

Record No. 0157-24-2

**IN THE
COURT OF APPEALS OF VIRGINIA**

Alice Minium,
Appellant,

v.

David R. Hines and Hanover County,
Appellees.

**BRIEF OF *AMICUS CURIAE*
VIRGINIA COALITION FOR OPEN GOVERNMENT
IN SUPPORT OF APPELLANT**

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae the Virginia Coalition for Open Government (the Coalition) respectfully submits this brief supporting Appellant Alice Minium. The Coalition is a non-partisan, non-profit organization founded in 1996 and dedicated to promoting transparency and open government in Virginia. Membership in the Coalition is open to anyone, and the Coalition has nearly 200 paying individual and institutional members and supporters, including Virginia lawyers and media organizations. The Coalition's work includes advocacy before the FOIA Council and General Assembly, providing Virginia Freedom of Information Act (VFOIA) training and information for government officials and the public, engaging in public commentary, and serving as a resource to citizens involved in public records and meeting issues. The Coalition also joins or submits amicus briefs in cases involving VFOIA and other public records laws, to assist courts by providing the Coalition's perspective on the law, practice, and policy involved in cases concerning the public's right to access government information and proceedings.¹

NATURE OF THE CASE

This case concerns the public's right to obtain the names of government employees, basic information to which the Virginia Freedom of Information Act

¹ No party or its counsel, nor any person other than the Coalition and its counsel, contributed to the preparation or submission of this brief.

(VFOIA) expressly guarantees public access. Appellees withheld the names of certain employees in the Hanover County Sheriff's Office based on a claimed discretionary exemption in VFOIA. Under the statute, however, names of public employees may not be withheld. After an extensive study of VFOIA, the General Assembly expressly, by unanimous vote, removed from the statute any arguable discretion to withhold such information. The legislature amended VFOIA in 2017 to provide that "[n]o provision of this chapter ... shall be construed as denying public access to ... records of the *name*, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body." Va. Code § 2.2-3705.1(1) (emphasis added). The court below ignored and failed to even mention this provision in its opinion. This Court should not ignore the statute. This Court should maintain the public's right to basic information about government employees by giving effect to the unambiguous language of the statute and reversing the decision below.

ASSIGNMENT OF ERROR

This brief relates to Appellant's Assignment of Error 1, which includes the trial court's error in permitting Appellees to refuse to disclose the names of most employees of the Hanover County Sheriff's Office, contrary to Virginia Code

§ 2.2-3705.1(1). (Preserved at Rec. 4 [Verified Pet. for Writ of Mandamus ¶ 11]; Rec. 80-81, 82, 84 [Trans. of Oct. 30, 2023 Hrg.]; Rec. 30-31 [Final Order].)

SUMMARY OF FACTS AND PROCEEDINGS BELOW

There are no material factual disputes.

Appellant Alice Minium filed a Virginia Freedom of Information Act (VFOIA) request seeking the full legal name and certain other demographic, organizational, and salary information for each deputy employed by the Hanover County Sheriff's Office. (Rec. 23 [Ltr. Op.]

Hanover County Human Resources, which maintains Sheriff's Office personnel records, initially responded by producing a spreadsheet containing all requested information except names. The spreadsheet contained names of only a small number of high-ranking Sheriff's Office employees. *See id.*; Rec. 106-15 [Joint Exh. 2] (showing 13 names); Rec. 137 [Joint Exh. 6 – Stipulations ¶ 8].

After Ms. Minium pressed, Hanover County later provided 12 additional names of personnel “who were in highly visible public facing positions” but continued to withhold 220 other names. Rec. 23 (Ltr. Op.); *see* Rec. 126-35 [Joint Exh. 5] (disclosing 25 names but withholding 220); Rec. 139 [Joint Exh. 6 – Stipulations ¶ 14].

