



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

DAVID W. LANNETTI  
CHIEF JUDGE

150 ST. PAUL'S BOULEVARD  
NORFOLK, VIRGINIA 23510

September 2, 2022

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Joshua Stanfield  
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**Re: Joshua Stanfield v. City of Norfolk, Andria McClellan, and Thomas Smigiel, Jr. (Civil Docket No.: CL22-10511)**

Dear Mr. Stanfield and Counsel:

Today the Court rules on the demurrer (the "Demurrer") filed by Respondents the City of Norfolk (the "City"), Councilwoman Andria McClellan, and Councilman Thomas Smigiel, Jr. in response to the "Petition for Mandamus Relief" (the "Petition") filed by Petitioner Joshua Stanfield. Stanfield claims that Respondents violated the Virginia Freedom in Information Act (FOIA) because (1) the City failed to timely respond to Stanfield's first FOIA request; (2) Councilwoman McClellan never responded to Stanfield's second FOIA request; (3) the City failed to produce documents responsive to the second request, despite the related costs being less than \$200; (4) the City failed to provide a cost estimate for part of the first request, and the cost estimate for the second request was unreasonable; and (5) despite Councilman Smigiel's response that he had no responsive documents to the first request, he almost certainly does possess responsive documents based on the number of identified documents.

The Court finds that Stanfield (1) has not adequately pleaded that the City violated FOIA by not timely responding to the first FOIA request; (2) has not adequately pleaded that Councilwoman McClellan violated FOIA by not timely responding to the second FOIA request; (3) has adequately pleaded that the City violated FOIA by not producing records responsive to the second FOIA request; (4) has not adequately pleaded that the City violated FOIA by not providing an estimate of costs for part of the First FOIA Request or that the estimate for the second FOIA request was unreasonable; and (5) has not adequately pleaded that Councilman Smigiel's response was untrue.

The Court therefore SUSTAINS in part and OVERRULES in part the Demurrer.

## Background

### The First FOIA Request

On Thursday, June 23, 2022, Stanfield submitted a FOIA request (the “First FOIA Request”) to the City asking for “all documents and communication” (1) related to the drafting and finalization of the City’s ballot language for a 2020 casino referendum and (2) from 2022 containing the phrases “Harbor Park,” “200 Park Avenue,” and “boundary adjustment.” (Pet. ¶ 56.) Stanfield emailed this request to the official Norfolk City Council email address and the individual official email addresses of the City’s eight councilmembers, including Councilwoman McClellan and Councilman Smigiel. (*Id.* ¶ 55.) The request included Stanfield’s email address, phone number, and city of residence: Yorktown, Virginia. (*Id.* ¶ 57.) Smigiel responded the same day by emailing Stanfield a link to the City’s official FOIA portal. (*Id.* ¶ 58.) Smigiel also informed Stanfield that he did not possess any of the requested documents and that the City Attorney and the City’s FOIA office would handle Stanfield’s other requests. (*Id.* ¶ 60.)

Amanda Littlefield, a City FOIA officer, acknowledged receipt of the FOIA request and asked Stanfield for his full address via email on June 24, the same day. (*Id.* ¶ 61.) On July 1, Stanfield emailed Littlefield his full address: 208 Crestwood Court, Yorktown, Virginia, 23692. (*Id.* ¶ 62.) Littlefield responded to Stanfield the same day, acknowledging receipt of his full address. (*Id.* ¶ 65.) On July 11, the City sent Stanfield a seven-day extension letter, which stated that the new due date for the First FOIA Request was July 20. (*Id.* ¶ 73 & Exs. 22, 23.) On July 13, Stanfield emailed all councilmembers, Littlefield, and Heather Tierney—another City FOIA officer—at their official City of Norfolk email addresses following up on the FOIA request. (Pet. ¶ 66.) Councilwoman Mamie Johnson emailed Stanfield on July 13 acknowledging receipt of the June 23 request. (*Id.* ¶ 67.)

On July 19, the City emailed Stanfield a cost estimate for the First FOIA Request indicating that the City required prepayment because the cost estimate exceeded \$200. (*Id.* ¶ 79.) The cost estimate was \$856.49 for the second part of the request, *i.e.*, the 2022 records containing the specific phrases. (*Id.* ¶ 80.) It included charges between \$17.72/hour and \$24.16/hour for City staff members who would be involved. (*Id.* Ex. 28.) The first part of the request, which asks for “documents and communications” about the 2020 casino referendum ballot language, is not addressed in the City’s cost estimate. (*Id.* ¶ 56.)

