

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

INVISIBLE INSTITUTE and TOM
NASH

Petitioners,

v.

Case No. _____

VIRGINIA DEPARTMENT OF
CRIMINAL JUSTICE SERVICES

Serve:
Jackson Miller, Director
1100 Bank Street
Richmond, VA 23219

Respondent.

PETITION FOR WRIT OF MANDAMUS

Petitioners Invisible Institute and Tom Nash (collectively, “Petitioners”), by and through their undersigned counsel, state as follows:

1. This case involves an improper attempt by the Virginia Department of Criminal Justice Services (“DCJS” or “Respondent”) to shield records from the public that are required to be disclosed under Virginia’s public records law.

2. By statute, DCJS is responsible for establishing professional certification and training requirements for law enforcement and corrections officers in the Commonwealth. Va. Code §§ 9.1-102(2), (9); 15.2-1706(A).

3. DCJS is further responsible for ultimately certifying and decertifying individual officers. Va. Code §§ 9.1-102(36); 15.2-1706(A).

4. In furtherance of this responsibility, DCJS maintains the Training and Certification Electronic Records database (TRACER) to compile and store certification data regarding individual officers. Va. Dep't Crim. Just. Servs.: TRACER Quick Tips (2021), <https://perma.cc/N8JZ-7DP5>.

5. The information stored on TRACER includes, *inter alia*, an officer's name, identification number, rank, employer, and dates of employment, and reason for termination if applicable. *Id.* at 16-18.

6. On March 9, 2023, Invisible Institute, in coordination with Tom Nash, a resident of Virginia (collectively, "Invisible Institute"), submitted a request to DCJS (the "Request") under the Virginia Freedom of Information Act, Va. Code Ann. § 2.2-3704 *et seq.* ("VFOIA"). Exhibit A.

7. The Request sought records containing certain categories of information about each certified law enforcement and corrections officer (both current and inactive) in the Commonwealth. Exhibit A. This request sought, *inter alia*, records containing officer names and identification numbers, certification status, the department or agency of employment, employment start dates, previous employment, disciplinary actions, and training history. Exhibit A.

8. Additionally, the Request sought "any additional records sufficient to understand and interpret the data" disclosed pursuant to the Request. Exhibit A.

9. On March 14, 2023, DCJS denied the Request in full, citing the VFOIA exception codified at Va. Code § 2.2.-3705.1(1) (the "Personnel Information Exemption"). Exhibit A. This provision exempts from mandatory disclosure "personnel information concerning identifiable individuals." Va. Code § 2.2.-3705.1(1).

10. On May 13, 2024, DCJS made a supplemental response, electing to produce some of the requested records, but withholding officer names, citing Va. Code § 2.2-3706(B)(8) and Va. Code § 2.2-3706(B)(10) (collectively, the “Undercover Officer Exemptions”). Exhibit B. These provisions exempt from mandatory disclosure “[t]hose portions of any records containing information related to undercover operations or protective details that would reveal the staffing, logistics, or tactical plans of such undercover operations or protective details,” Va. Code § 2.2-3706(B)(8), and “[t]he identity of any victim, witness, or undercover officer, or investigative techniques or procedures.” Va. Code § 2.2-3706(B)(10).

11. DCJS continued to withhold several other portions of the requested records pursuant to the Personnel Information Exemption. Exhibit B.

12. On May 20, 2024, as contemplated in its supplemental response of May 13, DCJS produced a spreadsheet reflecting portions of the requested records for active officers. Exhibit C. On the same day, DCJS also produced a second spreadsheet reflecting portions of the requested records for inactive officers. Exhibit D. These spreadsheets did not contain information corresponding to several portions of Petitioners’ Request, including officer names.

13. As set forth below, neither the Undercover Officer Exemptions nor the Personnel Information Exemption are applicable to the records sought through Petitioners’ Request.

14. Accordingly, Petitioners seek the issuance of a writ of mandamus and other relief pursuant to Virginia Code § 2.2-3713 to require DCJS to comply with the provisions of VFOIA, Va. Code § 2.2-3700, *et seq.*

JURISDICTION AND VENUE

15. This Court has jurisdiction over this matter pursuant to Virginia Code § 2.2-3713(A).

16. This Court is the proper venue for this motion pursuant to Virginia Code § 2.2-3713(A)(1) because DCJS is an agency of the Commonwealth’s government.

PARTIES

17. Petitioner Invisible Institute is a nonprofit organization engaged in data journalism with the goal of enhancing the ability of citizens to hold public institutions accountable. *About*, Invisible Institute, <https://perma.cc/U63T-EYLR> (last visited March 30, 2023).

