

VIRGINIA: GENERAL DISTRICT COURT FOR THE CITY OF WILLIAMSBURG AND JAMES CITY COUNTY

ROBERT LEE WILSON

Petitioner,

V.

Case # GV26-16

CITY OF WILLIAMSBURG

Respondent,

Memorandum on Petition for Writ of Mandamus to Require the City of Williamsburg to Produce Documents Requested Pursuant to the Virginia Freedom of Information Act

This matter comes before the Court as a result of the Petitioner requesting copies of all agreements between the City of Williamsburg and Cale Development, LLC with regard to the termination of a purchase agreement between the parties for the sale of City owned property located at 180 Strawberry Plains Road in the City of Williamsburg. This request was made pursuant to the Virginia Freedom of Information Act. The Respondent has refused to provide the requested document(s), citing § 2.2-3705.1(3) of the Code of Virginia, which, in pertinent part, exempts from mandatory disclosure under the Virginia Freedom of Information Act “[L]egal memoranda and other work product compiled specifically for use in litigation.” The Respondent argues that the document requested is a confidential settlement agreement between itself and Cale Development, LLC, and as such falls under the disclosure exemption of § 2.2-3705.1(3). The Petitioner has filed this action to enforce the provisions of the Virginia Freedom of Information Act, challenging the Respondent’s refusal to provide the requested document.

The Court recognizes that the action before it raises two important yet competing interests. One is governmental transparency. That is the entire purpose behind the Virginia Freedom of Information Act. Virginia courts have consistently held the Virginia Freedom of Information Act is to be liberally

construed in favor of disclosure, with exemptions being narrowly construed. Hawkins v. Town of South Hill, 301 VA. 416, (2022), Bergano v. City of Virginia Beach, 296 Va. 403 (2018). On the other hand, as the Respondent properly points out, local public bodies have an interest in being able to resolve matters and avoid litigation. That often means entering into settlement agreements. Further, as the Respondent argues, the terms of settlement agreements are often confidential for a myriad of proper reasons, and local public bodies have the right to enter into such agreements just as any other party to actual or potential litigation does.

Pursuant to § 2.2-3705.1(E) of the Code of Virginia, the Respondent bears the burden of proof to establish by a preponderance of evidence that the claimed exclusion applies to the requested document. The Respondent has been unable to provide any Virginia case law to support its position that a confidential settlement agreement constitutes a legal memoranda and other work product compiled specifically for use in litigation, and thus is exempt from disclosure under § 2.2-3705.1(3). This is admittedly for a good reason, given that no such case law exists. Likewise, there is no Virginia case law supporting the position taken by the Petitioner. Neither the Virginia Court of Appeals nor the Virginia Supreme Court has weighed in definitively on this particular issue. The case which comes the closest to addressing this issue is Lemond v. McElroy, 239 Va. 515 (1990), which both the Petitioner and Respondent have cited, and which the Respondent correctly points out, affirmed the trial court's order requiring production of a settlement agreement without specifically finding that confidential settlement agreements do not constitute work product compiled specifically for use in litigation. The Court in Lemond seemed to indicate that there may be circumstances in which a confidential settlement agreement could fall under the disclosure exception of the then enacted Virginia Freedom of Information Act, but found that it could not make such a decision because the settlement agreement was not made a part of the trial record. This Court finds itself in the same position. Neither party requested the Court to

review the document in camera. Therefore, the Court is without any knowledge as to the contents of the document.

The Respondent has provided the Court with several Attorney General Opinions on the subject, all of which find that confidential settlement agreements should be considered attorney work product because they have no purpose other than that of ending or preventing litigation. However, as both parties point out, Attorney General Opinions are not binding upon any court. They serve an advisory function rather than an authoritative one.

The Court does not find itself in full agreement with Attorney General Opinions that have been offered by the Respondent. Attorney work product consists of documents and tangible things prepared in anticipation of litigation or for trial, and includes the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Bergano at 409. The Court is of the opinion that, in most instances, settlement agreements constitute a contract between the parties in an effort to avoid litigation. Certainly memoranda, mental impressions, conclusions, opinions, or legal theories used in producing a settlement agreement would constitute attorney work product, but the Court fails to see how the agreement itself, entered into by the parties, constitutes either a memoranda or attorney work product. It is a contract between the parties, and as such is not entitled to the disclosure exemption under § 2.2-3705.1(3). Perhaps there could be circumstances where such an agreement would be exempt, but without the agreement before it, the Court cannot find that to be the case here.

This is not to say that the Respondent's concern over its ability to protect confidential settlement agreements is not legitimate. However, the Virginia General Assembly has the sole power to create exceptions to the disclosure requirements of the Virginia Freedom of Information Act. The courts do not possess such power.

For the reasons herein the Court finds that the Respondent has failed to meet its burden under § 2.2-3705.1(E). The Court grants the Petitioner's request, and orders the Respondent to provide the Petitioner with copies of all agreements between the City of Williamsburg and Cale Development, LLC with regard to the termination of the purchase agreement between the parties for the sale of City owned property located at 180 Strawberry Plains Road in the City of Williamsburg. The Petitioner did not request costs. Therefore, no costs will be awarded.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Judge