparency and his plans to file “a criminal complaint with [the] Norfolk Commonwealth’s Attorney alleging a violation of Virginia Freedom of Information Act pursuant to 2.2-3713 and 2.2-3714” should City Council fail to publicly investigate the document destruction alleged in the Article. (Pet’r’s Ex. F; Tr. 44–45.) One City Council member replied to Hurst’s email three minutes later, indicating that “all legal matters (including threats of lawsuits)” should be addressed to the City Attorney’s Office. (Pet’r’s Ex. G; Tr. 46–47.) At 4:39 p.m., Washington sent an email to Hurst again requesting clarification of his FOIA request—whether he was requesting a copy of the City’s response to the newspaper’s FOIA request or a copy of the written communications as stated in his original request. (Pet’r’s Ex. H.) Hurst responded to Washington by email at 5:32 p.m., reiterating that he was requesting the written communications as stated in his original request on August 1. (Pet’r’s Ex. I; Tr. 48.)

At 9:52 a.m. on Tuesday, August 8, 2017, Washington answered Hurst’s email, again requesting increased specificity, including “some degree of definition” with “keywords and departments/offices or the names of individuals if you know them.” (Pet’r’s Ex. J; Tr. 49.) At 5:51 p.m. that evening, Washington responded to Hurst’s record request with an attached letter, which identified the City’s initial steps to satisfy the request, provided a cost estimate of \$5,536 plus copying costs to produce responsive documents, sought a \$5,500 deposit to produce the documents, offered as a free alternative that the City could provide copies of “FOIA responses that the city has already provided to The *Virginian-Pilot* in regards to the article,” and requested

that Hurst inform the City how he wanted the City to proceed. (Pet'r's Exs. L, M; Tr. 53, 56, 100, 104–08.) Hurst emailed Washington at 6:02 p.m., informing her that any keywords had been provided in the Article, which was included with his original FOIA request. (Pet'r's Ex. K; Tr. 52–53.)

On the afternoon of August 9, 2017, Hurst emailed Washington, stating that he wanted a copy of the City's FOIA responses to the Virginian-Pilot "immediately and for free" as offered in the City's August 8, 2017, letter. (Pet'r's Exs. M, N; Tr. 58.) The City subsequently sent Hurst a package postmarked August 14, 2017, containing these documents. (Pet'r's Ex. O; Tr. 58–59.) Hurst concedes that he ultimately received all documents responsive to the First FOIA Request. (Tr. 30, 65.)

The Second FOIA Request

At 4:34 p.m. on Friday, August 18, 2017, Hurst submitted a second FOIA request to the City (the "Second FOIA Request"), asking for documents related to four categories of information, with specific sub-categories. (Pet'r's Ex. P; Tr. 59–65; 93–98.) Two minutes later, Hurst followed up with a second email requesting an immediate response to confirm receipt of his request. (Pet'r's Ex. Q.) On Monday, August 21, 2017, the City sent Hurst an email acknowledging receipt of his FOIA request. (Pet'r's Ex. R; Tr. 68–69, 140.)

On Tuesday, August 29, 2017, Sandra Hemmingway—manager of publications and direct communications for the City—responded by email to Hurst with an attached letter, signed by Washington, indicating that the City could not "provide the requested records or determine whether they are available within the five working days required by FOIA" and "invoking subsection B 4 of § 2.2-3704 to provide . . . seven additional working days to respond" to the request. (Pet'r's Exs. S, T; Tr. 69–70, 120–22, 133–36.)

That afternoon, Hurst sent a lengthy email response outlining his grievances related to his two FOIA requests, on which he copied Norfolk City Attorney Bernard Pishko and the Norfolk City Council members. (Pet'r's Ex. U; Tr. 71–72.) Pishko responded to Hurst by email six minutes later, indicating that he would contact Hurst after discussing Hurst's requests "with Hemmingway and others." (Pet'r's Ex. V; Tr. 72.)

On Wednesday, August 30, 2017, Deputy City Attorney Jack Cloud responded to Hurst's August 29 email. Cloud apologized for the delayed response to the Second FOIA Request, "which was received in the City's FOIA email inbox on Friday, August 18, 2017 at 4:35 p.m."; stated that the City's late response was the result of "a series of errors"; and indicated that Hurst's request was being expedited to receive "a required response . . . no later than the end of this week." (Pet'r's Ex. W; Tr. 74–75, 88–89, 140.)

On Friday, September 1, 2017, Hemmingway emailed Hurst an attached letter, signed by Washington, which estimated a cost of \$333 to search, retrieve, and review documents potentially responsive to the Second FOIA Request. (Pet'r's Exs. X, Y; Tr. 76–77.) The letter

solicited a \$333 deposit should Hurst wish the City to proceed. (Pet'r's Ex. Y.) Hurst did not respond to the letter.

