



CHRISTIAN & BARTON, LLP
ATTORNEYS AT LAW

DAVID B. LACY
Direct Dial: 804.697.4121
Direct Fax: 804.697.6121
E-mail: dlacy@cblaw.com

June 29, 2018

By Electronic And Overnight Delivery

Hon. Westbrook J. Parker, Circuit Judge (Ret.)
5th Judicial Circuit
108 Lake Crescent
Franklin, Virginia 23851
westbrookjparker@hotmail.com

Re: *Virginia Information Technologies Agency v. William H. Turner, et al.*
Case No.: CL17-5280-1

Dear Judge Parker:

Under cover of this letter, we enclose a courtesy copy of the *Virginia Press Association's Petition For Leave To Intervene As A Party Defendant*, including exhibits, filed yesterday in the above referenced matter.

Please contact me if you have any questions or require additional information.

Respectfully submitted,



David B. Lacy

Enclosure

cc: Andrew R. McRoberts, Esquire (*by reg. mail and email w/encl.*)
Cullen D. Seltzer, Esquire (*by email w/encl.*)
Faith A. Alejandro (*by email w/encl.*)
Dr. William H. Turner (*by reg. mail and email w/encl.*)
Craig T. Merritt, Esquire

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

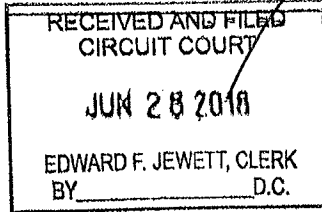
VIRGINIA INFORMATION TECHNOLOGIES)
AGENCY,)

Plaintiff,)

v.)

WILLIAM H. TURNER and)
OFFICE OF THE EXECUTIVE SECRETARY,)

Defendants.)



Case No. CL17-5280-1

VIRGINIA PRESS ASSOCIATION'S
PETITION FOR LEAVE TO INTERVENE
AS A PARTY DEFENDANT

Petitioner, the Virginia Press Association (“VPA”), by counsel, pursuant to Rule 3:14 of the Rules of the Supreme Court of Virginia, respectfully petitions for leave to intervene in this case as a party defendant for the limited purpose of obtaining a dismissal of the action solely on the basis that Defendant William H. Turner (“Dr. Turner”) failed to file a petition in compliance with the Court’s Interpleader Order, entered February 21, 2018. In support of its petition, the VPA states the following:

1. This case was commenced on November 7, 2017, by the Virginia Information Technologies Agency (“VITA”). VITA alleged that it was in possession of certain telephone records that were the subject of a dispute arising under the Virginia Freedom of Information Act (“VFOIA”) between Dr. Turner and the Office of the Executive Secretary of the Supreme Court of Virginia (“OES”).

2. On VITA’s motion, this Court entered an order dated February 21, 2018 (the “Interpleader Order”), that (i) ordered VITA to interplead the subject phone records; (ii)

discharged VITA from further liability arising out of the phone records and dismissing VITA from the case; (iii) restrained Dr. Turner and OES from instituting or prosecuting any proceeding in Virginia affecting the phone records; (iv) required Dr. Turner to file within twenty-one (21) days a petition asserting the grounds for his claim of access to the phone records; and (v) required the OES to file a response to Dr. Turner's petition within twenty-one (21) days after Dr. Turner's filing. A copy of the Interpleader Order is attached to this Petition as Exhibit 1.

3. Pursuant to the terms of the Interpleader Order, Dr. Turner's deadline for filing a petition was March 14, 2018. To date, Dr. Turner has not filed a petition. Thus, this interpleader case, subsequent to March 14, 2018, no longer presented an actual case or controversy, having been abandoned by Dr. Turner. The proper outcome is a simple dismissal on mootness grounds.