### The Second FOIA Request

On Friday, July 1, 2022, Stanfield submitted via email a second FOIA request (the “Second FOIA Request”) to Councilwoman McClellan asking for “documents and communications” in her possession that contained the phrase “temporary casino.” (*Id.* ¶¶ 63–64.) Stanfield included in the request the following statement: “I’m further requesting that you **not reroute this request** and, instead, fill it yourself - as I am not financially able to pay for these public records, if they exist.” (*Id.* ¶ 64.) On July 18, Stanfield sent a follow-up email to McClellan inquiring as to the status of his request. (*Id.* ¶ 75.) Tierney, a City FOIA officer, acknowledged Stanfield’s FOIA request via email the same day. (*Id.* ¶ 78.) On July 20, the City

emailed Stanfield a cost estimate of \$37.06 for the request. (*Id.* ¶ 86.) The cost estimate was based in part on a \$51.58/hour rate for a City staff member to conduct a “global email search.” (*Id.* ¶ 85, Ex. 30.) The estimate included the following statement: “The comment on your request that you ‘cannot afford’ to pay for the email search led us to provide you with an estimate of charge, as allowed by state law, to conduct the search and produce the response charges. Charges are not waived.” (*Id.* ¶ 86.) There apparently were no further negotiations between the parties.

### Petitioner’s Claims and Relief Sought

Stanfield filed the Petition against the City of Norfolk, Councilman Smigiel, and Councilwoman McClellan on August 11, 2022.<sup>1</sup> Stanfield claims that the Respondents violated FOIA because (1) the City failed to timely respond to the First FOIA Request (Stanfield’s “First Cause of Action”) (Pet. ¶¶ 88–103); (2) Councilwoman McClellan never responded to the Second FOIA Request (Stanfield’s “Second Cause of Action”) (*Id.* ¶¶ 104–19); (3) the City failed to produce documents responsive to the Second FOIA Request (Stanfield’s “Third Cause of Action”) (*Id.* ¶¶ 120–29); (4) the City failed to provide a cost estimate for part of the First FOIA Request, and the cost estimate for the Second FOIA Request was unreasonable (Stanfield’s “Fourth Cause of Action”) (*Id.* ¶¶ 130–35); and (5) despite Councilman Smigiel’s response that he had no responsive documents to the First FOIA Request, he almost certainly possesses responsive documents based on the large number of identified documents (Stanfield’s “Fifth Cause of Action”) (*Id.* ¶¶ 136–42).

Stanfield requests mandamus relief, asking that the Court direct the City to provide documents responsive to both the First FOIA Request and the Second FOIA Request at no cost. (*Id.* ¶¶ 1, 166.) He also requests reimbursement of his costs, including his filing fee and process service costs. (*Id.*) Lastly, Stanfield requests that the Court impose a civil penalty against Councilman Smigiel for violating FOIA. (*Id.* at 38.)

The Court held a hearing (the “Hearing”) on August 18, 2022. At the conclusion of the Hearing, the Court took the matter under advisement.

### **Positions of the Parties**

#### Stanfield’s Position

Regarding the First FOIA Request, Stanfield contends that the City failed to respond within five working days as required by Virginia FOIA law. (*Id.* ¶ 22.) He argues that the five-day compliance deadline started on June 24, 2022, the first working day after the City received the request, and that the City’s response therefore was due on or before June 30, five working days later. (*Id.* ¶¶ 22, 25.) Stanfield claims that his failure to provide the City his full address did not toll the FOIA response deadline. (*Id.* ¶¶ 23–24.) He also contends that the City provided no response until June 11, when it sent Stanfield a seven-day extension letter via the FOIA online

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<sup>1</sup> Stanfield filed a separate “Motion to Append Affidavit” to the Petition on August 15, 2022, which was unopposed by the City. At the hearing on the Demurrer, the Court granted the motion.

portal and notified him via email. (*Id.* ¶¶ 31–32.) Stanfield further claims that the City did not provide him an estimate of costs for part of the FOIA request. (*Id.* ¶¶ 30–31.) Lastly, Stanfield contends that despite Councilman Smigiel’s response that he had no responsive documents to the First FOIA Request, he almost certainly possesses at least one of the 3,000 documents identified. (*Id.* ¶¶ 31–32.)

Regarding the Second FOIA Request, Stanfield alleges that Councilwoman McClellan never responded to his request and that the City did not respond within five days as required. (*Id.* ¶ 25.) He argues that the FOIA response period started on July 1, and that the City’s response therefore was due by July 11. (*Id.* ¶ 28.) Stanfield contends that the City did not respond to the request until a July 18, email acknowledging receipt and a July 20, email providing a cost estimate in the form of an invoice. (*Id.* ¶ 26, Ex. 30.) Stanfield further alleges that the City did not produce any responsive documents even though the City’s cost estimate was less than \$200. (Pet. ¶ 30.) Lastly, Stanfield argues that the City’s estimate of costs for the Second FOIA Request was unreasonable based on the disparity between the hourly rates in this request and those in the First FOIA Request estimate. (*Id.* ¶ 31.)

