

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

THOMAS A. BLACKSTOCK, Jr.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: _____
	)	
VIRGINIA DEPARTMENT OF	)	
TRANSPORTATION	)	
SERVE:     Stephen C. Brich, P.E.	)	
Commissioner	)	
Virginia Dept. of Transportation	)	
1401 E. Broad St.	)	
Richmond, VA 23219	)	
	)	
Defendant.	)	

**PETITION FOR MANDAMUS**

Thomas A. Blackstock, Jr., pursuant to Va. Code § 2.2-3713, states as follows for his Petition for Mandamus against the Virginia Department of Transportation (“VDOT,” the “Agency,” or “Defendant”).

**NATURE OF ACTION**

1.       This Petition represents the latest effort by Blackstock to obtain a clean copy of an August 10, 2020 audit report from VDOT. For more than three years, Blackstock has fought an uphill, almost futile, battle against VDOT to obtain such a copy. At first, he was stone-walled; then, he received (twice) an almost totally redacted version; and finally, he received a version that, while better, remained heavily redacted. At no time has he ever received a clean version of the report that complies with the requirements of the Virginia Freedom of Information Act (“VFOIA”), Va. Code § 2.2-3700, *et seq.* As such, Blackstock now files this Petition, asking this Court to order VDOT to comply with VFOIA and for all other appropriate relief against the Agency.

## **PARTIES**

2. Blackstock is an individual resident of Chesterfield, Virginia, a citizen of the Commonwealth of Virginia, and a former employee of VDOT.

3. VDOT is a “public body” under Virginia’s FOIA, *see* Va. Code. § 2.2-3701, and thus, it is an entity capable of being sued under VFOIA.

## **JURISDICTION AND VENUE**

4. Personal and subject matter jurisdiction are proper in this Court pursuant to, among other things, Va. Code § 2.2-3713.

5. Venue is proper in this Court on several grounds, including pursuant to Va. Code § 8.01-262(3), because VDOT regularly conducts affairs and business activity within the City of Richmond, and pursuant to Va. Code § 8.01-262(4), because the causes of action stated herein arose within the City of Richmond.

## **FACTUAL BACKGROUND**

6. From August 10, 2005 to April 1, 2022, Blackstock worked in various HR management roles at VDOT. At the time of his retirement in 2022, Blackstock worked as an Assistant Division Administrator in VDOT’s HR Division, a position he had held for more than 14 years.

7. One of Blackstock’s many duties as an Assistant Division Administrator at VDOT was to review personnel actions, such as new hires, and ensure that they complied with various guidelines from VDOT and the Commonwealth of Virginia.

### **A. Blackstock Rejects An Irregular Hiring Request; Retaliation Ensues.**

8. In early 2020, Blackstock reviewed a personnel action for a proposed hire that caused him concern. Specifically, the proposed hire involved hiring either a friend or relative of VDOT’s HR Director (Blackstock’s immediate supervisor), yet the opening was

not slated to be advertised or otherwise go through a standard competitive hiring process. It was just going to be a direct hire. This was highly irregular.

9. Although Blackstock's supervisor told him to approve the personnel action, Blackstock hesitated and raised the irregularities with the VDOT Commissioner, Stephen Brich. Upon doing so, Commissioner Brich held meetings with both Blackstock and Blackstock's supervisor and instructed Blackstock ***not*** to approve the hiring action.

10. Blackstock's supervisor was furious with this outcome, and she immediately chastised Blackstock for his actions. In a conversation soon after the Commissioner's meetings, she told Blackstock that she was "extremely disappointed" with his actions and that she could never trust him again.

11. Blackstock's supervisor then began retaliating against him. Examples of this retaliation were taking away Blackstock's review authority and making false accusations against him about his work.

**B. Blackstock Grieves The Retaliation And, As Part Thereof, Requests A Review Of The Irregular Hiring Proposal.**

12. In response to this retaliation, Blackstock filed a grievance against VDOT.

13. In doing so, he specifically requested -- as part of his grievance relief -- that VDOT review whether the proposed hiring action at issue (i.e., hiring the HR Director's friend or relative) was consistent with DHRM guidance, VDOT HR Division guidance, and standard agency practices.