It is undisputed that Minium is a proper petitioner and that Sheriff David Hines and Hanover County are each a “public body” and may be sued under

VFOIA. (Rec. 23 [Ltr. Op.].) There was some argument below about the form of production, which this brief does not address, but there is no dispute about what information was requested, provided, and withheld, nor about whether that information was a “public record.” *Id.* “The dispute rests on the reason for the denial of a portion of the information requested,” specifically the names of the government employees who work for the Hanover County Sheriff’s Office. *Id.*

There were no briefs below. The circuit court issued a letter opinion on December 20, 2023, based on the pleadings, joint exhibits, stipulations, and transcript of arguments of counsel at an October 30 hearing. *See* Rec. 22-23. Both the Petition and the arguments of Appellants’ counsel relied upon Virginia Code § 2.2-3705.1(1), as cited in the Assignment of Error section above. Yet the opinion below does not mention Virginia Code § 2.2-3705.1(1) at all.

STANDARD OF REVIEW

Whether records are properly withheld under the Virginia Freedom of Information Act is a mixed question of fact and law. But where there are no material factual disputes, as in this case, what remains are “issues of statutory interpretation and a circuit court’s application of a statute to its factual findings,” which are reviewed *de novo*. *Hawkins v. Town of South Hill*, 301 Va. 416, 424, 878 S.E.2d 408, 411 (Va. 2022) (citing cases); *accord Brown v. Kirkpatrick*, 79 Va. App. 252, 256, 895 S.E.2d 788 (Va. App. 2023) (“Questions of statutory

interpretation ... are subject to de novo review on appeal, and we owe no deference to the circuit court's interpretation of the statutory scheme.”) (citing *Esposito v. Va. State Police*, 74 Va. App. 130, 133, 867 S.E.2d 59 (Va. App. 2022)).

ARGUMENT

I. The statute mandates public access to government employee names and therefore requires reversal of the decision below.

After a multi-year study, the General Assembly clarified the Virginia Freedom of Information Act (VFOIA) by adding language that explicitly ensures public access to government employee names. That unambiguous provision – which the opinion below did not even mention – overrides Appellees' desire to withhold 89.8% of the names of employees of the Sheriff's Office. *See* Rec. 126-35 [Joint Exh. 5] (withholding 220 out of 245 names).

A. VFOIA was amended in 2017, after extensive study, to clarify that government employee names cannot be withheld.

In 2014, reiterating fundamental open government principles, the General Assembly charged the Freedom of Information Advisory Council (the FOIA Council) with conducting a comprehensive study of VFOIA, including the appropriateness of exemptions. *See* 2014 House Joint Res. (HJR) 96, *available at* <https://lis.virginia.gov/cgi-bin/legp604.exe?141+ful+HJ96ER>.

Pursuant to the General Assembly's direction, the FOIA Council established subcommittees, conducted years of study, heard from many stakeholders, and

ultimately produced a report. *See* House Document No. 6 (2017), *available at* <https://rga.lis.virginia.gov/Published/2017/HD6> (hereinafter House Doc. 6).²

“The Records Subcommittee met 18 times during the course of the study” and “systematically reviewed all of the records exemption sections of FOIA (§§ 2.2-3705.1 through 2.2-3706), as well as relevant FOIA definitions (§ 2.2-3701) and the procedures for making and responding to a public records request (§ 2.2-3704).” House Doc. 6, *supra*, at 5. Consensus and legislative recommendations were not achieved on all issues studied (*see id.*), but the FOIA Council did make a consensus recommendation to revise the personnel records exemption found in Virginia Code § 2.2-3705.1(1). *See id.* at M-12.

Records of the study show a specific, considered decision to add employee names to the statutory list of information that government may not withhold. *See, e.g.*, House Doc. 6, *supra*, at 61 (“The draft also adds ‘name’ to the list of items that must be released.”). The FOIA Council noted that this addition would make explicit what existing law already required. *Id.* at 61 n.34 (“Names are required to

² The FOIA Council’s report is published as a legislative document. *See* Procedures for Processing Legislative and Report Documents, Division of Legislative Automated Systems (revised Sept. 21, 2023), *available at* <https://rga.lis.virginia.gov/PublicationGuidelines.pdf> at 1. Virginia courts take judicial notice of such reports and other legislative information as official documents or publications of the Commonwealth or its agencies. *Fairfax Cty. Sch. Bd. v. S.C.*, 297 Va. 363, 368 n.2, 827 S.E.2d 592, 593 (Va. 2019); *accord* Va. Code § 8.01-388; Rule 2:203 of the Rules of the Supreme Ct. of Va.

be released under existing law, but that requirement is not explicitly stated.”). Indeed, over decades prior to the study, Attorney General and FOIA Council Advisory opinions had repeatedly interpreted the law as requiring release of government employee names.³ The FOIA Council’s consensus recommendation codified those prior interpretations.

