

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VIRGINIA INFORMATION TECHNOLOGIES)	
AGENCY,)	
Plaintiff,)	
)	
v.)	Case No. CL17-5280
)	
WILLIAM H. TURNER)	
)	
and)	
)	
OFFICE OF THE EXECUTIVE)	
SECRETARY,)	
Defendants.)	

OFFICE OF THE EXECUTIVE SECRETARY'S ANSWER, INITIAL AFFIRMATIVE DEFENSES, PLEAS, AND MOTIONS TO COMPLAINT

COMES NOW the Executive Secretary of the Supreme Court of Virginia and his office (the "Executive Secretary"), by counsel, and for his Answer, Initial Affirmative Defenses, Plea in Bar, and Motions to the Complaint of the Virginia Information Technologies Agency ("VITA") regarding William H. Turner ("Turner"), states as follows.

I.
ANSWER AND INITIAL AFFIRMATIVE DEFENSES

The Executive Secretary, by counsel, for his Answer and Initial Affirmative Defenses to VITA's Complaint, states the following as responsive paragraphs to the numbered allegations of the Complaint, restated verbatim below:

SUMMARY

1. William H. Turner has sought, and continues to seek, production under the Virginia Freedom of Information Act (FOIA) of the monthly itemized long distance phone call billing records for the Office of the Executive Secretary of the Supreme Court of Virginia (OES). VITA centrally administers telecommunications billing for many state agencies, including OES,

so VITA has possession of such billing records. Turner claims that VITA is a custodian of the billing records for OES calls and must produce the records to him under FOIA. OES, on the other hand, claims that the records are confidential as a matter of law and that OES is the legal custodian of the records. VITA wishes merely to ascertain and comply with the law, so respectfully requests that this Court (i) require the Defendants to interplead their conflicting claims to the records, and then (ii) decide the disposition of the records.

RESPONSE: The Executive Secretary admits the allegations found in Paragraph 1 of the Complaint. Specifically, the Executive Secretary admits that it has asserted that the records in question are confidential as a matter of law and that the Executive Secretary is the custodian of the records. The Executive Secretary further disputes the position asserted by Turner that VITA is the custodian of the records. The Executive Secretary seeks, ultimately, disposition by this court that the Executive Secretary (i) is the custodian of the records; (ii) is not a public body under the Virginia Freedom of Information Act ("FOIA"); (iii) is not subject to FOIA largely because of the doctrine of the separation of powers provided by the Constitution of Virginia, Article I § 5, Article III § 1, and Article VI § 4; (iv) is not subject to the enforcement provisions of FOIA based on the statutory language of FOIA; and (v) enjoys sovereign immunity from any action to enforce FOIA against the Executive Secretary.

PARTIES

2. VITA is a state agency in the executive branch responsible for a variety of information technology functions, as provided in Chapter 20.1 of Title 2.2 of the Code of Virginia. VITA's principal office is located at 11751 Meadowville Lane, Chester, VA 23836.

RESPONSE: Although the allegations of Paragraph 2 of the Complaint contain legal conclusions requiring no response, the Executive Secretary admits these allegations.

3. Turner is a citizen of Virginia residing in Accomack County.

RESPONSE: Upon information and belief, the Executive Secretary admits the allegations found in Paragraph 3 of the Complaint.

4. OES was created by statute to be the court administrator for the Commonwealth, as provided in § 17.1-314 of the Code of Virginia. OES's principal office is located at 101 North 9th Street, Richmond, VA 23219.

RESPONSE: The Executive Secretary admits the allegations of Paragraph 4 and further avers that, pursuant to Va. Code § 17.1-314, he is authorized by statute to be the court administrator for the Commonwealth and serves at the pleasure of the Supreme Court of Virginia.

JURISDICTION AND VENUE

5. Like other Virginia trial courts, this Court has jurisdiction to order parties with conflicting claims to the same property to interplead their claims, and then to decide the proper disposition of that property, pursuant to § 8.01-364 of the Code of Virginia. This Court also has jurisdiction to decide FOIA disputes, as provided in Va. Code §§ 2.2-3704 & 2.2-3713.

RESPONSE: Although the allegations of Paragraph 5 of the Complaint contain legal conclusions requiring no response, the Executive Secretary admits these allegations. The Executive Secretary further avers that FOIA cannot be enforced against the Executive Secretary based on the statutory language of FOIA; the separation of powers under Constitution of Virginia, Article I § 5, Article III § 1, and Article VI § 4; and the doctrine of sovereign immunity.