#### The City’s Position

Regarding the First FOIA Request, the City claims that because Stanfield did not provide his full legal address until July 1, 2022, the City’s five-day compliance period did not start until then. (Dem. ¶ 1.) It also argues that, based on the July 1 start date, it timely produced an estimate of costs. (*Id.*) Lastly, the City contends that Stanfield is not entitled to the documents responsive to this request because he has not paid for them and the estimated cost exceeds \$200. (Mem. Supp. Resp’ts Dem. & Opp’n Mandamus Relief (“Mem.”) 2.)

Regarding the Second FOIA Request, the City contends that Councilwoman McClellan was not required to respond because she is not a public body subject to FOIA. (Mem. 4.) Further, the City argues that once the FOIA office received the request, it promptly reached out to Stanfield and informed him that he would need to pay for the records. (*Id.*)

Also with respect to the Second FOIA Request, the City argues that because Stanfield indicated he could not pay for any responsive documents, it was not required to produce such documents even though the estimated cost was less than \$200. (*Id.* at 13.)

Regarding the First FOIA Request, the City contended at the Hearing that Stanfield’s request for two sets of documents in a single request constituted a single FOIA request. Further, the City alleges that the fact that it provided no cost estimate for part of the request implied that there was no additional cost for that part of the request. (Dem. ¶ 4.)

Also with respect to the First FOIA Request, the City contends that Stanfield’s assertion that Councilman Smigiel violated FOIA by improperly claiming that he did not possess responsive documents is purely speculative and, in any case, does not rise to the level of a willful and knowing violation of FOIA. (*Id.* ¶ 5; Mem. 5.)

Regarding Stanfield's prayer for costs and civil penalties, the City asserts that the Court should not award any, as neither the City nor any councilmember committed any FOIA violations. (Mem. 15.)

### Analysis

#### Legal Standard

A demurrer tests the legal sufficiency of the claims stated in the pleading challenged. *Dray v. New Mkt. Poultry Prods., Inc.*, 258 Va. 187, 189, 518 S.E.2d 312, 312 (1999). On demurrer, the court must admit the truth of all material facts properly pleaded, facts that are impliedly alleged, and facts that may be fairly and justly inferred from the alleged facts. *Cox Cable Hampton Rds., Inc. v. City of Norfolk*, 242 Va. 394, 397, 410 S.E.2d 652, 653 (1991). However, the court may also examine, in addition to the substantive allegations of the pleading attacked, any accompanying exhibits to the pleading. *Flippo v. F & L Land Co.*, 241 Va. 15, 17, 400 S.E.2d 156, 156 (1991). A demurrer also does not admit the correctness of any conclusions of law. *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997).

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). 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." *Id.* § 2.2-3700(B) "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.*

"The [FOIA] request need not make reference to [FOIA] in order to invoke the provisions of [FOIA] or to impose the time limits for response by a public body." *Va. Code* § 2.2-3704(B). A public body, but not a public official, must comply with FOIA procedures and time constraints. *Connell v. Kersey*, 262 Va. 154, 162, 547 S.E.2d 226, 232 (2001). "A public body conducts 'meetings' involving the business of the public, whereas a public official may or may not conduct such public meetings." *Id.* at 161, 547 S.E.2d at 232.

"The [FOIA] custodian may require the requester to provide his name and legal address." *Va. Code* § 2.2-3704(A).

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).

“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).

Prior to conducting a search for records, the public body shall notify the requester in writing that the public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records and inquire of the requester whether he would like to request a cost estimate in advance of the supplying of the requested records.

*Id.* “The public body shall provide the requester with a cost estimate if requested.” *Id.* 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 [a FOIA violation has occurred], 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 an officer, employee, or member of a 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 against the person in his individual capacity. *Id.* § 2.2-3714.

### Discussion

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

The purpose of FOIA is to ensure the transparency of government and “promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” *Va. Code* § 2.2-3700(B) (Repl. Vol. 2017). In response to a FOIA request, a public body must respond within five working days in one of five ways: (i) produce the documents; (ii) notify the requester that the requested records are being entirely withheld; (iii) notify the requester that the requested records are being provided in part and withheld in part; (iv) notify the requester that the requested records could not be found or do not exist; or (v) notify the requester that it is not practically possible to provide the requested records or determine whether they are available, whereupon the public body has an additional seven work days to respond. *Id.* § 2.2-3704(B). Additionally, the public body “shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.” *Id.* § 2.2-3700(B).

FOIA also allows the public body to charge the requester for the actual cost to respond 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. *Stanfield has not adequately pleaded that the City violated FOIA by not timely responding to the First FOIA Request.***

Stanfield alleges that the City failed to respond timely to the First FOIA Request. Specifically, he asserts that he adequately demonstrated that he was a Virginia citizen by listing “Yorktown, Virginia,” in his FOIA request and that the five-day FOIA response period therefore started the day after the City’s receipt of the request, *i.e.*, on June 24. The City, on the other hand, argues that the response period started the day after the City received Stanfield’s full address, *i.e.*, on July 2. The Court agrees with the City.