18. Invisible Institute has collaborated with the Virginia Center for Investigative Journalism to examine and report on the Commonwealth’s maintenance and disclosure of basic information about police officer identity and certification. Sam Stecklow, *Virginia Is In The Minority Of States Keeping Even The Most Basic Police Data Secret*, Invisible Institute for the Virginia Center for Investigative Journalism at WHRO (Feb. 8, 2024), <https://perma.cc/H77K-YFC8>. Exhibit E. Sam Stecklow, *Police Reform May Expand In Virginia, But Behind Closed Doors*, Invisible Institute for the Virginia Center for Investigative Journalism at WHRO (Apr. 11, 2024), <https://perma.cc/RQ8N-TWXW>. Exhibit F.

19. Specifically, Invisible Institute has investigated the potential for officers to evade disciplinary investigations and the possibility of decertification by transitioning to new roles or agencies—a practice known as “job jumping.” Exhibit E.

20. Petitioner Tom Nash is a citizen of Virginia and a resident of Richmond.

21. Respondent DCJS is the administrative agency for Virginia’s criminal justice enforcement system. Among other statutory responsibilities, DCJS is required to “certify and decertify law-enforcement officers,” Va. Code 2.2 § 9.1-102(36), and establish “compulsory training standards” for corrections officers, Va. Code 2.2 § 9.1-102(9).

22. Respondent is a “public body” of the Commonwealth of Virginia and is therefore governed by the disclosure requirements of VFOIA. Va. Code §§ 2.2-3700, 2.2-3701.

FACTS

23. On March 9, 2023, Petitioner Nash, on behalf of and in coordination with Petitioner Invisible Institute, sent the Request to DCJS, seeking:

- (1) Records containing certain information about each certified officer, both current and inactive:

Please provide records that contain the below information for each law enforcement and corrections officer actively certified as of the date of this request. . . .

- Officer unique ID number
- POST or state certification ID number
- Officer’s full name
- Officer’s date of birth or, if not releasable, year of birth or current age
- Officer’s city and/or zip code of residence
- Officer’s last/current department or agency
- Officer’s last/current department or agency start date
- Officer’s last/current position and/or rank at that department or agency
- Officer’s previous departments/agencies (employment history), with start and end dates
- Officer’s positions and/or ranks at previous departments or agencies
- Officer’s original date of certification
- Current status of certification (active, lapsed, expired, suspended, etc.)
- Last action taken on certification
- Date of last action on certification
- Disciplinary actions taken against this officer’s certification
- Dates of disciplinary actions taken against this officer’s certification
- Training history/additional certifications of this officer, if available

If your certification system contains data elements not listed above, please include them in the response, provided they are releasable under the law.

. . .

- (2) Documentation necessary to understand the certification records

In addition to records reflecting the data elements listed above, we request any additional records sufficient to understand and interpret the data, including but not limited to record layouts, data dictionaries, code sheets, lookup tables, etc.

Exhibit A.

24. On March 14, 2023, DCJS denied the Request in full, stating that “[p]ursuant to § 2.2-3705.1(1) of the Code of Virginia, DCJS is exercising its discretion to not disclose this information as they are personnel records.” Exhibit A.

25. DCJS did not indicate the number of records in their possession which are responsive to Petitioners’ Request. Exhibit A.

26. In October 2022, DCJS produced a record in response to an earlier VFOIA request that sought, in part, the names of decertified officers. Exhibit G. However, DCJS withheld all records that related to certified officers. Exhibit H.

27. The record produced by DCJS in October 2022 contained the names, agencies, functions, decertification status, dates of decertification, and the reason for decertification for numerous former Commonwealth law enforcement officers. *Id.* The record also included the names, agency, and function of several officers that had been reinstated by DCJS, but the record did not include the dates or reasons for those officers’ prior decertification. *Id.*

28. On April 29, 2024, undersigned counsel for Petitioners provided DCJS a copy of the original petition as required under Va. Code § 2.2-3713(C). Exhibit I.

29. On May 13, 2024, after the parties conferred, DCJS elected to make a supplemental response to the request, indicating that it would produce certain responsive records, including officer identification numbers, certification status, rank or position, agency of employment, and date of certification for all active and inactive law enforcement and corrections officers. Exhibit B.

30. DCJS denied Petitioners’ request for officer names, citing the Undercover Officer Exemptions at Va. Code § 2.2-3706(B)(8) and Va. Code § 2.2-3706(B)(10). It also continued to

rely on the Personnel Information Exemption to withhold records about additional certification and training information, hire date, previous departments/agencies (with start and end dates), position or ranks at previous departments/agencies, date or year of birth, and city or zip code of residence. Exhibit B.

31. Along with the supplemental response of May 13, 2024, DCJS made a supplemental production, containing a revised officer decertification list. Exhibit J. This supplemental production also contained a list of the data fields contained in TRACER. Exhibit K.

32. On May 20, 2024, DCJS made another supplemental production, containing the records it had agreed to produce with respect to both active and inactive officers. Exhibit C; Exhibit D.