6. Venue is proper in this Court pursuant to Va. Code § 8.01-261(1)(b)(2), because OES regularly or systematically conducts affairs or business activity in the City of Richmond; Va. Code § 8.01-262(1), because OES's principal office is located in the City of Richmond; and

Va. Code § 8.01-262(4), because OES's claims, a part of this cause of action, arose in the City of Richmond.

RESPONSE: Although the allegations of Paragraph 6 of the Complaint contain legal conclusions requiring no response, the Executive Secretary admits these allegations.

FACTS

7. Among many other functions, VITA centrally administers telecommunications billing for many state agencies, including OES. VITA receives bills from telecommunications vendors, and VITA's telecommunications billing system (now known as TEBS) aggregates them, turns them into a readable format, and generates monthly bills to the respective agencies for their long distance phone calls. In addition to operating TEBS, VITA staff also work with the telecommunications vendors to identify and resolve billing errors.

RESPONSE: The Executive Secretary is without sufficient information to admit or deny the allegations found in Paragraph 7 of the Complaint and, therefore, denies the allegations except as described below. The Executive Secretary admits only that VITA has a role in administering telecommunications billing on behalf of the Executive Secretary. The Executive Secretary denies the allegation that VITA generates the Executive Secretary's records because individual phone call records are created by individual judges and other court staff in the Judiciary when they make and receive telephone calls. The Executive Secretary further avers that VITA merely stores, maintains, and archives these digital records for the purpose of carrying out its limited role in administering telephone services for the Executive Secretary. VITA has no responsibility or ability to assess the function, propriety, or nature of the phone calls reflected in these digital records. Further, VITA is unable to determine whether any exemptions from mandatory production under FOIA apply and is unable to exercise proper

discretion under FOIA to determine whether to withhold records that may be so exempted. Only the Executive Secretary and the Judiciary can make those assessments and exercise that discretion when responding to a citizen's request for information. VITA's role with respect to the phone records is best understood as that of a storage provider, acting on behalf of the Executive Secretary and at his instruction. VITA's receipt and any further manipulation or compilation of these individual phone call records does not change the nature of these records, nor does it cause VITA to become the custodian of these records under FOIA.

8. Beginning on August 22, 2017, Turner made requests to VITA for OES's long distance billing records, eventually covering the period January 2016 through August 2017. VITA initially responded by noting that VITA did not have printouts and by referring Turner to OES, citing provisions of FOIA (Va. Code § 2.2-3704(J), and the Public Records Act (Va. Code § 42.1-85(B)) concerning agencies' custodial responsibilities for records.

RESPONSE: To the extent Paragraph 8 calls for a legal conclusion regarding VITA's responsibilities under the FOIA, specifically with regard to whether VITA is a "custodian" under FOIA, no response is required. The Executive Secretary admits only that Turner began making requests to VITA for the Executive Secretary's long distance billing records on or about August 22, 2017. VITA's written responses to Turner's requests otherwise speak for themselves.

9. Upon information and belief, before and/or during the same period of time that Turner was seeking the records from VITA, Turner requested OES's long distance billing records from OES too, but OES declined to produce the records.

RESPONSE: The Executive Secretary admits the allegations found in Paragraph 9 of the Complaint and further avers that in declining Turner's request, the Executive Secretary

explained, among other things, that the Judiciary's records are not subject to FOIA, that the records are confidential as a matter of law, and that the doctrine of the separation of powers prohibited the release of these confidential records of the Judiciary.

10. Turner sought to enforce FOIA and compel OES to produce the records by filing a petition for injunction or mandamus in Accomack General District Court (*Turner v. Office of the Executive Secretary*, case no. GV17001833) on September 28, 2017. Turner requested, and the Clerk issued, a subpoena for VITA employee Dan Wolf in that action.

RESPONSE: The Executive Secretary asserts that the judicial records from the petition referenced in Paragraph 10 of the Complaint speak for themselves.

11. After further consideration and communications with Turner, VITA ascertained what information was available and decided to produce that information. Accordingly, on October 3, 2017, VITA produced OES long distance phone billing records covering the period January 2016, the start point in Turner's requests to VITA, through June 2017, the latest available. Turner requested hard copies, and VITA produced the same records to him on paper on October 12, 2017.