On September 26, 2017, Hurst appeared before Norfolk City Council and submitted a draft of the Petition to Pishko. (Tr. 86–87, 147.) On September 29, 2017, Hurst received a telephone call from Cloud offering—on behalf of the City—to produce the documents responsive to the Second FOIA Request free of charge. (Joint Stip. of Facts ¶¶ 2–3; Tr. 86–87, 110.) Hurst received those documents on October 5, 2017, four working days later. (Joint Stip. of Facts ¶ 1; Tr. 126.) Hurst concedes that he ultimately received all documents responsive to the Second FOIA Request. (Joint Stip. of Facts ¶ 1; Tr. 30, 110–13, 148.)

The Petition

Hurst filed a “Petition for Declaratory, Mandamus, and Injunctive Relief” on October 2, 2017, alleging that the City failed to provide a timely response to his two FOIA requests and asking the Court for the following relief: (1) to find the City violated FOIA by failing to provide all information requested, (2) to find that the City violated FOIA by failing to adhere to the FOIA-mandated time limits, (3) to issue a writ of mandamus to the City directing it to provide copies of communications it had with Eberly and with the FBI related to the Article, and (4) to award him reasonable costs and attorney’s fees.¹ (Pet. ¶¶ 49–53.) Hurst failed to provide a supporting affidavit with his Petition as required by FOIA, although he produced one at trial. (Tr. 5.) On October 20, 2017, the City filed “Defendant’s Brief in Opposition to Petition for Declaratory Judgment, Mandamus, and Injunctive Relief.”

Trial was held on October 23, 2017. At the conclusion of the Petitioner’s case, the City moved to strike the Petitioner’s evidence, which the Court took under advisement. (Tr. 114.) At the conclusion of the trial, the Court granted the parties leave to file post-trial briefs.

Position of the Parties

Hurst’s Position

Hurst’s Petition recites the factual premise upon which his claim is based and makes several discrete claims: (1) the City failed to appropriately and timely respond to the First FOIA Request (Pet. ¶¶ 9, 27); (2) the City failed to produce documents responsive to the First FOIA Request (*Id.* ¶¶ 9, 26); (3) the City failed to appropriately and timely respond to the Second FOIA Request (*Id.* ¶¶ 9, 34); (4) the City failed to produce documents responsive to the Second FOIA Request (*Id.* ¶¶ 9, 45); (5) the City requested fees from Hurst that were either unreasonably excessive or related to the general business of the public body (*Id.* ¶¶ 9, 40, 42); (6) the City failed to provide an adequate reason to invoke a seven-working-day extension of time as

¹ Despite the style of the pleading, there is no prayer for injunctive relief in the Petition. (*See* Pet. 17–18.) Hurst conceded at trial that he did not specifically delineate in the Petition the injunctive relief being sought, effectively abandoning any request for an injunctive remedy. (Tr. 28.)

required by FOIA (*Id.* ¶ 35);² and (7) the City intentionally delayed responding to the FOIA requests (*Id.* ¶ 47).

Regarding the First FOIA Request, Hurst contends that the City violated the five-working-day response requirement when it provided documents “six working days after the due date, without communication from the City FOIA office invoking the appropriate subsection of the Act for an extension to the deadline, violating state law.” (*Id.* ¶ 27.) Hurst further argues that documents postmarked August 14, 2017, were untimely because the deadline to receive a statutorily required response was August 7, 2017. (Tr. 59–60.) Hurst also contends that the City violated FOIA by “not including the communications between Eberly and the [City’s] FOIA office” in the documents it produced and that his request therefore was left unsatisfied—although he ultimately made the decision to abandon the First FOIA Request in favor of filing a new FOIA request.³ (Pet. ¶ 26; Tr. 60–62.)

Regarding the Second FOIA Request, Hurst alleges that the City violated the five-working-day response requirement “by missing the deadline [to provide documents], since [the City’s letter] was dated August 28, 2017 and sent via e-mail August 29, 2017, both of which were after the five working day deadline of August 25, 2017.” (Pet. ¶ 34.) Hurst argues that because the Second FOIA Request was submitted at 4:34 p.m. on August 18 (Pet’r’s Ex. P), *i.e.*, prior to 5:00 p.m., the five-day statutory clock began on that day. (Tr. 68.) Secondarily, Hurst asserts that the City’s August 28 letter “did not specify . . . the conditions that make a response impossible” when it invoked Section 2.2-3704(B)(4) to obtain an additional seven days to respond to the Second FOIA Request. (Pet. ¶ 35.) Hurst indicates he sought documents that were “already requested and sent out” and that “nothing should be easier” than finding documents that had been produced pursuant to an earlier FOIA request. (Pet’r’s Post-Trial Br. 3.) According to Hurst, the City’s assertion that it “was unable to gather the records in time” is not an adequate explanation for why the documents were “impossible to gather in the required five days.” (*Id.*)

Lastly, Hurst claims that the City was disingenuous in its communications and purposefully avoided producing documents. (Pet. ¶ 9.) Hurst asserts that Washington’s sole job as the custodian of records, and the jobs of those working under her, is to respond to FOIA requests. (Pet’r’s Post-Trial Br. 2.) He also claims that the City’s requests for a deposit was a solicitation for unlawful charges “for transacting the general business of the public body” and that the City’s cost estimates were merely attempts to dissuade or delay Hurst’s pursuit of records. (Pet. ¶¶ 42–43; Tr. 55–56, 76–77, 90.) Hurst postulates that his threat—and ultimate filing—of a lawsuit was the only reason the City produced the documents sought by the Second FOIA Request. (Pet’r’s Post-Trial Br. 1.)