14. Subsequently, VDOT did just that<sup>1</sup> – i.e., it conducted a review and audit of the hiring decision at issue. This was done by VDOT's Assurance and Compliance Office ("ACO"), which issued a Final Report on the matter on August 20, 2020.

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<sup>1</sup> This review may or may not have been related to Blackstock's grievance.

15. In the meantime, Blackstock's grievance moved forward. Blackstock, for his part, gathered his potential evidence and witnesses, and VDOT, for its part, hired outside counsel and did the same.

16. As part of his grievance preparations, however, Blackstock learned of the existence of the ACO Final Report and requested it.

17. VDOT's counsel vehemently objected and flatly refused to produce the ACO Final Report.

18. After examining the issue, the Hearing Officer for the grievance ordered that Blackstock be given a copy of the Final Report or that it be reviewed *in camera*. VDOT, however, again objected and requested an immediate review of the Hearing Officer's decision. In doing so, VDOT also engaged in *ad hominem* attacks on Blackstock, falsely claiming that the only reason he wanted the report was "to perpetuate his continuing efforts to undermine his supervisor."

19. Despite its false attacks and spurious objections, VDOT's effort to withhold the Final Report was rejected. A copy of the ruling by the Commonwealth of Virginia's Office of Employment Dispute Resolution ("EDR") upholding the Hearing Officer's production ruling is attached as **Exhibit A**.

20. Even then, VDOT, through counsel, continued to fight. After EDR returned the matter back to the Hearing Officer and he subsequently ordered the Final Report be produced directly to Blackstock, VDOT, through counsel, *again* sought EDR review of the Hearing Officer's ruling.

21. VDOT even asked that the Hearing Officer be removed from the case based on his actions in ordering the production of the Final Report.

22. As before, VDOT's request for a second review was likewise rejected, and EDR ***again*** upheld the Hearing Officer's order for VDOT to produce the Final Report to Blackstock. A copy of EDR's second ruling upholding the Hearing Officer's decision to order the production of the Final Report is attached hereto as **Exhibit B**.

23. But VDOT remained intransigent and obstructionist. Specifically, even when VDOT finally produced the Final Report to Blackstock, it produced a version that was so heavily redacted that it was utterly useless.

24. The VDOT redactions impacted every single page of the Final Report, and included such things as: (i) a COMPLETE REDACTION of the "Overall Conclusion" section of the report; (ii) an almost complete redaction of the "Overall Recommendation" section of the report; (iii) a redaction of the actual "issue" being reviewed by the ACO; (iv) a redaction of almost the entire factual background section of the report, including a redaction of MORE THAN HALF of page 3 of the report and a COMPLETE REDACTION of page 4; and (v) a COMPLETE redaction of one of the exhibits to the report. A true and accurate copy of the redacted Final Report (which is redacted in black magic marker) is attached as **Exhibit C**.

25. Upon receipt of the overly redacted Final Report, Blackstock realized that the version produced to him would not in any way help him as he pursued his grievance. As such, faced with the daunting prospect of having to present his grievance without full access to the information he believed was necessary for him to prevail, Blackstock withdrew his grievance.

26. The grievance was closed in the Spring of 2021.

**C. Even After His Grievance Ends, Blackstock Continues To Request An Unredacted Copy Of The Final Report And Continued To Be Rebuffed.**

27. With the grievance closed and the irregular hiring matter seemingly in the rear-view mirror, Blackstock decided to make a new effort to receive an unredacted copy of the Final Report.

28. To that end, on December 10, 2021, Blackstock e-mailed VDOT personnel and requested a clean copy of the report. In relevant part, his e-mail said:

Now that grievance #11571 is behind us, is the agency agreeable to providing me with a copy of the audit report produced by Internal Audit in 2020 which presumably in part addressed my role in the recruitment for position H0096?

If so, what is the best avenue for me to formally request this document?

The Agency treated Blackstock's e-mail as a VFOIA request.

29. Blackstock then followed up his December 10, 2021 e-mail with an e-mail on January 3, 2022 that reiterated his request. In relevant part, the e-mail stated:

I'm optimistic that on Monday you will be able to provide me with an unredacted copy of the document identified in my December 10th FOIA request.