RESPONSE: Regarding the allegations of Paragraph 11 of the Complaint, the Executive Secretary denies any inference, arising from the allegation that VITA decided to produce the records requested by Turner, that either VITA or the Executive Secretary had any obligation to provide such records to Turner. Otherwise, the Executive Secretary is without sufficient information to admit or deny the allegations regarding VITA's decision to produce records to Turner and, therefore, denies the allegations. The Executive Secretary further asserts that the referenced correspondence between VITA and Turner speak for themselves.

12. On October 13, 2017, the Accomack General District Court held a trial on Turner's petition and entered a final order denying the petition. At that trial, Turner orally asked of VITA's counsel that VITA provide copies of the OES long distance phone records for July, August, and September 2017. The substitute judge who presided over that trial, the Honorable Robert B. Carter, echoed Turner's request and instructed VITA's counsel that VITA should write to Turner to state whether VITA is willing to produce those records when they exist.

RESPONSE: The Executive Secretary admits the allegations of Paragraph 12 of the Complaint.

13. On October 16, OES, through Edward M. Macon, Assistant Executive Secretary and Counsel at OES, wrote to VITA asserting that OES did not authorize the release of telephone records for 2016-17, that OES is the legal custodian of OES's phone records, and that many, if not all, of the phone records are confidential as a matter of law and contain potentially very sensitive information. A copy of OES's email is attached as Exhibit A.

RESPONSE: The Executive Secretary admits the allegations of Paragraph 13 of the Complaint and further avers that the email found at Exhibit A to the Complaint speaks for itself.

14. On October 22, Turner sent VITA a letter repeating his demands for the July 2017 and August 2017 records. Turner has sent many letters to VITA, including letters on September 15, 2017, September 17, 2017, and October 22, 2017, copies of which are attached as Exhibits B, C, and D, respectively. On more than one occasion, Turner has threatened VITA with filing a further FOIA petition and accused VITA of criminal activity (a purported conspiracy to withhold, alter, or destroy the records he seeks).

RESPONSE: The Executive admits the allegations of Paragraph 14 of the Complaint. The Executive Secretary further asserts that the letters referenced in this allegation speak for themselves.

15. Prior to November 3, 2017, VITA has told Turner on multiple occasions that OES long distance phone records covering calls made in July 2017, August 2017, and September 2017 did not yet exist because telecommunications bills for those months had not yet been created and issued. Generation of billing records for those months had been delayed due to technical problems with TEBS, which is a new telecommunications billing system that began operation with the bills covering judicial branch calls made in June 2017. During this period, VITA staff was working to resolve the technical issues with an expectation that the records would come into existence in the near future as the billing would occur for those months. On November 3, VITA was able to resolve the technical impediment as to the phone records covering calls made in July 2017. As of the date of the filing of this action, the billing records for August 2017 and September 2017 still do not exist but should come into existence soon.

RESPONSE: The Executive Secretary is without sufficient information to admit or deny the allegations of Paragraph 15 of the Complaint and, therefore, the Executive Secretary denies these allegations except as described below. The Executive Secretary admits only that the Executive Secretary's long distance phone records covering calls made in July 2017, August 2017, and September 2017 did not yet exist at the time of Turner's request and the filing of the Complaint. The Executive Secretary further denies the allegation that VITA generates the Executive Secretary's billing records to the extent that individual phone call records are created

by individual judges and other court staff members of the Judiciary as described in the Executive Secretary's response to Paragraph 7, above.

COUNT I - INTERPLEADER

16. Through the telecommunications billing system, VITA generates and maintains OES long distance phone billing records, which would include the records reflecting calls made in July 2017, August 2017, and September 2017.

RESPONSE: Regarding the allegations of Paragraph 16 of the Complaint, the Executive Secretary admits only that through the telecommunications billing system VITA administers and maintains the Executive Secretary's long distance phone billing records, including records reflecting calls made in July 2017, August 2017, and September 2017. The Executive Secretary further denies the allegation that VITA generates the Executive Secretary's long distance phone billing records to the extent that individual phone call records are created by individual judges and other court staff members of the Judiciary as described in the Executive Secretary's response to Paragraph 7, above.

17. VITA is exposed to conflicting claims to those records. On the one hand, Turner maintains that VITA must release them to him. On the other hand, OES maintains that VITA may not release them to Turner.

RESPONSE: Upon information and belief, the Executive Secretary admits the allegations of Paragraph 17 of the Complaint.

18. VITA is or may be exposed to multiple liability through the existence of these competing claims to the same property, the records at issue.

RESPONSE: Upon information and belief, the Executive Secretary admits the allegations of Paragraph 18 of the Complaint.