² The Petition has two paragraphs identified as paragraph 35 and two paragraphs identified as paragraph 36, which first appear on page 12 and later appear on page 14. (Pet. 12, 14.)

³ Because the August 14 documents were not submitted into evidence, the Court is unable to determine whether the City did or did not include “communications between Eberly and the FOIA Office.” (Pet. ¶ 26; Tr. 58–59.) However, Hurst conceded that the documents he ultimately received “provide exactly what [Washington] said she was going to provide.” (Tr. 58.)

In the Petition Hurst requested mandamus relief, asking that the Court direct the City to provide correspondence it had with Eberly and the FBI (Pet. ¶ 51), award reasonable costs and attorney's fees (*id.* ¶ 52), and grant "such other and further relief as [the Court] deems proper" (*id.* ¶ 53). Hurst orally amended his requested relief at trial, conceding that the City had produced documents related to both of his FOIA requests to his satisfaction and at no cost after the Petition was filed. (Tr. 9.) Hurst now seeks only a declaration that the City violated FOIA and reimbursement of his court costs, including postage for mailing the Petition.⁴ (Pet'r's Post-Trial Br. 3; Tr. 10–11.)

The City's Position

As a preliminary matter, the City contends that Hurst failed to meet the procedural requirement of filing a proper FOIA suit, as a supporting affidavit demonstrating good cause was not submitted with the Petition and, absent leave of court to append an affidavit to the Petition, judicial intervention is inappropriate. (Def.'s Br. in Opp'n 7 n.4, 13.)

Regarding the First FOIA Request, the City argues that its response did not violate FOIA timeliness requirements. (*Id.* at 8.) Specifically, it contends that Washington's August 8 letter was timely, as the five-working-day clock began to run the day *after* the FOIA request was received. (*Id.* at 11.) Additionally, the City asserts that its request for a deposit—and offer to provide a copy of the Virginian-Pilot FOIA response in the alternative—tolled the response clock, after which Hurst abandoned the First FOIA Request in favor of receiving a copy of the Virginian-Pilot FOIA response. (*Id.* at 8–9.) The City alleges it timely produced the Virginian-Pilot FOIA response documents, as Hurst's acceptance of Washington's offer to provide those documents started the five-day clock anew. (*Id.* at 9 n.6.) According to the City, those documents were requested on August 9 and received by Hurst on August 16, five working days later. (*Id.*) Additionally, the City contends that it is the date the records are *sent*, not the date they are *received*, that is the proper indicator of timeliness under FOIA, as "the Act expressly permits localities to make the requested records available either 'by inspection or by providing copies,'" and if not offered for inspection, the time it takes for the Post Office to deliver copies to the requester by mail "is not a delay that counts against the FOIA deadline." (*Id.* (quoting *Va. Code* § 2.2-3704(B)) (citing Virginia Supreme Court Rule 1:7, which adds three additional days to deadlines to accommodate mailing).) Thus, the City claims it timely responded to both the First FOIA Request and Hurst's follow-up request for a copy of the Virginian-Pilot FOIA response documents, and it provided all required documents.

Regarding the Second FOIA Request, the City concedes it was one day late in responding but asserts that its untimeliness does not trigger a remedy under FOIA. (*Id.* at 13.) The City contends that—because the Second FOIA Request was sent at 4:34 p.m. on Friday, August 18, and was acknowledged by the City on Monday, August 21—August 21 should be treated as the day the request was received. (*Id.* at 11 n.7.) According to the City, it had until August 28 to respond, and although it prepared a letter dated August 28 entitling it to an additional seven days to produce the documents, the letter was not sent to Hurst until August 29—the sixth working

⁴ Hurst does not seek any attorney's fees, as he appeared *pro se* in this litigation.

day after receipt of the Second FOIA Request. (*Id.* at 11–12.) The City argues that this minor technical violation does not trigger a remedy under FOIA because it does not “cause [the] deprivation of a right or privilege.” (*Id.* at 13.) It further points out that it provided a formal response three days later—well within the twelve days the City otherwise would have had if it had timely invoked the seven-day extension—that requested a deposit of \$333 and tolled the statute until the deposit was paid. (*Id.* at 12–14; Tr. 119.) Although Hurst never paid the deposit, the City contends that the clock resumed on September 29, when it offered to waive the deposit and provide the documents without charge; those documents were provided four working days later, on October 2. (*Id.* at 13.) Thus, the City asserts that, although it responded to the Second FOIA Request one day late, any untimeliness was negligible and was cured by ultimately providing documents well within the twelve days it otherwise would have had with the seven-day extension. (*Id.* at 14.) Additionally, the City states it eventually provided all documents sought by the Second FOIA Request, thereby precluding the need for judicial intervention. (*Id.* at 13–14.)

