

TWENTY-THIRD JUDICIAL CIRCUIT
OF VIRGINIA



LEISA K. CIAFFONE, JUDGE
OLIVER W. HILL JUSTICE CENTER
315 CHURCH AVENUE, S.W.
P.O. BOX 211
ROANOKE, VIRGINIA 24002-0211
(540) 853-2437
FAX (540) 853-1040

CIRCUIT COURT FOR THE COUNTY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF SALEM

COMMONWEALTH OF VIRGINIA

November 5, 2025

Via U.S. Mail and
Email: founder@roanokerambler.com

Henri Gendreau
31 Campbell Ave., SW, Suite 100
Roanoke, VA 24016

Via U.S. Mail and
Email: jcarroll@spilmanlaw.com

Jeremy E. Carroll, Esq.
Spilman Thomas & Battle
310 First Street, Suite 1100
Roanoke, VA 24011

Re: Henri Gendreau v. Mike McEvoy
Roanoke City Circuit Court
CL25-2187

Dear Mr. Gendreau and Mr. Carroll,

This matter is before the court upon Henri Gendreau's Petition for Writ of Mandamus, filed pursuant to Va. Code § 2.2-3713. In his Petition, Mr. Gendreau alleges that his rights and privileges under the Freedom of Information Act, Va. Code § 2.2-3700 – § 2.2-3715 ("FOIA") were improperly denied by the Western Virginia Water Authority ("WVWA"). He alleges that WVWA "failed to cite an exemption under Virginia FOIA in withholding information and has also made an improper exemption under FOIA in redacting records." Petition, filed Oct. 9, 2025. The court conducted an evidentiary hearing on October 16, 2025. Mr. Gendreau appeared *pro se*. Mike McEvoy, Executive Director of WVWA, appeared in person and by counsel. The court has considered the pleadings, the evidence submitted, and the oral arguments made at the hearing on October 16, 2025. The court is ready to rule.

November 5, 2025

p. 2

I. Facts.

There are no material facts in dispute in this case. WVWA is a party to a Water Supply and Infrastructure Planning and Development Services Agreement between WVWA and Botetourt County, Virginia ("Water Supply Agreement"). Pet. Ex. 1. WVWA is also a party to a Utility Services Funding Agreement between WVWA and Helio Capital LLC ("Utility Agreement"). Helio Capital, LLC is an affiliate of Google, LLC and Alphabet, Inc. ("Google") Pet.'s Ex. 1 and Def. Ex. 3.

These agreements pertain to a proposed project between WVWA (owner of the Carvin's Cove water reservoir), Botetourt County, and Google. The project is for a data center that may be constructed in Botetourt County. The data center will use a large quantity of water, and the only source of such a large quantity of water is the Carvin's Cove reservoir. Pet. Ex. 2 and Def. Ex. 3.

On September 5, 2025, Mr. Gendreau emailed to WVWA a request for a copy of the Water Supply Agreement and the Utility Agreement which would be voted on at the WVWA Board of Director's meeting on September 10. The Board's secretary advised Mr. Gendreau that the documents were not ready. On September 10, the Board held a public meeting and voted on the agreements. Mr. Gendreau made an oral request under FOIA for a copy of the agreements, and Mr. McEvoy advised him they would be sent the next day. Affidavit of Henri Gendreau, filed Oct. 9, 2025, p. 1.

On September 11, 2025, Mr. McEvoy emailed copies of the agreement to Mr. Gendreau. Both copies were redacted and neither copy was signed. The Utility Agreement had a notation citing an exemption for trade secrets as defined in Va. Code § 59.1-336, and claimed to be exempt from FOIA disclosure under Va. Code § 2.2-3705.6(3).¹ The Water Supply Agreement did not include any FOIA exemption. *Id.*

Mr. McEvoy later amended his response by email dated October 15, 2025, to advise:

We redacted information concerning water supply capacity volumes required for the proposed project from the unexecuted Utility Services Funding Agreement and the unexecuted Water Supply and Infrastructure Planning and Development Services Agreement and information concerning potential contractors providing services referenced in the unexecuted Utility Services Funding Agreement (where such contracts have not yet been executed) under Virginia Code § 2.2-3705.6.3. The volumetric information and the names of prospective contractors were provided to the Authority voluntarily by a private business pursuant to a promise

¹ While the "confidential / trade secret" label was used, the cited FOIA exemption was § 2.2-3705.6 (3). Subsection 3 does not apply to trade secrets.