4. On April 4, 2018, two weeks after Dr. Turner's deadline to file a petition expired, the OES filed an *Answer, Affirmative Defenses, Pleas, and Motions To Petition*. Notably, the OES did not request that the action be dismissed based on Dr. Turner's failure to file a petition and the resulting absence of a case or controversy. Rather, the OES explained in a subsequent supporting memorandum that it sought "success on the merits . . . to obtain a precedential ruling" not only as to the records in dispute, but on various defenses raised by the OES. *See Memorandum in Support of the Executive Secretary's Motion to Construe, Motion to Dismiss, and Pleas in Bar*, filed June 8, 2018, at 6. The stated objective of the proposed exercise was to create law on issues that lack "any persuasive or binding legal precedent." *Id.*

5. In seeking success on the merits of its defenses, the OES was aware that Dr. Turner had not filed a petition as required by the Court's Interpleader Order. The OES acknowledged that "[t]o date, Dr. Turner has filed no petition as ordered by the Court . . . Thus, he has not complied with the Interpleader Order." *See The Executive Secretary's Answer, Affirmative Defenses, Pleas,*

and Motions To Petition, filed April 4, 2018, at ¶ 12. Nonetheless, in its pursuit of favorable precedent, the OES asked the Court to “construe” a portion of a prior filing by Dr. Turner as the petition required by Interpleader Order. *See id.* at ¶¶ 18-19.

6. Dr. Turner’s prior filing, submitted months before the Interpleader Order on November 29, 2017, is entitled “Index” and consists of at least 163 pages. The OES described the filing generally as “incomplete, confusing, unsigned statements and attachments.” *Id.* at ¶ 18. Even the portion of Dr. Turner’s November 29 filing that OES sought to have construed as the petition “lacks full sentences, was not served, and lacks some of the proper form required under the rules[.]” *Id.* The OES nevertheless asserted that construing Dr. Turner’s November 29 filing as the ordered petition would “promot[e] substantial justice for all parties through the advancement of this case.” *Id.* at ¶ 20. In the next sentence, the OES clarified that the “justice” it sought to promote was its own desire to “respond to the merits of Dr. Turner’s claims, as set forth in [Dr. Turner’s November 29 filing], before a proper and binding tribunal.” *Id.* at ¶ 21.

7. The Court conducted a hearing on June 20, 2018, at which it heard argument by counsel for the OES in support of the points and authorities presented in its pleas and motion to dismiss Dr. Turner’s purported “petition.” Dr. Turner did not appear, and the arguments presented were unopposed. The briefing and argument on the merits of the OES’s legal contentions, therefore, were effectively *ex parte*.

8. On June 26, 2018, counsel for the OES tendered a proposed final order to the Court, a copy of which is attached to this Petition as Exhibit 2. The proposed final order, rather than simply dismissing an abandoned case as moot, includes findings of fact and conclusions of law with regard to (1) the scope of the VFOIA and its applicability to the judiciary, (2) sovereign immunity, (3) separation of powers, and (4) the deliberative process privilege.

9. The VPA, founded in 1881, is an association of 180 journalistic organizations, including daily and weekly newspapers, magazines and online publishers across the Commonwealth. VPA members use the VFOIA daily to seek access to the records and meetings of public bodies throughout Virginia. The OES is among the public bodies to whom VPA members have directed requests under the VFOIA. In fact, a dispute between a VPA member and the OES was the subject of recent adjudication by the Supreme Court of Virginia. *See Daily Press, LLC v. Office of Executive Secretary of Supreme Court*, 293 Va. 551, 800 S.E.2d 822 (2017) (regarding access to OES records built with electronic data transmitted by circuit court clerks). Additionally, a bill to exempt the judiciary entirely from operation of the VFOIA, Senate Bill 727, was introduced in the 2018 session of the General Assembly and later stricken.

10. VPA maintains an ongoing, substantial, and concrete interest in the issues that would be adjudicated by this Court should it enter the OES's proposed final order. Although the VPA does not assert that core judicial functions are without protection from outside scrutiny, there is a policy issue – very much under debate – concerning the proper scope of public access under VFOIA to various aspects of the operations of the judicial system. The proposed final order purports to adjudicate those issues, not only without public debate, but without opposition.