Disputing Hurst’s “claim that the City’s charge of \$333 [associated with the Second FOIA Request] to recover the cost of legal review and searching by its FOIA officers is prohibited by law,” the City asserts the claim is moot because the City waived the charge, leaving no existing case or controversy between Hurst and the City. (*Id.* at 14–15.) In the event it is not moot, the City alternatively argues that there is nothing in Hurst’s allegations or the City’s cost itemization suggesting the deposit was related to conducting the general business of the City, but that the itemized charges instead relate “directly to the estimated cost of complying with Hurst’s request” and “appear to be derived entirely from the need to process the request.” (*Id.* at 15–16.) The City also contends that requiring payment of costs for legal exclusion review is expressly authorized under FOIA. (*Id.* at 16.)

Regarding Hurst’s related assertion that the City failed to properly identify why the seven-day extension was being invoked, the City argues that the statement in the City’s response indicating that it was “unable to gather the records in that allotted time frame” satisfies the statutory requirement, and “Hurst’s representation that the letter is missing any explanation is demonstrably false.” (*Id.* at 17.)

The City rebuts Hurst’s claim that it intentionally delayed responding to his request by stating that it timely responded to Hurst’s requests, with the exception of an admitted one-day unintentional misstep. (*Id.* at 17–18.) The City further argues that “there is no probative evidence that the City’s technical failure was intentional.” (*Id.* at 18.)

The City contends that all forms of relief sought by Hurst are inappropriate. (*Id.*) It asserts that the one-day technical violation was cured by the City expediting its response to the Second FOIA Request, ultimately producing the requested documents within nine working days of the request—less than the twelve working days the City otherwise would have had—and does not constitute a deprivation of rights. (*Id.* at 19.)

Lastly, the City argues that Hurst is not entitled to recover his costs from the City because he did not substantially prevail on his claim. (*Id.*) The City contends that costs should be

awarded only when a FOIA violation is proven, and even then, the judge has discretion to determine whether the petitioner substantially prevailed or whether special circumstances demand an award be denied. (Def.'s Post-Trial Br. 6–7.) The City proffers that a finding that the City failed to meet the statute one time—missing the deadline by only one day—is a technical violation that “hardly amounts to a substantial victory on the merits of the case.” (*Id.* at 8, 10.) In short, the City argues that Hurst failed to prove a justiciable violation and failed to demonstrate a denial of his rights and privileges, and even if he had, there is no requirement that costs be awarded, as Virginia routinely refuses to award costs where *de minimus* violations occur. (*Id.* at 10–11.)

Analysis

Legal Standard

FOIA “ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees Unless a public body or its officers or employees specifically elect to exercise an exemption[,] . . . all public records shall be available for inspection and copying upon request.” *Va. Code* § 2.2-3700(B) (2017 Repl. Vol.). “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.” *Id.*

“A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to [the FOIA statute] in order to invoke the provisions of [FOIA] or to impose the time limits for response by a public body.” *Id.* § 2.2-3704(B). “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.* § 2.2-3700(B).

Under FOIA, within five working days of receiving a FOIA request a public body must respond with a production of records or, in the alternative, a written response indicating one of the following:

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.

Id. § 2.2-3704(B).

“Any 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 or requires an extraordinarily lengthy search, and a response by the public body within the time required by [FOIA] will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.” *Id.* § 2.2-3704(C).

“Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of [FOIA].” *Id.* § 2.2-3704(E).

FOIA allows the public body to charge the requester for the “actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.” *Id.* § 2.2-3704(F). The allowable costs may include the expense of a lawyer to review the documents to see if any of them—or any portion of them—are exempt from disclosure. *See Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 345, 756 S.E.2d 435, 443 (2014).

If the public body determines, before completing the search and response, that the costs of complying with the request are likely to exceed \$200, it can require the requester to pay a deposit—not to exceed the estimated cost—before continuing to work on the request. *Va. Code* § 2.2-3704(H). The deadline for the public body to respond is tolled during the time period “between notice of the advance determination and the response of the requester.” *Id.*

FOIA permits any person who has been “denied the rights and privileges conferred by” FOIA “to enforce such rights and privileges by filing a petition for mandamus or injunction.” *Id.* § 2.2-3713(A). Such petition must be “supported by an affidavit showing good cause.” *Id.* Additionally, the petition must identify “with reasonable specificity the circumstances of the denial of the rights and privileges conferred by” FOIA. *Id.* § 2.2-3713(D).