FOIA expressly provides that “[t]he custodian [of records] may require the requester to provide his name and legal address.” *Va. Code* § 2.2-3704(A) (Repl. Vol. 2017). The common understanding of a person’s “legal address” includes the registered lot number and street name. *See, e.g.*, Address, *Black’s Law Dictionary* (11th ed. 2019) (defining “address” as “[t]he place where mail or other communication is sent”).

As the FOIA Advisory Council has opined, “A [FOIA] custodian may certainly require a requester to provide his legal name and address [and] may also ask for verification that a requester is a citizen of the Commonwealth.” FOIA Advisory Council Op. (AO-05-18, Aug. 8, 2018). Although a public body cannot require a “specific form of identification without an alternative for those who do not have such identification,” FOIA officers are entitled to ensure that requesters are citizens of Virginia.<sup>2</sup> *Id.* (opining that requiring presentment of a driver’s license or other photographic identification could violate FOIA policy). Here, the City was simply requesting that Stanfield also provide, in addition to the city of county in which he resides, his street address. Although courts should liberally interpret FOIA, the statute expressly provides that the City can ask requesters for their legal address. *Va. Code* § 2.2-3704(A). Further, the Virginia General Assembly added this specific language in 2002, indicating its express intent to provide public bodies this right. *Id.* The Court finds that the City’s inquiry was appropriate under FOIA.

The City essentially asserts that the start of the response period was tolled until Stanfield provided his full address. Initially, the Court finds that this is distinguishable from when a requester fails to provide sufficient specificity in his initial request, which does not involve tolling. This Court previously held that tolling of the five-day response window does not occur upon receipt of a non-specific request; rather, the government should resolve any specificity issues during the required five-day response period if possible. *Hurst v. City of Norfolk*, 97 Va. Cir. 158, 170 (2017) (relying on *Va. Code* §§ 2.2-3704(B), (E)). Unlike the specificity requirement, the right to verify a requester’s address is specifically included in the statutory

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<sup>2</sup> In addition to verifying Virginia citizenship, the legal address may be used to verify that the requester is not exempted from requesting public records via a FOIA request, *e.g.*, the requester is not incarcerated. *Va. Code* § 2.2-3703(C); *see also* FOIA Advisory Council Op. (AO-06-06, May 25, 2006) (discussing that “while the General Assembly has chosen to grant rights of access to public records and public meetings to citizens [of Virginia] generally, it has chosen not to grant those same rights to incarcerated persons”).



language. The Court holds that verification of a requester's legal address acts as a gatekeeping device to ensure only eligible citizens of the Commonwealth gain access to public records under FOIA. *Va. Code* §§ 2.2-3704(A). Hence, if a public body properly requests the requester's legal address, there is no tolling of the response period; rather, the Court holds that the public body has not received a proper FOIA request until the address is received.

Here, Stanfield did not provide his legal address to the City until July 1. Therefore, the Court finds that the FOIA request was not properly submitted to the City until July 1. Further, the Court finds that the City timely provided Stanfield a seven-day extension notice on July 11. *See id.* § 2.2-3704(B)(4).

The City then timely provided Stanfield a cost estimate for the FOIA request on July 19. The City's cost estimate totaled \$856.49, and the City indicated that it required prepayment. Stanfield had not made any payment as of the date of the Hearing. Because the FOIA costs were likely to exceed \$200, the City was justified in requiring Stanfield to pay a deposit—not to exceed the estimated cost—before continuing to work on the request. *Id.* § 2.2-3704(H). Per the statute, the response period was tolled—and the City was not required to take any further action—between notice of the cost estimate and receipt of the deposit.

Hence, even assuming the allegations pleaded are true, the City has not failed to comply with FOIA by not timely responding to the First FOIA Request because the City timely responded to the request and Stanfield has not paid for the requested records. The Demurrer is sustained as to this case of action, *i.e.*, Stanfield's "First Cause of Action," and this claim is dismissed with prejudice.

***B. Stanfield has not adequately pleaded that Councilwoman McClellan violated FOIA by not timely responding to the Second FOIA Request.***

Stanfield alleges that Councilwoman McClellan violated FOIA by failing to timely respond to the Second FOIA Request, which Stanfield emailed to her on July 1, 2022. The City asserts that Stanfield is precluded from seeking information subject to FOIA from individual public officials because they are not public bodies and that the City promptly responded when it became aware of the request on July 18. The Court holds that although McClellan—as an agent or employee of the City—could receive a FOIA request on behalf of the City, she had no obligation to respond, individually, under FOIA.