For purposes of the recruitment actions which are the subject of the requested document, I served as both the Commissioner and as the HR DA per the delegated authorities assigned to me by both Mr. Brich and Ms. Bullock which I believe is sufficient to establish my standing in this matter.

The fact that I am entitled to a copy of this report which reviews a recruitment to which I was a party has already been asked and answered in the affirmative by Mr. Bill Davidson while he served as a hearing officer under contract with DHRM. The agency at that time challenged my access to the document much as it seems they are doing again today, but that challenge was clearly dismissed by DHRM EDR as documented in their published ruling 2021-5176.

<https://www.edrdecisions.dhrm.virginia.gov/RulingsList/Rulings%20-%20Oct%202020-Dec%202020/11-2020/2021-5176.pdf>

If you or the OAG have any questions about this document request, please feel free to ask me directly and I'll do my best to respond immediately so as not to put Monday's FOIA deadline at risk.

Thank you for your consideration in this matter and I look forward to receiving the requested document on Monday.

Thank you,

Tom.

The deadline for VDOT to respond to the request was January 10, 2022.

30. On January 10, 2022, however, VDOT did ***not*** produce a clean unredacted copy of the ACO Final Report. Instead, it sent Blackstock a copy of the report that was redacted ***in exactly the same manner as before***. The only difference between the two reports was that the redactions in the initially-produced report were done in magic marker whereas the redactions in the newly-produced report were done electronically with a computer.<sup>2</sup> VDOT explained its refusal to provide a clean copy of the Final Report as follows:

Mr. Blackstock-

This email is in response to your FOIA request to VDOT for a copy of a report produced by Internal Audit in 2020 relating to the recruitment for a specific position. Please be advised that portions of the record you have requested relate to ***personnel information and investigations*** and are exempt from disclosure pursuant to §§ 2.2-3705.1 (1) and 2.2-3705.3 (7) of the Code of Virginia. Therefore, these portions have been redacted from the records being released to you.

Thanks,

(emphasis added).

31. Although Blackstock disagreed with this heavily redacted production, he did not pursue it any further at that time. He retired on April 1, 2022.

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<sup>2</sup> A true and accurate copy of the heavily redacted version of the ACO Final Report that was produced to Blackstock on January 10, 2022 is attached as **Exhibit D**.

**D. The Supreme Court of Virginia Issues Its Decision In *Hawkins v. Town of South Hill* And, In Doing So, Heralds A New Day For Public Record Openness Under VFOIA.**

32. On October 20, 2022 – six months after Blackstock retired from VDOT – the Supreme Court of Virginia issued its decision in *Hawkins v. Town of South Hill*, 301 Va. 416, 878 S.E.2d 408 (2022). In that case, the Supreme Court narrowly defined the “personnel exemption” under VFOIA, and, in turn, greatly expanded the information that public bodies must produce about their employees under VFOIA. Indeed, the Court emphasized that the words “personnel” and “content” under Va. Code § 2.2-3705.1(1) – the so-called “personnel exemption” – must be narrowly construed under the Act. *Hawkins*, 301 Va. at 430; 878 S.E.2d at 415.

33. Relevant here, the Supreme Court in *Hawkins* defined the term “personnel information” as used in the VFOIA exemption under Va. Code § 2.2-3705.1(1) to mean: “data, facts, or statements within a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual's employment relationship with the entity, and are private, but for the individual's employment with the entity.” *Id.* at 432; 878 S.E.2d at 416.

34. The Supreme Court then reversed the decision of the Circuit Court below which had refused to order the production of certain requested documents and remanded the case so that the Circuit Court could consider the VFOIA request at issue under the new definition.

35. On remand, the Circuit Court concluded that the new definition made it much more difficult for public bodies to withhold information under this exemption and, in large part, ordered the production of the requested documents. *See Hawkins v. Town of South Hill*, May 26, 2023 Opinion, attached as **Exhibit E**. In doing so, the Circuit

Court expressly recognized that “[t]he Supreme Court’s opinion in *Hawkins* ***heralded a new day*** for the processing of FOIA requests . . . [and] significantly limits the [personnel] exemption in favor of disclosure.” *Id.* at 1. (emphasis added).