A FOIA petition must be heard within seven days of the date it is filed, provided the public body has received a copy of the petition at least three working days prior to filing. *Id.* § 2.2-3713(C).

“If the court finds the denial to be in violation of the provisions of [FOIA], the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys’ fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this

determination, 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." *Id.* § 2.2-3713(D).

If the public body willfully and knowingly violates FOIA, regardless of whether a writ of mandamus or injunctive relief is awarded, the court shall impose a civil penalty not less than \$500 and not more than \$2,000, and not less than \$2,000 and not more than \$5,000 for any subsequent violation. *Id.* § 2.2-3714.

Discussion

The Court has considered the pleadings, evidence and oral argument presented at trial, and applicable authorities. The Court now rules on the matters before it.

The purpose of FOIA is to ensure the transparency of government by providing citizens the opportunity to view and be informed about governmental activities and operations. *Va. Code* § 2.2-3700(B) (Repl. Vol. 2017). In response to a FOIA request where the requested documents are available and the public body does not seek to withhold them, a public body must respond within five working days by either producing the documents or notifying the requester that it is not practically possible to provide the documents or determine whether they are available, in which case the public body is given seven more days to respond. *Id.* § 2.2-3704(B). Additionally, the public body is required to make reasonable efforts to reach an agreement with the requester about producing the requested documents. *Id.* § 2.2-3700(B).

FOIA also allows the public body to charge the requester for the cost associated with responding to a FOIA request. *Id.* § 2.2-3704(F). If those costs are likely to exceed \$200, it can require the requester to pay a deposit—not to exceed the estimated cost—before continuing to work on the request, and the deadline for the public body to respond is tolled between notice of the cost estimate and receipt of the deposit. *Id.* § 2.2-3704(H).

A. *Hurst's Failure to Provide an Affidavit with His Petition Does Not Bar His Claim.*

A FOIA requester may seek relief from a perceived FOIA violation by "filing a petition for mandamus or injunction, supported by an affidavit showing good cause." *Va. Code* § 2.2-3713(A). The affidavit must state "with reasonable specificity the circumstances of denial of the rights and privileges conferred by" the statute. *Id.* § 2.2-3713(D). The City contends that because Hurst failed to submit an affidavit, the City—as well as the Court—is unable to assess or argue whether there is good cause to support the Petition. Upon receiving the City's responsive brief, Hurst attempted to remedy his procedural misstep by presenting an affidavit at trial. The City concedes that, assuming the Court grants Hurst leave to append the affidavit to the Petition, the affidavit otherwise satisfies the requisite statutory requirements. At trial, the Court took the issue of whether to grant leave for Hurst to amend his filing to include the affidavit under advisement.

The City's objection to this procedural defect is presumptively waived, as the City did not object within seven days after the Petition was filed. *See* Va. Sup. Ct. R. 1:10; *see also* *Robinson v. Brugiere*, 72 Va. Cir. 109, 109 (Amherst 2006) (applying Rule 1:10 to FOIA).⁵ Because the City first objected in its reply brief, which was filed eighteen days after the Petition, the Court grants Hurst leave to append his affidavit to the Petition.

B. *The City's Response to the First FOIA Request Was Not Timely.*

Hurst alleges that the City violated FOIA by failing to timely respond to the First FOIA Request, which was submitted on Tuesday, August 1, 2017. Specifically, he contends that the City failed to provide a proper response within five working days.

Under FOIA, within five working days of receiving a request a public body must either produce the requested records or, under the circumstances here,⁶ provide a written response indicating that it is not "practically possible" to provide the records or determine whether they are available. *Va. Code* § 2.2-3704(B)(4). If this response is timely provided, the public body is given an additional seven work days in which to provide one of the other allowed responses. *Id.*

Of note, Section 2.2-3704(B) states that the FOIA requirements relate to a request that identifies the requested public records "*with reasonable specificity.*" *Id.* § 2.2-3704(B) (emphasis added). Although a public body clearly is required to timely and appropriately respond to a request that contains reasonable specificity, the statute does not identify what is required in the event a request is not reasonably specific. *See* FOIA Advisory Council Op. (AO-07-11, Nov. 9, 2011). An argument can be made that the five-day clock does not start until a FOIA request with the requisite *reasonable specificity* is received. *See, e.g.,* *Burton v. Mann*, 74 Va. Cir. 471, 472 (Loudoun 2008) ("Initiation of proceedings to obtain 'public records' begins with a request identifying the requested record(s) with reasonable specificity." (quoting *Va. Code* § 2.2-3704)).⁷ Consistent with this interpretation, a public body need not take any action upon receipt of a FOIA request that lacks reasonable specificity. Such an interpretation is not supported by the statute, however. According to FOIA, the "[f]ailure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of [FOIA]." *Va. Code* § 2.2-3704(E). Hence, a public body that fails to respond to a vague FOIA request—relying on the safe harbor of the "reasonable specificity" requirement—would be in violation for failing to respond. Additionally, the statute provides only five options for responding to a FOIA request, none of which toll the response period while additional specificity is sought.⁸ *See id.* § 2.2-3704(B). It

⁵ As is appropriate, the Court does not consider Virginia Circuit Court opinions to hold precedential value. The Court instead considers the rationale offered by the courts to the extent that this Court finds it persuasive.