FOIA enables Virginia citizens to access public records from *any public body* that is subject to the act. *Va. Code* § 2.2-3704(B) (Repl. Vol. 2017) (emphasis added) (requiring a "response by a public body" to a FOIA request). It is undisputed that the City is a public body for purposes of FOIA. *See id.* § 2.2-3701 (defining "public body"). Further, the statutory timeline to respond to FOIA requests applies only to "[a]ny *public body* that is subject to [FOIA] and that is the custodian of the requested records." *Id.* § 2.2-3704(B) (emphasis added). As the Supreme Court of Virginia has pointed out, a "public body" and a "public official" are not the same. *Connell v. Kersey*, 262 Va. 154, 161, 547 S.E.2d 226, 232 (2001). "Essentially, a public body conducts 'meetings' involving the business of the public, whereas a public official may or may

not conduct such public meetings.” *Id.* It is undisputed that, as an elected City of Norfolk Councilmember, McClellan is a public official; however, she is not a public body and therefore had no obligation to respond under FOIA to the Second FOIA Request. However, as discussed *infra*, this does not mean that Stanfield was not entitled to a response.

Although the City has a FOIA online portal—apparently for expediency, tracking, and the requester’s convenience—FOIA itself does not restrict the method by which a Virginia citizen may request public records. *See Va. Code* § 2.2-3704 (detailing procedures to request public records but making no mention of where to submit FOIA requests). It is clear, however, that FOIA is designed to provide to a requester any “public records [that are] in the custody of a public body or its officers and employees.” *Va. Code* § 2.2-3700(B). It therefore makes sense that officers and employees can receive FOIA requests that trigger a responsive action by the public body.<sup>3</sup> *See* FOIA Advisory Council Op. (AO-01-17, Jan. 10, 2017) (treating receipt of a FOIA request by a City employee or the City Manager as a valid request). The Court therefore disagrees with the City that Stanfield improperly sent a FOIA request to McClellan personally.

The Court finds that the statutory FOIA response period begins when a public body receives a valid FOIA request, either directly from the requestor or via an agent or employee of the public body. *See id.* (recognizing receipt of a FOIA request by a city employee as a request “received by the public body” and commencing the FOIA response period upon receipt). As an elected official, McClellan certainly was an officer or agent of the City, and the City therefore was required to meet the FOIA deadlines applicable to public bodies once McClellan received the request for public records. In the spirit of openness inherent in FOIA, an individual officer, agent, or employee should promptly forward a received FOIA request to the public body’s FOIA officer for processing. *Id.* § 2.2-3704.2 (requiring that all public bodies have a designated FOIA officer as of 2016). This is because the individual council member—as a public official and not the public body itself—is not required to adhere to the strict procedural and time limits of FOIA, although the public body is. *Connell*, 262 Va. at 162, 547 S.E.2d at 232. Hence, the Court agrees with the City that McClellan was not required to respond personally to Stanfield’s Second FOIA Request.<sup>4</sup>

The Court recognizes that Stanfield requested public records from McClellan—which she might or might not have—that the City might not possess.<sup>5</sup> Such records, if any exist, might

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<sup>3</sup> The City essentially concedes that FOIA requests are not required to be submitted through its online portal. In an email to Stanfield, the City states the following: “Registering with the City’s [online FOIA portal] was not part of the requirement for your FOIA request to be properly submitted, instead it is an option given to make the process easier and less expensive.” (Pet. Ex. 21.)

<sup>4</sup> Additionally, the Court expressly rejects Stanfield’s implication that he can somehow bypass his statutory obligation to pay for public records by submitting a request directly to a public official—as opposed to the associated public body—and asking that official not to reroute the request to the public body.

<sup>5</sup> The better practice is for individual officers and employees of a public body to ensure that all self-generated public records are shared with the public body so that the public body can more quickly access the records and respond to any related FOIA requests. *See* FOIA Advisory Council Op. (AO-02-14, Jan.

nevertheless be subject to FOIA. *See Va. Code* § 2.2-3701 (defining “public records” to include those records “prepared or owned by, or in the possession of a public body *or its officers, employees or agents* in the transaction of public business” (emphasis added)). Therefore, the City was required to provide to Stanfield any records that were responsive to the FOIA request he sent to McClellan.<sup>6</sup> Further, the City likely still is the custodian of any public records in McClellan’s possession, assuming such records exist, because the City probably had constructive possession of them.<sup>7</sup> *See* FOIA Advisory Council Op. (AO-02-14, Jan. 29, 2014) (“In the sense of constructive or legal ownership, the [public body] is the custodian of all public records concerning the transaction of the [body’s] public business, regardless of who has actual possession.”). Upon receipt of the Second FOIA Request, McClellan—like any officer, employee, or agent of a public body who receives a FOIA request—should have notified the City FOIA officer so that the City could timely respond to the request consistent with FOIA requirements.<sup>8</sup>

The Court reiterates that McClellan is not a public body for purposes of FOIA and therefore is not subject to the procedures or time limits imposed by the statute. *See* FOIA Advisory Council Op. (AO-06-14, Sept. 26, 2014) (“In analyzing a FOIA matter, the first consideration must always be whether the entity receiving the request is a public body subject to FOIA.”). Her obligation, as an officer or agent of the City who received a FOIA request for public records of the City, was merely to forward the Second FOIA Request to the City’s FOIA office. Even accepting the facts alleged in the Petition as true, as the Court must for purposes of the Demurrer, McClellan did not violate FOIA. Hence, the Demurrer is sustained as to this case of action, *i.e.*, Stanfield’s “Second Cause of Action,” and this claim is dismissed with prejudice. Further, because this the only cause of action against Councilwoman McClellan, she is dismissed as a party in this suit.