33. On September 12, 2024, undersigned counsel for Petitioners provided DCJS a copy of this petition as required under Va. Code § 2.2-3713(C).

34. Pursuant to Virginia Code § 2.2-3713(C), this petition “shall be heard within seven days of when the same is made.”

FIRST CAUSE OF ACTION
RESPONDENT HAS VIOLATED VFOIA BY FAILING TO PRODUCE
RECORDS RESPONSIVE TO PETITIONERS’ VFOIA REQUEST

35. Petitioners reassert and adopt by reference paragraphs 1-34.

36. VFOIA defines “public records” as “all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, . . . or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or

its officers, employees or agents in the transaction of public business.” Va. Code Ann. § 2.2-3701.

37. VFOIA provides that “[a]ll public records . . . shall be presumed open, unless an exemption is properly invoked.” Va. Code Ann. § 2.2-3700(B).

38. The records responsive to Petitioners’ VFOIA Request are public records under VFOIA.

39. DCJS has denied Petitioners access to the officer information responsive to Petitioners’ Request.

40. In denying Petitioners access to the responsive information, DCJS relied on Va. Code § 2.2-3706(B)(8), Va. Code § 2.2-3706(B)(10), and Va. Code § 2.2-3705.1(1).

41. DCJS has asserted no other exemption as a basis for denying Petitioners access to the responsive officer information.

42. Code § 2.2-3706(B)(8) is inapplicable to the records sought by Petitioners. DCJS has failed to show that the records contain information that would “reveal the staffing . . . [of] undercover operations or protective details,” when those statutory terms are afforded their plain meaning.

43. Code § 2.2-3706(B)(10) is inapplicable to the records sought by Petitioners. DCJS has failed to show that the records contain the “identity of any . . . undercover officer,” when those statutory terms are afforded their plain meaning.

44. Va. Code § 2.2-3705.1(1) is inapplicable to the records sought by Petitioners. DCJS has failed to show that the records contain “[p]ersonnel information concerning identifiable individuals,” *id.*, as interpreted by the Virginia Supreme Court in *Hawkins v. Town of South Hill*, 878 S.E.2d 408 (2022).

45. Because DCJS has asserted no applicable exemption justifying the withholding of records responsive to Petitioners' Request, and because those recordings are public records under VFOIA, DCJS's withholding of those records in response to Petitioners' VFOIA Request violates Virginia Code §§ 2.2-3704(A) and 2.2-3700(B).

SECOND CAUSE OF ACTION
RESPONDENT HAS VIOLATED VFOIA BY FAILING TO PRODUCE REDACTED
RECORDS RESPONSIVE TO PETITIONERS' REQUESTS

46. Petitioners reassert and adopt by reference paragraphs 1–44.

47. VFOIA prohibits a public body from “withhold[ing] a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law.” Va. Code Ann. § 2.2–3704.01. Accordingly, “[a] public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.” Va. Code Ann. § 2.2-3704.01.

48. Respondent is required by VFOIA to release the entirety of the requested records. Alternatively, to the extent that portions of records are appropriately withheld under the Personnel Information Exemption or Undercover Officer Exemptions the remainder of those records must be made available to Petitioners, with the withheld portions redacted. Va. Code Ann. § 2.2-3704.1; *see Hawkins v. South Hill*, 2022 WL 11420016, *4 (Va.).

49. Respondent's failure to disclose all non-exempt portions of the requested records violates Virginia Code § 2.2-3704.1.


PRAYER FOR RELIEF

Wherefore, Petitioners pray that this Court will:

- A. Hold a hearing on this matter within seven days of the filing of this Petition, as required by VFOIA.
- B. Issue a writ of mandamus ordering Respondent to release the records sought by Tom Nash and the Invisible Institute in full or, alternatively, to show cause why any portion of that record may not be produced pursuant to an applicable VFOIA exemption.
- C. Order Respondent to pay Petitioners' costs, including attorneys' fees, as Petitioners have substantially prevailed on the merits of the case and no special circumstances make an award of fees unjust. Va. Code 2.2-3713(D).
- D. Grant any further relief as this Court deems just and proper.

Respectfully submitted,

INVISIBLE INSTITUTE and TOM NASH

By: 
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Counsel for Petitioners

CERTIFICATE OF STATUTORY NOTICE

I hereby certify that, pursuant to Va. Code Ann. § 2.2-3713(C), a copy of this Petition for Writ of Mandamus was sent by mail on September 12, 2024, for delivery on September 13, 2024, to the following addresses:


Department of Criminal Justice Services
1100 Bank Street
Richmond, VA 23219

[Faint, illegible text]

I further certify that a copy of this Petition for Writ of Mandamus was sent by email to the following address on September 12, 2024:

Catherina F. Hutchins, CHutchins@oag.state.va.us
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