⁶ There is no contention that any of the records requested were exempt from production.

⁷ *See supra* note 5.

⁸ Of course, "requesters and public bodies may always reach their own agreements on the terms of production of public records," in addition to the five allowable responses. FOIA Advisory Council Op. (AO-06-14, Sept. 26, 2014).

therefore appears that 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 the five statutorily required responses under Section 2.2-3704(B).

Regardless, the Court finds that the First FOIA Request has the reasonable specificity required by statute. According to the FOIA Advisory Council, a request contains sufficient specificity if “the request identif[ies] the records sought in sufficient detail that the public body *can begin to process the request and, if needed, ask relevant questions to clarify the request.*” FOIA Advisory Council Op. (AO-07-11, Nov. 9, 2011) (emphasis added). The First FOIA Request clearly contained enough detail for the City to ask relevant questions to clarify the request, which it in fact did. The time for the City to respond to the First FOIA Request therefore is unaffected by any alleged lack of specificity.

Regarding the deadline by which the City was required to respond to the First FOIA Request, Hurst contends as an initial matter that the day of the FOIA request and the first of the allotted five work days to respond are one and the same. Under this analysis, the City would be required to produce responsive documents or file a proper response on or before Monday, August 7, 2017. The Court disagrees. The first day to respond “is the first working day *after* the request was actually *received.*” FOIA Advisory Council Op. (AO-06-14, Sept. 26, 2014) (emphasis added). This means that the City was required to respond on or before Tuesday, August 8, 2017.

The Court agrees that Hurst’s request was less than clear when he asserted that he “in essence” was requesting what the City produced to the Virginian-Pilot. Hurst clarified this statement less than three hours later, however, and as of the end of the day on August 7, the Court finds that the City understood that Hurst was requesting *both* the records previously given to the newspaper (the “Newspaper Records”) and the written communications related to the Article (the “Article Records”). As discussed *supra*, the time spent clarifying the request did not toll the City’s requirement to respond using one of the statutorily allowable responses.

With respect to the Newspaper Records, in its August 8 letter the City did not indicate to Hurst that it needed any additional time to respond and, in fact, stated that it could provide those records immediately and without charge. On August 9, Hurst clearly indicated that he wanted a copy of the Newspaper Records, and the City forwarded a copy of the records to Hurst by mail on August 14.⁹ Although the August 8 letter was provided to Hurst within five working days of the First FOIA Request, the letter did not affect the five-working-day deadline. The Court therefore finds that when the City provided the Newspaper Records on August 14, the production was four days late.¹⁰

⁹ No explanation was provided regarding why the City did not provide the Newspaper Records prior to August 14, as the City asserted on August 8 that these records were available “immediately.”

¹⁰ Although the City argues that the request for the Newspaper Records was a new FOIA request, the Court finds that the documents sought in the First FOIA Request clearly encompassed the Newspaper Records, so the Court holds that the five-working-day clock did not re-start on

With respect to the Article Records, the City notified Hurst in its August 8 letter—which, as discussed *supra*, was a timely response—that it would proceed to process the request for documents once the \$333 deposit was received. Section 2.2-3704(H) provides that where a public body determines that the cost to produce the requested records will likely exceed \$200, the public body may require the requester to pay a deposit, up to the cost estimate, before continuing to process the request. *Va. Code* § 2.2-3704(H). It goes on to provide that “[t]he period within which the public body shall respond under this section shall be tolled for the amount of time that elapsed between notice of the advance determination and the response of the requester.” *Id.* Because Hurst never forwarded the deposit, the City was not obligated to forward the Article Records to him.¹¹

C. *The City’s Response to the Second FOIA Request Was Not Timely.*

Hurst alleges that the City violated FOIA by failing to timely respond to the Second FOIA Request, which was submitted on Friday, August 18, 2017. As an initial matter, the Court disagrees with the City’s assertion that—because the FOIA request was received at 4:34 p.m., *i.e.*, at the end of the work day—the date of receipt should be deemed to be the next working day. The statute is designed to not count the day the request is received, regardless of the time of receipt; hence, the specific time of receipt is irrelevant, at least to the extent it is during the work day.¹² Additionally, the Court notes that Deputy City Attorney Cloud indicated in his email to Hurst that the Second FOIA Request was “*received* in the City’s FOIA email inbox on Friday, August 18, 2017 at 4:35 p.m.” (emphasis added).