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29, 2014) (“FOIA is silent regarding [practices involving personal email accounts of public officials], but keeping in mind that the definition of public records would include all such emails in the transaction of public business, regardless of the account used, we have advised that all emails in the transaction of public business should either be on government accounts or be copied to staff.”). Such a practice also would assist the public body in complying with record retention requirements.

<sup>6</sup> This would require coordination between McClellan and the City if McClellan truly possessed responsive public records that the City did not possess.

<sup>7</sup> FOIA does not define the term “custodian,” although the FOIA Advisory Council has opined that “the term custodian for FOIA purposes is dependent on preparing, owning, or possessing public records.” FOIA Advisory Council Op. (AO-02-14, Jan. 29, 2014).

<sup>8</sup> This is not to say that individuals are precluded from responding directly to requesters. Further, an individual who causes or contributes to a FOIA violation could be subject to civil penalties. *Va. Code* § 2.2-3714.

**C. *Stanfield has adequately pleaded that the City violated FOIA by not producing records responsive to the Second FOIA Request, despite the related estimated costs totaling less than \$200.***

Stanfield asserts that the City violated FOIA because it never provided documents responsive to the Second FOIA Request, despite the fact that the City's estimated cost associated with producing those records was less than \$200. The City claims that it was relieved of its obligation to produce the records because Stanfield stated in his request that he was not financially able to pay for them. The City conceded at the Hearing that had Stanfield not made this statement, it would have produced the responsive records and subsequently invoiced Stanfield for the cost.

Stanfield alleges that the City failed to timely respond to the FOIA request he submitted on July 1, 2022. Under FOIA, a public body must either produce responsive records or respond with one of the four acceptable alternative answers within five working days of receiving a FOIA request. *Va. Code* § 2.2-3704(B) (Repl. Vol. 2017). Stanfield argues that the FOIA response period started the day after the July 1 request and that the request therefore was due on or before July 11. *See* FOIA Advisory Council Op. (AO-06-14, Sept. 26, 2014) (noting that weekends and legal holidays are not considered "working days"). As discussed *supra*, the Court finds that the FOIA response period started when Councilwoman McClellan received the request and not the date on which the City's FOIA office received it.<sup>9</sup> Although the FOIA office processed the request promptly upon its receipt on July 18, this was beyond the five days allowed for an appropriate request.

If a public body determines, before completing the search and response, that the costs of complying with the FOIA 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) (Repl. Vol. 2017). However, there is no similar provision allowing the public body to require prepayment for requested records when the costs are not likely to exceed \$200. The FOIA Advisory Council has held as follows:

In a situation where a public body has provided an estimate, the response time limit is reached, and the estimated charges are less than \$200, a public body is compelled by the statutory requirements to provide records without waiting to hear further from a requester, unless there is an explicit agreement setting different terms.

FOIA Advisory Council Op. (AO-05-14, June 12, 2014).

Here, the City asserts that it was not required to produce the records, despite the fact that the associated estimated cost was less than \$200, because Stanfield indicated in his request that he could not pay for them. The Court holds that this position is inconsistent with both the

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<sup>9</sup> Because the responsive records had not been provided as of the Hearing date, the production also would have been untimely even if the response period starting date were based on the date the City received the request.

statutory language and the spirit of FOIA, which promotes transparency and accessibility to public records for Virginia citizens. *Va. Code* § 2.2-3700(B). Production of public records that will cost the public body less than \$200 is not contingent upon payment—or presumably upon the requester’s ability to pay, or the public body’s assessment of the requester’s ability to pay. Rather, the public body normally is *compelled* to produce such records “without waiting to hear further from a requester.”<sup>10</sup>

Although the Court appreciates the City’s position—that it should not have to produce records after the requester declares that he will not pay for them—there is an express statutory provision that addresses a requester’s failure to pay an invoice for FOIA records, *i.e.*, the inability to have *future* FOIA requests processed. *Id.* § 2.2-3704(I) (“Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.”). There is no indication that Stanfield failed to pay for any records provided to him by the City pursuant to any prior FOIA requests. The Court finds that the intent and structure of FOIA lead to the conclusion that Stanfield’s statement did not relieve the City of its obligation to produce the requested records, as the estimated cost was less than \$200. If Stanfield fails to pay for those documents within thirty days of billing, he would be precluded from having future FOIA requests processed by the City.