11. The doctrine of judicial restraint obliges courts to adjudicate cases on the narrowest proper grounds, and the OES itself, in an ironic reference, invokes the doctrine of “constitutional avoidance.” *See Memorandum In Support Of the Executive Secretary's Motion To Construe, Motion To Dismiss, and Pleas In Bar*, filed June 8, 2018, at 23. That doctrine includes the principle that courts should avoid adjudicating constitutional issues when a case may be fully resolved on non-constitutional grounds. As the Supreme Court of Virginia noted in a recent opinion:

The doctrine of judicial restraint dictates that we decide cases “on the best and narrowest grounds available.” *McGhee v. Commonwealth*, 280 Va. 620, 626 n. 4, 701 S.E.2d 58, 61 n. 4 (2010) (quoting *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 531, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991) (Stevens, J., concurring)). A fundamental and longstanding precept of this doctrine is that “unnecessary adjudication of a constitutional issue” should be avoided. *Bell v. Commonwealth*, 264 Va. 172, 203, 563 S.E.2d 695, 715 (2002); see *Christopher v. Harbury*, 536 U.S. 403, 417, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002) (noting the “obligation of the Judicial Branch to avoid deciding constitutional issues needlessly”); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193, 29 S.Ct. 451, 53 L.Ed. 753 (1909) (explaining that “[w]here a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued”).


Comm. v. Swann, 290 Va. 194, 196–97, 776 S.E.2d 265, 267 (2015). To adjudicate either the constitutional or other arguments in the current procedural posture of this interpleader case would be to abandon those principles.

12. VPA respectfully asks that this Court permit it to intervene as a party to this interpleader case to seek a simple outcome: dismissal of the case for Dr. Turner’s failure to file a pleading as directed in the order dated February 21, 2018, and denial of the OES’s motion to construe and attendant motions addressing the merits of Dr. Turner’s non-existent petition, on the ground that there is no longer any case or controversy, and the matter is moot. An order in the form that VPA would propose, if permitted to intervene, is attached to this Petition as Exhibit 3.

WHEREFORE, for the foregoing reasons, the VPA respectfully requests that its petition to intervene be granted, that this interpleader action be dismissed based on Dr. Turner’s failure to file a petition as required by the Court’s Interpleader Order, and that it be awarded any additional relief that it deems fair and just.

Date: June 28, 2018.

Respectfully submitted,



Craig T. Merritt (VSB #20281)

cmerritt@cblaw.com

David B. Lacy (VSB #71177)

dlacy@cblaw.com

CHRISTIAN & BARTON, L.L.P.

909 East Main Street, Suite 1200

Richmond, Virginia 23219

Telephone: (804) 697-4100

Facsimile: (804) 697-4112

Counsel for Virginia Press Association

CERTIFICATE OF SERVICE


I hereby certify that a true copy of the foregoing was delivered by electronic and first class mail this 28th day of June, 2018, on:

Andrew R. McRoberts (VSB #31882)
Cullen D. Seltzer (VSB #35923)
Faith A. Alejandro (VSB #80076)
SANDS ANDERSON PC
1111 East Main Street. Suite 2400
Richmond, Virginia 23219
Telephone: (804) 648-1636
Facsimile: (804) 783-7291
Email: amcroberts@sandsanderson.com
cseltzer@sandsanderson.com
falejandro@sandsanderson.com

Dr. William H. Turner
27316 Lankford Highway
P.O. Box 128
Onley, Virginia 23418
gallery@turnersculpture.com
wht@turnersculpture.com

Defendant Pro Se

*Counsel for the Office of the Executive
Secretary*

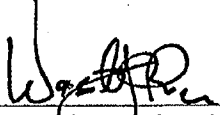


David B. Lacy

2. Defendants are RESTRAINED from instituting or prosecuting any proceeding in any Virginia court affecting the subject matter of the interpleader action, including without limitation *Turner v. Office of the Executive Secretary et al.*, CL17-279, in Accomack County Circuit Court.
3. Within 14 days of the entry of this Order, VITA is DIRECTED to file UNDER SEAL records reflecting OES long distance phone calls made in July 2017, August 2017, and September 2017.
4. Once VITA has filed the records with this Court pursuant to the foregoing paragraph, VITA is DISCHARGED from liability relating to such property and is hereby DISMISSED from this action.

The Clerk is DIRECTED to send a copy of this Order to Turner and to counsel of record.