Because the first day to respond “is the first *working day* after the request was actually received,” FOIA Advisory Council Op. (AO-06-14, Sept. 26, 2014), the five-day timeline did not begin until Monday, August 21, 2017, which meant that the City was required to respond on or before August 25, 2017. Although the City confirmed receipt on August 21, 2017, this was not a recognized response under Section 2.2-3704(B). The City ultimately provided the required response by email on August 29, 2017, with an attached letter invoking Section 2.2-3704(B)(4), thereby allowing the City seven more working day to respond.¹³

August 7 when the City understood that Hurst specifically wanted the Newspaper Records. Additionally, the City apparently could have easily provided the documents on or prior to the August 8 deadline, as the City indicated that day that the documents were available immediately.

¹¹ Although the City ultimately waived the deposit and produced the documents, the Court finds that it was not required to do so pursuant to the statutory language.

¹² The City arguably would have a stronger position if the FOIA request had been sent—and received by the City’s email server—after normal working hours. The Court need not reach this issue, however.

¹³ The Petition makes a third fact-based allegation that the City’s cost estimate of \$5,536 plus copying costs for the First FOIA Request and \$333 for the Second FOIA Request are charges for “transacting the general business of the public body” in violation of Section 2.2-3704(F) and that the City used inflated charges to deter the petitioner from pursuing his request. Petitioner failed to provide *any* evidence to support these allegations, however. To the contrary, Petitioner

The Court also disagrees with the City's argument that the failure to respond within five working days is irrelevant because the ultimate production of documents was within twelve working days of receipt of the Second FOIA Request—the initial five working days in which to respond plus the seven additional working days allowed by statute if additional time is required. The language of the statute is clear, and although the Court agrees that there was no prejudice to Hurst based on the untimely initial response, the Court cannot rewrite the statute. According to the express statutory language, a public body may only validly invoke Section 2.2-3704(B)(4) “[i]f the response is made within five working days.” Because the City did not abide by this requirement, it was not entitled to any time beyond the initial five days.

Because a FOIA response was required on or before August 25, 2017, the City's August 29 response was not timely. On September 1, the City properly invoked Section 2.2-3704(H) by providing a cost estimate and requiring payment of a \$333 deposit for the City to proceed with the request. Hurst never paid the deposit, thereby tolling the response deadline.¹⁴ The City's September 1 letter, while a proper response under FOIA, was five days late.

D. The Only Relief Currently Being Sought by Hurst Is Declaratory Relief, Which Is Not Available Under FOIA.

The style of the Petition indicates that Hurst seeks declaratory, mandamus, and injunctive relief. The Petition—including the prayer for relief—does not request injunctive relief, however. Hurst concedes that he did not specifically delineate in the Petition what form of injunctive relief he was requesting, so there is no cognizable claim for injunctive relief. Similarly, there is no apparent request for mandamus relief in the Petition, nor is there any need for such relief as all requested documents have been received to Hurst's satisfaction. At trial, Hurst orally amended the relief sought, acknowledged that all of the documents he requested were produced to his satisfaction, and abandoned his claims for mandamus and injunctive relief. Hurst now seeks only a declaration that the City violated FOIA in handling his requests and reimbursement of his costs related to this case, which total approximately \$100.

At trial, the City moved to strike Hurst's evidence, arguing that declaratory relief is not an available remedy under FOIA. The Court agrees, as the statutorily conferred rights and privileges under FOIA have specific associated statutorily conferred identifiable causes of action for which the Court can provide relief—specifically, mandamus or injunction. *Va. Code* § 2.2-3713(A) (“Any person . . . denied the rights and privileges conferred by [the FOIA statute] may proceed to enforce such rights and privileges by filing a petition *for mandamus or injunction*.”)

provided evidence in the form of letters from the City breaking down these costs, with both time estimates and seemingly permitted hourly charges for services specifically related to Hurst's request. *See Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 345, 756 S.E.2d 435, 443 (2014) (holding that the charge of a reasonable fee for activity ancillary to a FOIA request is permissible).

¹⁴ The City subsequently opted to waive the deposit—as well as the production costs—and produced documents responsive to the Second FOIA Request and acceptable to Hurst on October 5, 2017.

(emphasis added)). The Court therefore lacks the authority to award declaratory relief and is compelled to grant the City's motion to strike that claim.

The purpose of FOIA is to ensure citizens have ready access to public records held by public bodies, and the statutory remedial scheme supports this goal. *Id.* § 2.2-3700(B). Upon receipt of a FOIA request, the public body must produce all responsive, non-exempt records within five working days—and may be provided an additional seven working days if it is not practical for the City to provide the requested records or to determine whether the documents are available within the initial five working days.¹⁵ If the public body fails to adequately or timely respond, the requester may file a petition, which normally must be heard by the appropriate court within seven days of filing. *Id.* § 2.2-3713(C). If the petitioner is successful, the court will enter an order—either mandamus or injunction—for the public body to produce the records, and the petitioner will be entitled to reimbursement of his or her reasonable costs, including attorney's fees. *Id.* § 2.2-3713(D). Additionally, if the court finds that the public body knowingly and willingly violated the statute, the court shall impose a civil penalty. *Id.* § 2.2-3714.