November 5, 2025

p. 3

of confidentiality contained in an NDA executed by the Authority, and the Authority has used the information for business development.

Next, attached is the executed Utility Services Funding Agreement between the Western Virginia Water Authority and Helio Capital, LLC in two files. We just received the complete executed document back from Helio Capital, LLC yesterday, so we could not have provided it to you any sooner. We have again redacted water supply capacity volumes required for the proposed project under Virginia Code § 2.2-3705.6.3. That volumetric information was provided to the Authority voluntarily by a private business pursuant to a promise of confidentiality contained in an NDA executed by the Authority, and the Authority has used the information for business development. . . . We are no longer asserting the exemption concerning the names of certain contractors.

Def. Ex. 1.

At the hearing on October 16, Mr. Gendreau indicated that he accepted this amendment to the FOIA response, identifying and citing the FOIA exemption claimed; however, he disagreed that the information should be exempt. Thus, to the extent that WVWA initially suggested that the exemption was based upon a trade secret, it retreated from this position in the email and at the hearing.

Mr. Gendreau's arguments are set forth in his Affidavit, primarily on page 4. He asserts that the cited exemption does not apply because the information is not proprietary.

He also argues that the information sought to be protected is already in the public arena in several respects. First, an unredacted version was released, which specified a water supply of up to 8 total mgd in the future. Pet. Ex. 3. Second, an article published by Cardinal News on July 17, 2025 reported that the agreement between Botetourt and WVWA "states that the replacement will start at two million gallons of water per day, increasing to 8 million gallons per day at some point in the future, based upon possible future expansions by Google." Pet. Ex. 2. The Cardinal News article citing a future water supply use of 8 mgd is corroborated by evidence in the record. Pet. Ex. 3. Third, Google regularly makes available the amount of water used by its data centers around the world.

Mr. Gendreau argues that the circumstance at hand does not meet the language of the statute requiring that the release of the information adversely affect the interest of the public body. He argues that the public body cannot be affected because the land purchase already closed and the deal was approved. (This argument specifically pertains to the second clause in 2.2 -3705.6(3), which was not relied upon by WVWA. WVWA did not make the argument to support this clause, and there was no evidence regarding adverse financial interests of the public body, WVWA.)

November 5, 2025

p. 4

Finally, Mr. Gendreau asserts that, even if protected from disclosure, a significant public interest can override a FOIA exemption.

Mr. McEvoy asserted that the cited exemption applied because the covered information falls squarely within Virginia Code § 2.2-3705.6 (3). The water supply capacity and wastewater service capacity of the prospective project is proprietary information because it could be used to infer particular aspects of the project, which is still in the planning stage. Specifically, water usage is tied to computing capacity; if Google's competitors knew the proposed water usage, they could extrapolate computing capacity. The information was shared by Helio, LLC (Google), a private business, pursuant to a promise of confidentiality. Google is not a current customer and will only become a customer if the project progresses to completion. In the meantime, the information sought to be protected could give Google's competitors insight into the design and configuration of the proposed data center. As such, this information should qualify as "proprietary information" under the cited code section. Mr. McEvoy's assertion that the information is exempt from FOIA disclosure was supported by a Mutual Non-Disclosure Agreement ("NDA") between WVWA and the company at issue. Def. Ex. 2. It was also supported by the "Declaration of Aaron McGarry." Def. Ex. 3.

II. Analysis.

A. Virginia Code §2.2-3700.

The parties agree that the documents requested are public records, and they are covered by the Virginia Freedom of Information Act. It is helpful to start with the language of §2.2-3700, which states the public policy of FOIA.

A. This chapter may be cited as "The Virginia Freedom of Information Act."

B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity

November 5, 2025

p. 5

to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law. This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.

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.

Any ordinance adopted by a local governing body that conflicts with the provisions of this chapter shall be void.

Va. Code §2.2-3700.