The General Assembly enacted the FOIA Council’s recommended records legislation unanimously, including the added paragraph that ensured public access to government employee names. *See* 2017 Va. Acts. ch. 778; HB1539 (2017) History, at <https://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB1539>.

B. Virginia Code § 2.2-3705.1(1) is unambiguous and decisive.

Since 2017, the second paragraph of Virginia Code § 2.2-3705.1(1) has provided that no provision in VFOIA may be construed to deny public access to government employee names and certain other information:

No provision of this chapter or any provision of Chapter 38 (§ 2.2-3800 *et seq.*) shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1;

³ *See* 1987-88 Op. Atty. Gen. Va. 33; 1978-79 Op. Atty. Gen. Va. 310; Freedom of Info. Advisory Op. 01 (2009), *available at* https://foiacouncil.dls.virginia.gov/ops/09/AO_01_09.htm; Freedom of Info. Advisory Op. 01 (2002), *available at* https://foiacouncil.dls.virginia.gov/ops/02/AO_01.htm; Freedom of Info. Advisory Op. 28 (2001), *available at* https://foiacouncil.dls.virginia.gov/ops/01/AO_28.htm. “These advisory opinions, while not binding on the Court, are instructive.” *Transparent GMU v. George Mason Univ.*, 298 Va. 222, 243, 835 S.E.2d 544, 554 (Va. 2019).

(ii) records of the name, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subdivision, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

The direction that “[n]o provision of this chapter” shall be construed as denying public access to “records of the name ... of any officer, official, or employee of a public body” is clear and unambiguous. Names may not be withheld.

Yet Appellees and the circuit court did exactly what the statute forbids: they construed and applied Virginia Code § 2.2-3706(B)(8) as giving Hanover County the discretion to withhold the names of most officers in the Sheriff’s Office. *See* Rec. 23 & 26 (Ltr. Op.); Rec. 138 [Joint Exh. 6 – Stipulations] ¶ 10 (an email from County Attorney Dennis Walter stated that, with respect to “the names of certain employees of the Hanover County Sheriff’s Office”, “*Hanover has consistently decided to not release that information, pursuant to the provisions of § 2.2-3706(B)(8) of the Code of Virginia...*”) (italics in original). Remarkably, the circuit court did not even mention Virginia Code § 2.2-3705.1(1), much less explain why it permitted Hanover officials to flout that explicit statutory provision.

Indeed, there is no good statutory explanation for the decision below. The discretionary exemption relied upon by Appellees and the circuit court is a provision in “this chapter.” *See Harmon v. Ewing*, 285 Va. 335, 337, 745 S.E.2d

415, 417 (Va. 2013) (“The provisions of ‘this chapter’” means “all of VFOIA”).

Therefore, that exemption (Virginia Code § 2.2-3706(B)(8)) may not “be construed as denying public access to ... the name” of “any officer, official, or employee of a public body.” Va. Code § 2.2-3705.1(1).

Nor is there any conflict between sections of VFOIA. Viewed in isolation, the “Conflict Resolution” provision of § 2.2-3706(F) might seem to prioritize that section over other sections of VFOIA, potentially creating a conflict with § 2.2-3705.1(1). Not so. Section 2.2-3706(D) expressly provides that § 2.2-3705.1(1) must govern requests for personnel information of a law enforcement agency:

Access to personnel records of persons employed by a public body engaged in emergency medical services or fire protection services, a law-enforcement agency, or an emergency 911 system or any other equivalent reporting system shall be governed by the provisions of subdivision B 9 and subdivision 1 of § 2.2-3705.1, as applicable.

Subsection B 9 of § 2.2-3706 is not applicable, because the request did not seek records of background or administrative investigations. Subsection 1 of § 2.2-3705.1 applies, because the request sought names of government employees.

Accordingly, § 2.2-3705.1(1) governs. The sections of VFOIA are in accord and leave no discretion. Subsection D confirms that § 2.2-3706 relies upon and does not conflict with § 2.2-3705.1(1). The unambiguous language of § 2.2-3705.1(1) requires the release of government employee names and decides this case.