**E. Armed With *Hawkins*, Blackstock Makes One Last Attempt To Obtain A Clean Copy Of The Audit Report But Again Is Unsuccessful.**

36. A few months after the Supreme Court issued *Hawkins*, Blackstock became aware of the decision.

37. Upon reviewing the Court’s decision – especially its narrowing the reach of the “personnel” exemption -- Blackstock decided to make one last effort to obtain a clean copy of the ACO Final Report under VFOIA.

38. To this end, on January 27, 2023, Blackstock reached out to VDOT yet again and, in relevant part, stated the following:

... today I was directed to a recent Supreme Court of Virginia ruling that provides clarity regarding a broader and more practical definition of personnel records under Virginia’s FOIA. Had this interpretation been in play during my grievance related FOIA request, I believe that I would have been more successful at that time.

As a result of this ruling, I am contemplating additional options available to me in order to obtain an appropriately redacted copy of the audit report under FOIA and will probably be compelled in my appeal to include the context under which the document was originally requested and effectively denied by VDOT.

My position (similar to that of plaintiff Richard Hawkins in the Supreme Court Case) is that agencies hide behind an overly broad definition of “personnel records” in order to deprive citizen access to documents which address the actions of government employees in the course of performing agency business.

It seems to me that VDOT’s denial of my request (ordered by DHRM) was less about protecting the personal info of the parties involved and more about denying me any sort of real or perceived tactical advantage in the grievance process that was simultaneously in play.

My apologies for sharing this via personal text but I didn't want you to feel blindsided when I escalate this issue. I trust you and view you as an objective arbiter who may be able to suggest a less contentious route to satisfactorily resolve this matter.

Blackstock also included a link to the Supreme Court's decision in *Hawkins*.

39. Despite this new attempt, VDOT ***yet again*** refused to produce a clean copy of the Final Report. It did, however, produce a report that was much less redacted and explained the production as follows:

Hi Tom, unfortunately VDOT did not have the benefit of this definition of personnel information at the time of your previous request. If you will share with me your home address (required in order to respond to FOIA) and email address (so I can send it to you), I will send you a copy of the report with redactions consistent with this decision.

A true and accurate copy of the less-redacted-report is attached as **Exhibit F**.

**F. Under *Hawkins*, VDOT Must Produce A Clean Copy Of The Audit Report.**

40. Even with its latest less-redacted production, VDOT has not complied with VFOIA. Specifically, despite Blackstock's clear and well-supported request, VDOT has failed to produce a clean unredacted copy of the ACO Final Report.

41. Under VFOIA and *Hawkins*, a clean unredacted report must be produced. Although VDOT has redacted certain names and information pursuant to the "personnel" exemption, these redactions are not well taken and are not permitted under the new – more open – interpretation of the exemption per *Hawkins*.

42. Production also furthers the purposes of VFOIA. By its clear terms, the Act ensures that "the people of the Commonwealth" have "ready access to public records in the custody of a public body or its officers and employees." Va. Code § 2.2-3700(B). It does this, as it expressly states, because "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy." *Id*

43. Blackstock has exhausted his attempts to obtain the documents at issue.
44. This Petition followed.

#### **COUNT I – PETITION**

45. The allegations of paragraphs 1-44 are realleged as if fully set forth herein.

46. As explained herein, Blackstock has sought public documents under VFOIA that should be produced. VDOT, however, has refused or otherwise failed to provide the requested documents.

47. Further, pursuant to the provisions of VFOIA, Blackstock submits an affidavit of good cause showing that this Petition is warranted. *See Exhibit G.*

48. As such, this Court should order the production of a clean unredacted copy of the ACO Final Report. Alternatively, this Court should order that all redactions other than the personal information (e.g., personal residential address) of the person to whom the letter “exhibit” to the Final Report is addressed be removed and that the Final Report be produced in that form. Blackstock also requests all other appropriate relief under VFOIA.

WHEREFORE, Blackstock respectfully and specifically requests the following relief against the Virginia Department of Transportation:

- (a) On order of mandamus compelling the production of a clean unredacted version of the ACO Final Report;
- (b) To the extent necessary, civil penalties under FOIA;
- (c) Attorney’s fees; and
- (d) Associated expenses and costs related to this action and all other such relief as is just and proper.

Respectfully submitted,

THOMAS A. BLACKSTOCK, Jr.

By: \_\_\_\_\_  
Of Counsel

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