B. Va. Code § 2.2-3705.6.

There are numerous exemptions from disclosure of public documents. Many categories of information exempt from disclosure are listed in the body of FOIA. For example, there is § 2.2-3705.1 (general application), § 2.2-3705.2 (public safety), § 2.2-3705.3 (administrative investigations), § 2.2-3705.4 (educational records), § 2.2-3705.5 (health and social services records), § 2.2-3705.6 (proprietary records and trade secrets), and § 2.2-3705.7 (specific public bodies and other limited exclusions). Other exemptions are scattered throughout the Code. See, for example, §2.2-5517 (exclusions for certain license plate reader data), §2.2-3815 (first 5 digits of a social security number contained in a public record), §33.2-299.7 (certain private information held by the Virginia Passenger Rail Authority).

Mr. McEvoy cited a specific exemption, § 2.2-3705.6 (3). Section 2.2-3705.6 describes 35 different categories of proprietary records and trade secrets which are covered. Mr. McEvoy cited subsection 3, which provides as follows:

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

...

November 5, 2025

p. 6

3. Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.

...

Va. Code § 2.2-3705.6.

In examining whether the exclusion applies to these contracts, WVWA bears the burden of proof to establish the cited exclusion by a preponderance of the evidence. The court is not required to give any weight to WVWA's determination as to whether the exclusion applies. Va. Code § 2.2-3713(E).

The only way to determine whether WVWA can successfully exclude the requested information under the exemption cited, is to dissect the language of the subsection.

The subsection at issue is divided into two clauses. WVWA relied upon the first clause. As noted above, WVWA did not argue the second clause, and it did not offer evidence of adverse effects to the public body, as required by the second clause. Under the first clause, WVWA has to establish that the information withheld ("water supply capacity volumes required for the proposed project") is:

- i. "Proprietary information,"
- ii. Voluntarily provided by a private business,
- iii. Pursuant to a promise of confidentiality from a public body,
- iv. To be used by the public body for business, trade, and tourism development or retention.

Mr. McEvoy's email explanation did not use the term "proprietary," but it otherwise tracked the first clause of § 2.2-3705.6 (3). The court will assume that WVWA did not rely upon the second clause because Mr. McEvoy did not refer to it.

- i.) Is the information concerning water capacity volumes required for the project proprietary information?

Proprietary information is not defined in FOIA. The term is differentiated from trade secrets.² "Trade secret" is defined in § 2.2-3701 of FOIA, by reference to The Uniform Trade Secrets Act:

Trade secret" means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and 2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Va. Code § 59.1-336.

The Supreme Court of Virginia addressed the definition of the term "proprietary" in a FOIA case. The case *American Tradition Institute v. Rector and Visitors of the University of Virginia* dealt with documents that a UVA professor produced and/or received while working at UVA. A FOIA exemption allowed the withholding of certain proprietary records. The Court noted that, since FOIA contained no express definition of "proprietary," general rules of statutory construction required the term to be given its ordinary meaning, taking into account the context in which it was being used. The Court applied the ordinary meaning of proprietary as "a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls." *Am. Trad. Inst. V. Rector and Visitors of the Univ. of Va.*, 287 Va. 330, 341 (2014) quoting *Green v. Lewis*, 221 Va. 547, 555 (1980).

In a concurring opinion, Justice Mims noted that the term "proprietary" as used in the opinion may be different when used in another context. He also seemed to wish for a clear definition from the General Assembly. He noted that "proprietary" appears throughout various subsections of FOIA. In many of those code sections, the term "proprietary" appears alongside the terms "business-related" and "trade secrets." General rules of statutory construction require us to give those terms different meanings rather than consider them to be synonyms. Justice Mims voiced his concern that the term "proprietary" is susceptible to too many meanings to be used so broadly and so often in FOIA with no specific definition. *Id.* at 346-347.

² Although many of the subsections in -3705.6 include references to trade secrets, subsection 3 does not include trade secrets, only proprietary information. The court must conclude that the General Assembly did not intend to include trade secrets in this subsection.

November 5, 2025

p. 8

Under Justice Mims' reminder of this tenet of statutory construction, the term "proprietary" is not the same as a trade secret. So, it is *not* a formula, pattern, process, or the like, that derives independent economic value from not being generally known. It is *not* business-related, not necessarily connected to a business. It is an ownership right in a thing or a property, held by one who owns, manages, or controls that thing.

This court also notes the definition from Black's Law Dictionary:

Proprietary, adj.