ENTER: February 21ST, 2018



The Honorable Westbrook J. Parker

WE ASK FOR THIS:

VIRGINIA INFORMATION TECHNOLOGIES AGENCY



By Counsel

Mark Herring
Attorney General of Virginia

Cynthia E. Hudson
Chief Deputy Attorney General

John S. Westrick (VSB # 31330)*
Senior Assistant Attorney General, Section Chief
jwestrick@oag.state.va.us

Joshua D. Heslinga (VSB # 73036)*
Assistant Attorney General
jheslinga@oag.state.va.us

OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA
202 North 9th Street
Richmond, Virginia 23219
(804) 786-3847

*Counsel of Record

01338731

SEEN AND OBJECTED TO :

WILLIAM H. TURNER, *pro se*

refused to sign 2/21/18

William H. Turner

P.O. Box 128

Onley, Virginia 23418

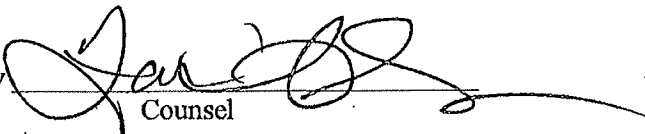
Fax:

gallery@turnersculpture.com

wht@turnersculpture.com

SEEN AND AGREED _____ :

OFFICE OF THE EXECUTIVE SECRETARY

By  _____
Counsel

Cullen D. Seltzer (VSB no. 35923)
Andrew R. McRoberts (VSB no. 31882)
Faith A. Alejandro (VSB no. 80076)
SANDS ANDERSON PC
2400 Bank of America Center
1111 East Main Street
P.O. Box 1998
Richmond, VA 23218-1998
Telephone: (804) 648-1636
Fax: (804) 783-7291
cseltzer@sandsanderson.com
amcroberts@sandsanderson.com
falejandro@sandsanderson.com

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

VIRGINIA INFORMATION TECHNOLOGIES)
AGENCY,)

Plaintiff,)

v.)

Case No. CL17-5280 - 1

WILLIAM H. TURNER and)
OFFICE OF THE EXECUTIVE)
SECRETARY,)

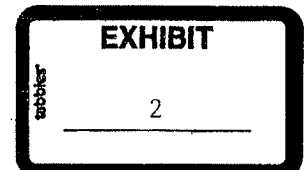
Defendants.)

FINAL ORDER

THIS DAY CAME the Office of the Executive Secretary (the "Executive Secretary"), by counsel, to be heard on the Executive Secretary's Motion to Construe, Motion to Dismiss, and Pleas in Bar (the "Dispositive Motions"), as well as his Motion for Rule to Show Cause and/or Motion for Sanctions Pursuant to Va. Code § 8.01-271.1 (the "Sanctions Motions").

Upon consideration of the Dispositive Motions, the arguments and authorities cited therein and at oral argument, and upon good cause shown, the Court hereby FINDS that the Virginia Freedom of Information Act, Va. Code §§ 2.2-3700 *et seq.* ("VFOIA"), does not apply to the judiciary, including the Executive Secretary, and further FINDS that the itemized long distance phone records in dispute are not public records of a public body under VFOIA, but rather are records of the judiciary, wherever lodged. Accordingly, it is hereby ADJUDGED, ORDERED, and DECREED that this Court:

1. GRANTS the Executive Secretary's Motion to Construe. Exhibit E to the Executive Secretary's Motion to Construe SHALL BE CONSTRUED as the Petition of Plaintiff, and INTERPRETED to reflect Dr. William H. Turner's ("Dr. Turner") request for



itemized long distance phone records from the Executive Secretary under VFOIA, and which Petition SHALL BE DEEMED FILED in this Court on March 14, 2018 pursuant to this Court's previously entered Order dated February 21, 2018; and

2. SUSTAINS the Executive Secretary's Pleas in Bar and GRANTS the Executive Secretary's Motion to Dismiss, for the reasons set forth in the Executive Secretary's filings and oral arguments, including that:
 - a. VFOIA does not apply to the judiciary, including the Executive Secretary, under its plain meaning;
 - b. The enforcement of VFOIA against the judiciary, including the Executive Secretary, is barred by the doctrine of sovereign immunity, which has not been waived;
 - c. The doctrine of the separation of powers bars enforcement of VFOIA against the judiciary, including the Executive Secretary; and
 - d. The judicial deliberative process privilege bars enforcement of VFOIA against the judiciary, including the Executive Secretary;

Accordingly, Dr. Turner's Petition is hereby DISMISSED WITH PREJUDICE.