The intent of the available remedies is to require the public body to produce the records, with reimbursement of the requester's costs and imposition of civil fines available to disincentivize non-compliance. A declaratory judgment simply is not within the statutory remedial framework.

E. Hurst Is Not Entitled to Recover His Costs Because He Did Not "Substantially Prevail" on His Claim.

Hurst seeks to recover his costs related to this suit, including his filing fees and the postage necessary to mail the Petition. Hurst has provided no proof regarding the postage costs he allegedly incurred, so the Court is unable to award postage costs even if it found that Hurst substantially prevailed on his claim. Although Hurst also failed to provide proof of his court costs, the Court can take judicial notice of these costs.

As discussed *supra*, Hurst proved at trial that the City's responses to both of his FOIA requests were untimely. The question before the Court is whether this is sufficient for the Court to find that Hurst substantially prevailed on the Petition. Although there is no specific means to identify when an individual "substantially prevails" under FOIA—and therefore is entitled to be reimbursed for his or her costs—the threshold appears to be high. *See, e.g., Nageotte v. Bd. of Supervisors*, 223 Va. 259, 269–70, 288 S.E.2d 423, 428 (1982) (declining to award costs and attorney's fees where the public body was acting in good faith and its violation of FOIA did not

¹⁵ Of note, "[a]ny 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 or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested." *Va. Code* § 2.2-3704(C).

prejudice the requester). The Court recognizes, however, that the statute provides that a petitioner *shall* be entitled to reimbursement of his or her costs and fees if the court finds that the petitioner substantially prevailed and there are no special circumstances that make such an award unjust. *Va. Code* § 2.2-3713(D); *Redinger v. Casteen*, 36 Va. Cir. 479, 483 (Richmond 1995).¹⁶

The Supreme Court of Virginia has provided some guidance regarding this issue. It denied a request for costs where a county's Board of Supervisors conducted multiple improperly closed sessions in violation of FOIA because the violations were not carried out in bad faith. *Nageotte*, 223 Va. at 267–69. Similarly, other courts have declined to award costs for minor or technical FOIA violations. *See, e.g., Shenandoah Publ'g House, Inc. v. Winchester City Council*, 37 Va. Cir. 149, 154 (Winchester 1995) (declining to award fees where the violations were “minor and unintended”); *Little v. Va. Ret. Sys.*, 21 Va. Cir. 248, 251, 259 (Richmond 1990) (finding that the public body technically violated the statute, but ultimately deciding petitioner did not substantially prevail as he failed to prove large portions of his case).

The City's only noncompliance with FOIA was its untimely response to the First FOIA Request—by four working days—and its untimely response to the Second FOIA Request—by five working days. The Court finds that, under the circumstances present here, these errors are minor and merely technical statutory violations that do not rise to a level warranting an award of costs. Additionally, as discussed *supra*, there is no cognizable relief on which Hurst can assert that he substantially prevailed.¹⁷

Contrary to Hurst's allegations, the Court finds that the City did not intentionally delay producing responsive documents or otherwise act in bad faith; rather, it appears that the City reasonably responded to Hurst's requests. The Court also notes that all requested documents ultimately were produced by the City to Hurst's satisfaction. Based on the extensive communications between Hurst and the City, the City's efforts to work with Hurst and provide him the documents he sought, and the absence of bad faith by the City, the Court finds that ordering the City to reimburse Hurst for his costs is not warranted.

Conclusion

Although the City did not comply with the FOIA timeliness requirements, the Court finds that there are no FOIA violations for which relief is available under the statute. Additionally, because Hurst did not substantially prevail on his claim and the City did not act in bad faith, Hurst is not entitled to recover his costs associated with this action.

¹⁶ *See supra* note 5.

¹⁷ This is not to say that—under certain circumstances—the award of costs is always precluded when the petitioner does not obtain judicial relief. For example, if a public body acts in bad faith or intentionally delays producing records, an award of costs may be appropriate despite the petitioner ultimately receiving all requested records.

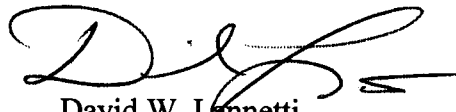
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Based on the foregoing, the Court SUSTAINS the City's motion to strike and DENIES Hurst's petition. Counsel for the City is directed to prepare and circulate an order consistent with this Opinion and submit it to the Court for filing within fourteen days.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Lannetti', with a stylized flourish extending to the right.

David W. Lannetti
Circuit Court Judge

DWL/man