Based on the allegations in the Petition, which the Court assumes are true for purposes of ruling on the Demurrer, the Court overrules the Demurrer as to this case of action, *i.e.*, Stanfield’s “Third Cause of Action.”

***D. Stanfield has not adequately pleaded that the City violated FOIA by not providing an estimate of costs for part of the First FOIA Request or that the estimate for the Second FOIA Request was unreasonable.***

Stanfield asserts that (1) the City’s cost estimate for the First FOIA Request, totaling \$856.49, violates FOIA because it only references one of the two parts of the request; and (2) the City’s cost estimate for the Second FOIA Request is unreasonable because one of the listed “staff time” hourly rates is more than the listed rates in the cost estimate for the First FOIA Request. The City asserts that (1) the City’s election not to list part of the request in the estimated cost indicates that there was no charge for the non-listed records and (2) the indicated rates in the costs estimates are reasonable based on who would be performing the tasks relevant to the production of the corresponding records.

FOIA provides that “a public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records and shall make all reasonable efforts to supply the requested records at the lowest possible cost.” *Va. Code* § 2.2-3704(F) (Repl. Vol. 2017). Additionally, “where a public body determines in

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<sup>10</sup> The Court disagrees with the City’s position that “[p]ublic bodies retain discretion to require payment in the interest of their taxpayers, or to partially or completely waive this requirement” when the estimated cost of production is less than \$200. (Mem. 5.)

advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to pay a deposit not to exceed the amount of the advance determination.” *Id.* § 2.2-3704(H). As the FOIA Advisory Council has noted, “FOIA does not specify the level of detail to be provided in estimating the charges, nor does it explicitly mandate an explanation of charges after a requester has been billed.” FOIA Advisory Council Op. (AO-05-13, May 30, 2013). Further, “the question of whether a particular charge is reasonable may only be decided by a court.” *Id.*

1. The City’s cost estimate for the First FOIA Request does not violate FOIA.

The Court finds that Stanfield’s First FOIA Request, which identified two items in one email, constituted a single FOIA request. Further, the Court agrees with the City that the absence of a cost estimate for one part of the request—and inclusion of a cost estimate for the other part—sufficiently communicated that there were no additional costs beyond those indicated. Stated differently, the Court finds that the City adequately informed Stanfield that it was only charging him the amount listed for all records responsive to the First FOIA Request. If and when Stanfield pays the invoice associated with the First FOIA Request, he is entitled to *all* documents requested in that request.

The Demurrer therefore is sustained with respect to this part of the claim.

2. Based on the exhibits accompanying the Petition, the cost estimate related to the Second FOIA Request does not violate FOIA.

Stanfield alleges that the cost estimate provided by the City for the Second FOIA Request is unreasonable because the listed “staff time” hourly rates—\$24.16 and \$51.58—greatly exceed those in the cost estimate associated with the First FOIA Request—\$17.72 and \$24.16. The City claims that the \$51.58/hour rate is associated with an individual with special email search privileges to search councilmembers’ email addresses and that the rates therefore are reasonable.

With respect to “staff time” hourly rates related to producing records, the FOIA Advisory Council has opined as follows:

Considering staff time more closely, FOIA generally presumes that processing a records request is a ministerial task that will be performed by administrative or clerical staff. If higher-level staff or officials are processing a request, their higher pay rate may reflect the actual cost incurred, but it will not necessarily be reasonable to charge at the higher pay rate *unless there is some specific reason why the request must be handled by a higher-level person*. Charges are not to be used as a deterrent to requests, as that would be contradictory to the basic policy of FOIA favoring openness and ready access to public records.

FOIA Advisory Council Op. (AO-07-11, Nov. 9, 2011) (emphasis added).

Here, the invoice for Stanfield's First FOIA Request incorporated hourly rates of \$17.72 and \$24.16, which resulted in a total cost estimate of \$856.49.<sup>11</sup> For the Second FOIA Request, the City provided an estimate of costs, totaling \$37.06, that included—in addition to the same \$24.16 hourly rate in the first request for “reviewing responsive emails”—a \$51.58 hourly rate for “conducting global email search.” The City proffered at the Hearing that the higher hourly rate was for an individual with special email search privileges to search councilmembers' email accounts. The Court finds that this constitutes the requisite specific reason why that aspect of the request needed to be handled by a higher-level individual.

The Court notes that the City estimated only 0.25 hours for the higher-rate search, with a resultant *total charge of \$12.90*.<sup>12</sup> Even though the Court must assume all allegations as true at this point in the proceedings—and despite the fact that the Court has not received any evidence—the Court is entitled to examine any exhibits accompanying the Petition. *Flippo v. F & L Land Co.*, 241 Va. 15, 17, 400 S.E.2d 156, 156 (1991).

Based on a review of the exhibits to the Petition regarding invoiced charges (Pet. Exs. 28, 30), the Court finds that the cost estimate related to the Second FOIA Request is reasonable and does not violate FOIA. The Demurrer therefore is sustained with respect to this part of the claim.