In addition, upon consideration of the Sanctions Motions, the arguments and authorities cited therein and at oral argument, good cause shown, and pursuant to the Court's authority under Va. Code § 8.01-364 to make its February 21, 2018 Order permanent and make all appropriate orders to enforce its judgment, it is hereby ADJUDGED, ORDERED, and DECREED that this Court further GRANTS IN PART the Sanctions Motions, which the Court further takes under advisement. Accordingly,

- A. Dr. Turner SHALL BE PROHIBITED from instituting or prosecuting any proceeding in any court of the Commonwealth of Virginia to seek records of the judiciary, including that of the Executive Secretary, wherever lodged, including without limitation any petition for a writ of mandamus or injunction against the Executive Secretary or the Virginia Information Technologies Agency under VFOIA. If Dr. Turner has a good faith desire to initiate civil litigation and/or request or cause to be issued a witness subpoena or subpoena *duces tecum* against the Executive Secretary, including his employees, and/or the Virginia Information Technologies Agency, in litigation related to the judiciary's records, including the Executive Secretary's records, wherever lodged, in any court of the Commonwealth,
- i. Dr. Turner SHALL file with this Court a "Petition for Leave to File Suit" along with a copy of his proposed lawsuit and a copy of this Order imposing this pre-filing review injunction;
 - ii. Dr. Turner SHALL attach to his Petition a separate and notarized declaration or affidavit certifying that the matters raised in the proposed lawsuit have never before been raised in state or federal court;
 - iii. Upon the Clerk's receipt of Dr. Turner's Petition, the Clerk is directed to submit the Petition to the consideration of the Chief Judge, or a designate judge; and
 - iv. Dr. Turner may file his proposed lawsuit with a court of competent jurisdiction only after the Chief Judge, or a designate judge, has approved Dr. Turner's Petition and issued an Order granting Dr. Turner leave to file the lawsuit.

B. Further, the Court hereby SEPARATES from this matter the Sanctions Motions and RESERVES limited jurisdiction over the Sanctions Motions for the purpose of determining whether any further appropriate sanctions should issue after Dr. Turner has been given notice and an opportunity to be heard in response to an Order to Show Cause, which the Court RESERVES jurisdiction to issue at the request of the Executive Secretary. *See, e.g., Concerned Taxpayers of Brunswick County v. Brunswick County*, 249 Va. 320, 332, 455 S.E.2d 712, 719 (1995).

The Clerk is DIRECTED to send a copy of this Order to all counsel of record and to Dr. William H. Turner, *pro se*, at 27316 Lankford Highway, Post Office Box 128, Onley, Virginia 23418, and the Clerk is further DIRECTED to return all long distance telephone records of the Executive Secretary in the Court's files to the Executive Secretary. The Clerk SHALL place this matter among the ended causes of the Court.

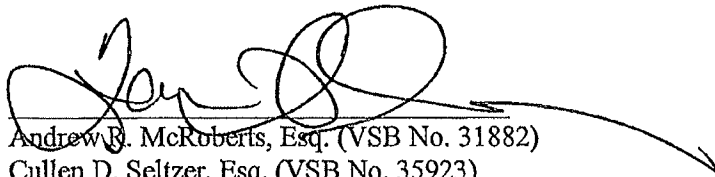
Pursuant to Rule 1:13 of the *Rules of the Supreme Court of Virginia*, the endorsement of Dr. William H. Turner, who did not appear at the hearing of this matter, is hereby dispensed with by the Court.

IT IS SO ORDERED.

ENTER: / /

The Honorable Westbrook J. Parker

WE ASK FOR THIS:

A handwritten signature in black ink, appearing to read "Andrew R. McRoberts", with a long horizontal flourish extending to the right.