1. Of, relating to, or involving a proprietor. (The licensee's proprietary rights.)
2. Of, relating to, or holding as property. (The software designer sought to protect its proprietary data.)
3. (Of a product) sold under a tradename.

Proprietary, Black's Law Dictionary (12th ed. 2024).

The Declaration of Aaron McGarry, Senior Director of Google LLC, asserts that "the water supply capacity and wastewater service capacity could be used to infer the size and design of the project and its planned expansions." Def. Ex. 3, para. 4. He discusses how this and other confidential, sensitive information (including the internal structure, number of servers, and the methodology of operation) can give competitors insight into the project. He asserts that if this confidential information is disclosed, "other companies would be provided a competitive advantage in the selection, design, and configuration of a data center, and Helio's competitors could derive substantial economic value from this confidential information." *Id.* at para. 5. What is being discussed in Mr. McGarry's declaration is much broader than just water capacity. Whether the information sought could be a trade secret is not before the court.

The court is mindful that an important purpose of FOIA is to promote the opportunity for citizens to witness and participate in their government. There are few resources more precious than water. The public has an overwhelming interest in the management of this critical resource and that interest is certainly more important in the beginning stages of a project than after the project has been finalized. For the public to be given information on water usage when the ink is dry on the deal is useless. Citizens who cannot get information on the facts cannot weigh the costs and benefits in order to meaningfully participate. Public participation in the data center discussion on a local level is especially critical, given that this is an industry still in its adolescence, with virtually no state-wide regulations. There is no question that a data center in Botetourt County will provide an economic benefit to the community, and well beyond. However, the citizens who want to examine all aspects of the proposal before the project is finalized seek to participate exactly as FOIA envisions.

The burden of proof is on WVWA to establish the exemption. Exemptions are to be narrowly construed. The water usage information being sought is not a right, much less a right associated with ownership or possession. It is not a thing that is possessed. It is not information that is owned by Google. It is not an item that is made or marketed. Considering the plain meaning of the word, the court finds that WVWA has not established that the water usage information is proprietary information.

ii.) Was the information voluntarily provided by a private business?

The evidence has established that this information was provided by Google.

iii.) Was the information pursuant to a promise of confidentiality from a public body?

The evidence has established that there is a "Mutual Non-disclosure Agreement" ("NDA") between WVWA and Google. Def. Ex. 2.

The NDA contains exceptions that the court finds apply to this matter.

First, paragraph 6(b) provides that there is no obligation with respect to confidential information that "is or becomes publicly available through no fault, action, omission or intervention of the recipient." Def. Ex. 2.

Mr. Gendreau established that another community news source already reported that the agreement between WVWA and Botetourt County "states that the replacement will start at two million gallons of water per day, increasing to eight million gallons per day at some point in the future, based on possible future expansions by Google." Samantha Verrelli, *Roanoke Seeks Share of Botetourt County's Google Data Center Tax Revenues*, Cardinal News (July 17, 2025). Although WVWA did not confirm these numbers in this litigation, an apparent inadvertent disclosure of the 8-million-gallon figure gives credibility to this news source. Pet. Ex. 2.

Second, paragraph 6(f) provides that the NDA imposes no obligation regarding information that "is required to be disclosed by operation of law, court order or other governmental demand ("Process")" as long as certain conditions are met. Def. Ex. 2. WVWA certainly can assert that it has taken the measures it was required to take under the NDA.

iv.) Is the information to be used by the public body for business, trade, and tourism development or retention?

The evidence has established that the project between Botetourt County and Google involves business development.

November 5, 2025
p. 10

III. Conclusion.

For these reasons, the court finds that WVWA has not established by a preponderance of the evidence that the requested information is exempted from disclosure under the Virginia Freedom of Information Act. The information shall be provided forthwith.

Mr. Carroll is directed to prepare and submit an order consistent with this opinion, properly endorsed by Mr. Gendreau. Please have the order submitted within the next 14 days. Scanned signatures are acceptable.

The court appreciates the courteous presentation of this very interesting case.

Very truly yours,

A handwritten signature in black ink, appearing to read 'LK Ciaffone', with a stylized, cursive flourish at the end.

Leisa K. Ciaffone

LKC
cc: Roanoke City Circuit Court Clerk