Based on the above, the Demurrer is sustained as to this case of action, *i.e.*, Stanfield's “Fourth Cause of Action,” and this claim is dismissed with prejudice.

***E. Stanfield has not adequately pleaded that Councilman Smigiel's response—that he had no responsive documents to the First FOIA Request—was not true.***

Stanfield requests that the Court impose a civil penalty against Councilman Smigiel, individually, for violating FOIA. Specifically, Stanfield contends that Smigiel, despite his denial, must have some responsive documents based on the large number of documents—3,000—that the City identified in the invoice related to the First FOIA Request. The City argues that Stanfield's claim amounts to nothing more than pure speculation.

Under FOIA, if an officer, employee, or member of a public body willfully and knowingly violates FOIA, the court shall impose a civil penalty. *Va. Code* § 2.2-3714 (Repl. Vol. 2017). Hence, a petitioner must first demonstrate a FOIA violation and then prove that the violation was willful and knowing. Here, Stanfield has done neither.

As an initial matter, the First FOIA Request does not appear to request any public records that would be unique to any individual councilmember. Rather, it appears to be a request for public records that are in the possession of the City. Further, as discussed *supra*, individual councilmembers themselves have no duty to adhere to the FOIA procedures and deadlines, as

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<sup>11</sup> The relatively high charge apparently was based on the broad scope of Stanfield's request, which the City estimated would require more than thirty-seven hours of “staff time” to fulfill. (Pet. Ex. 28.)

<sup>12</sup> Of note, this is *only \$6.86 more* than if an hourly rate of \$24.16—a rate not contested by Stanfield—had been used.

they are not public bodies. Even if individual councilmembers had responsive documents that only they possessed, it would be up to the City to collect and produce those documents in accordance with FOIA. Smigiel has no duty to produce responsive records to Stanfield directly. The Court finds that, even assuming Stanfield's allegations as true, Smigiel has not committed a FOIA violation.

Additionally, Stanfield has not adequately pleaded that Smigiel's response—that he had no responsive documents to the First FOIA Request—was untrue. Instead, Stanfield merely speculates that Smigiel must have some responsive documents based on the number of responsive documents the City identified as responsive to the First FOIA Request. Stanfield offers no allegations to support that Smigiel willfully and knowingly violated FOIA.

Even accepting the facts alleged in the Petition as true, as the Court must, the Court sustains the Demurrer as to this cause of action, *i.e.*, Stanfield's "Fifth Cause of Action," and this claim is dismissed with prejudice. Further, because this the only cause of action against Councilman Smigiel, he is dismissed as a party in this suit.

#### ***F. Costs and Civil Penalties.***

Stanfield requests costs and civil penalties associated with the FOIA violations he has alleged. Based on the Court's analysis above, the only alleged FOIA violation that survives the Demurrer is the City's alleged failure to produce records responsive to the Second FOIA Request, despite the related estimated costs totaling less than \$200.

FOIA states that "the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorney fees from the public body if the petitioner substantially prevails on the merits of the case." *Va. Code* § 2.2-3713(D) (Repl. Vol. 2017). Although civil penalties *against individuals* may be available for FOIA violations, *id.* § 2.2-3714(D), there apparently is no similar provision for assessment of civil penalties against a public body.<sup>13</sup>

Although the award of costs and fees potentially is available should Stanfield substantially prevail on his claim that the City violated FOIA by not producing records responsive to the Second FOIA Request, these issues are not appropriate to resolve at the demurrer phase of the proceedings.

#### **Conclusion**

For the reasons discussed above, the Court SUSTAINS the Demurrer with respect to Stanfield's First, Second, Fourth, and Fifth Causes of Action and dismisses those claims with prejudice. Further, the Court OVERRULES the Demurrer with respect to Stanfield's Third

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<sup>13</sup> Although Stanfield alleges that the City willfully and knowingly violated FOIA (Pet. ¶¶ 158–65), he appears to seek only "reimbursement of his filing fee and process service costs" and "responsive public records at no cost" (*id.* ¶¶ 166, 169) in his claim for "Costs & Civil Penalties."



Re: *Stanfield v. City of Norfolk, et al.* (CL22-10511)

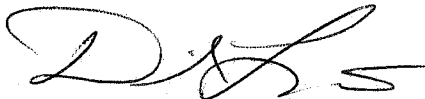
September 2, 2022

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Cause of Action—that the City violated FOIA by not producing records responsive to the Second FOIA.

Attached is an Order incorporating the Court's ruling. Any objections shall be filed with the Court within fourteen days. Additionally, the parties are directed to submit either a Scheduling Order for Trial or a Notice of Evidentiary Hearing within fourteen days to facilitate resolution of the remaining issues in the case.

Sincerely,

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

David W. Lannetti  
Chief Judge

DWL/aja