Andrew R. McRoberts, Esq. (VSB No. 31882)

Cullen D. Seltzer, Esq. (VSB No. 35923)

Faith A. Alejandro, Esq. (VSB No. 80076)

SANDS ANDERSON PC

2400 Bank of America Center

1111 East Main Street (23219)

P. O. Box 1998

Richmond, Virginia 23218-1998

Telephone: (804) 648-1636

Facsimile: (804) 783-7291

Email: amcroberts@sandsanderson.com

cseltzer@sandsanderson.com

falejandro@sandsanderson.com

Counsel for the Office of the Executive Secretary

RECEIVED AND FILED
CIRCUIT COURT
JUN 26 2018
BY EDWARD F. JEWETT, CLERK
D.C.

SANDS ANDERSON

Faith A. Alejandro
Attorney

Direct: (804) 783-7278
E-mail: FAlejandro@SandsAnderson.com

RICHMOND • MCLEAN • FREDERICKSBURG
CHRISTIANSBURG • RALEIGH
SANDS ANDERSON PC
WWW.SANDSANDERSON.COM

1111 East Main Street
Post Office Box 1998
Richmond, Virginia 23218-1998
Main: (804) 648-1636
Fax: (804) 783-7291

June 26, 2018

BY HAND

Edward F. Jewett, Clerk
Circuit Court for the City of Richmond
John Marshall Courts Building
400 North Ninth Street
Richmond, VA 23219

Re: *William H. Turner v. Office of the Executive Secretary*
Richmond Circuit Court Case No. CL17-5280
Our File No. 21071/95202

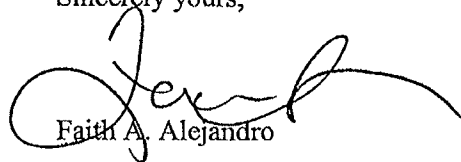
Dear Mr. Jewett:

Enclosed are the original and one copy of the sketch of a Final Order in connection with the matter referred to above. Please notify Judge Parker as soon as possible that this is ready for his consideration and entry.

After Judge Parker enters this Final Order, please return the certified copy to me in the enclosed self-addressed and stamped envelope. Also enclosed is our check in the amount of \$4.50 for the certified copy of the Final Order.

Thank you very much for your continued cooperation and assistance.

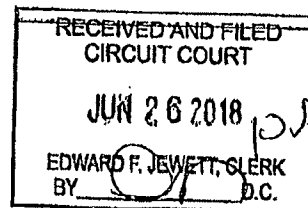
Sincerely yours,



Faith A. Alejandro

FAA/cea

cc: **By U.S. Mail**
William H. Turner (w/encl.)
P. O. Box 128
27316 Lankford Highway
Onley, VA 23418



VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VIRGINIA INFORMATION TECHNOLOGIES)
AGENCY,)

Plaintiff,)

v.)

WILLIAM H. TURNER and)
OFFICE OF THE EXECUTIVE SECRETARY,)

Defendants.)

Case No. CL17-5280-1

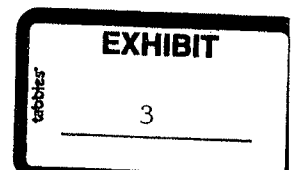
FINAL ORDER

On February 21, 2018, this Court entered an Interpleader Order providing, among other things, that defendant William H. Turner file within twenty-one (21) days a pleading setting forth the basis for his claimed right of access to certain public records that were lodged with the Clerk of this Court by the Virginia Information Technologies Agency. The pleading, by the terms of that Interpleader Order, was due on or before March 14, 2018.

It appearing that Dr. Turner failed to file the pleading within the time ordered by the Court, and that Dr. Turner has not sought to cure or otherwise be relieved from that default, it is hereby ORDERED, ADJUDGED and DECREED that this case is DISMISSED with prejudice, and that, as the case no longer presents an actual case or controversy, the Motion To Construe, Pleas In Bar and Motion To Dismiss filed by the Office of the Executive Secretary are DENIED as MOOT.

The Clerk shall direct a copy of this order to all counsel of record and to Dr. Turner.

It is SO ORDERED.



Entered: / /

Westbrook J. Parker
Circuit Judge