II. The courts’ role is to give effect to the unambiguous statutory language and leave policy arguments about potential outcomes to the legislature.

Competing policy arguments about the potential implications of disclosure of the names of employees of law enforcement agencies appear in the record. Appellees argued anonymity is needed – despite acknowledging that officers often wear name tags and badges – to properly plan and staff undercover operations or protective details, and the circuit court raised the possibility of someone “conducting further research, finding a picture, and publishing on social media the name and photos of all officers.” (Rec. 26 [Ltr. Op.]) Appellant disputed that disclosure of names would have any effect, noting that disclosing a general list of employee names “does not identify any single officer as a member of an undercover operation or protective detail.” *Id.*

Such arguments are for the legislature, not the courts. When interpreting statutes, a court “seeks ‘to ascertain and give effect to legislative intent,’ and it ‘determines [that] intent from the words employed in the statute.’” *Rock v. Commonwealth*, 76 Va. App. 419, 430-431, 882 S.E.2d 490, 496 (Va. App. 2023) (citations omitted, alteration in original). In interpreting VFOIA, like any other statute, “when the language of a statute is plain and unambiguous, [courts] are bound by the plain meaning of that statutory language.” *Beck v. Shelton*, 267 Va. 482, 488, 593 S.E.2d 195, 198 (Va. 2004) (quoting *Lee County v. Town of St. Charles*, 264 Va. 344, 348, 568 S.E.2d 680, 682 (Va. 2002)). “Thus, when the

General Assembly has used words that have a plain meaning, courts cannot give those words a construction that amounts to holding that the General Assembly meant something other than that which it actually expressed.” *Id.*

VFOIA cases often involve disputes over the breadth of exemptions, where courts are guided by both general principles of statutory interpretation and Virginia Code § 2.2-3700’s specific interpretive directions favoring open government. This is not one of those cases. Here, the statutory rule that no provision of VFOIA shall be construed to deny public access to the names of government employees is clear and unambiguous, and the courts are bound to give effect to that language.

To be clear, VCOG’s position is that required disclosure of government employee names has merit as a policy matter. Such disclosure upholds the fundamental open government principles enacted in Virginia Code § 2.2-3700. Beyond that, compensation to government employees is taxpayer-funded, and the public’s right to know how government spends money on salaries was well-established for decades prior to the 2017 statutory clarification. *See* n.3, *supra*. Moreover, disclosing names avoids giving individuals an ability to be paid from taxpayer funds without accountability. Law enforcement agencies should not be immune from such accountability (and arguably need more transparency and accountability than agencies whose employees do not have life or death power over their fellow citizens). On the very same day as the hearing below, news

reports revealed that two brothers of the Culpeper Sheriff, who is under federal indictment on bribery charges, were paid more in accrued leave payouts than anyone else in that department.⁴ Public access to the names and compensation of government employees is useful and important.

Regardless, it is clear as a matter of law that policy arguments must be made to the legislature, in the context of whether to amend the statute to add an exception to the rule of Virginia Code § 2.2-3705.1(1). Unless and until the General Assembly changes the law and policy of the Commonwealth by amending VFOIA, the job of Virginia courts is clear: apply § 2.2-3705.1(1)'s plain language and rule that the names of government employees must be disclosed.

CONCLUSION

The Coalition requests that this Court fulfill the judicial duty to give effect to the unambiguous language of Virginia Code § 2.2-3705.1(1) by reversing the ruling below and remanding for production of the withheld names and other appropriate relief.

⁴ Allison Brophy Champion and Patrick Wilson, *Culpeper sheriff's brothers top list of leave payouts this year*, CULPEPER STAR-EXPONENT (Oct. 30, 2023), available at https://starexponent.com/news/local/culpeper-sheriff-s-brothers-top-list-of-leave-payouts-this-year/article_20a459ea-74f6-11ee-a29e-471bd812f99f.html.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify on this 2nd day of May, 2024 that, in accordance with Rules 5A:4(d) & 5A:19(a), this brief—excluding the cover page, tables of contents and authorities, and certificate—contains 2,855 words. I further certify that this brief was served by email on the parties through their counsel as listed below:

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