19. VITA wishes to avoid legal liability and comply with the law as to the disposition of the records at issue. VITA has no interest in the disposition of the records beyond ensuring that VITA remains legally compliant and does not incur liability arising from the competing claims to the records.

RESPONSE: The Executive Secretary admits to the allegations of Paragraph 19. VITA is not the custodian of the phone call records in question and has no interest in whether they are produced or not to Turner. The Executive Secretary further avers that an interpleader action has been properly pleaded by VITA in this case.

20. VITA wishes to voluntarily tender the records for July 2017 calls into this Court under seal, as well as the further billing records at issue as they are generated, pending this Court's ruling concerning the proper disposition of the records.

RESPONSE: The Executive Secretary admits the allegations of Paragraph 20 of the Complaint. The Executive Secretary further avers that an interpleader action has been properly pleaded by VITA in this case.

PRAYER FOR RELIEF

21. WHEREFORE, VITA asks that the Court award the following relief, in accordance with the remedies specifically provided for by Va. Code § 8.01-364:

- a. Require Turner and the Executive Secretary to interplead their claims;
- b. Restrain all claimants from instituting or prosecuting any proceeding in any court of the Commonwealth affecting the Executive Secretary's long distance phone records at issue;
- c. Permit VITA to tender the records into this Court under seal as they become available during the pendency of this action;

- d. Hear and determine the case, discharging VITA from further liability; and
- e. Make all appropriate orders to enforce its judgment as to the disposition of the records, and award VITA any other relief that the Court deems just and proper.

RESPONSE: Although no response is required to VITA's prayer for relief, the Executive Secretary joins in the prayer for relief and further admits that the Complaint properly pleads an interpleader action to resolve the underlying dispute between the Executive Secretary and Turner.

22. All remaining allegations of the Complaint that have not been expressly admitted above are hereby denied, and the Executive Secretary calls for strict proof thereof.

23. The Executive Secretary reserves the right to amend this Answer and to assert all properly provable defenses in the event such defenses are discovered in the course of trial.

INITIAL AFFIRMATIVE DEFENSES

The Executive Secretary, by counsel, states and affirms the following Initial Affirmative Defenses in response to the Complaint, including the underlying claims of Turner, and to which affirmative defenses the Executive Secretary expressly requests a written reply from Turner:

1. In further answer to the Complaint and by way of affirmative defense, the doctrine of sovereign immunity serves as an absolute bar to the request of Turner for the records, as well as any records sought from the Executive Secretary, the court administrator for the Commonwealth, and to any liability that allegedly arises from either production or failure to produce the Executive Secretary's records.

2. In further answer to the Complaint and by way of affirmative defense, the separation of powers among the judicial, legislative, and executive branches serves as an

absolute bar to the request of Turner for the records, as well as any records sought from the Executive Secretary, the court administrator for the Commonwealth. *See* VA. CONST. art. I, § 5, art. III, § 1, art. VI, § 1.

3. In further answer to the Complaint and by way of affirmative defense, the records sought by Turner are confidential as a matter of law.

4. In further answer to the Complaint and by way of affirmative defense, FOIA does not apply to and is not enforceable against the Executive Secretary, the court administrator for the Commonwealth, and who serves at the pleasure of the Supreme Court of Virginia.

5. In further answer to the Complaint and by way of affirmative defense, Turner has failed to state a claim for which he can recover any relief at law or equity for alleged violations of FOIA by the Executive Secretary.

6. In further answer to the Complaint and by way of affirmative defense, Turner's claims are barred by the doctrines of waiver, estoppel, and *res judicata*.

7. The Executive Secretary reserves the right to assert additional defenses or claims that may become apparent during the course of discovery and reserves the right to amend his answer to assert such defenses.

WHEREFORE, the Executive Secretary respectfully requests that the Court:

- a. Permit Turner and the Executive Secretary to interplead their claims;
- b. Restrain all claimants from instituting or prosecuting any proceeding in any court of the Commonwealth affecting the Executive Secretary's long distance phone records at issue, or any other records of the Executive Secretary, pursuant to Va. Code § 8.01-364, including, without limitation, the pending lawsuits of *Turner v. Office of the Executive Secretary* and *Turner v. Office of the Attorney*

General, Kristi Wright & Nerissa Rouzer, consolidated at Case No. CL17-279, in the Accomack County Circuit Court;

- c. Permit VITA to tender the records into this Court under seal as they become available during the pendency of this action;
- d. Hear and determine the case, not only discharging VITA from further liability, but also dismissing Turner's claims against the Executive Secretary;
- e. Make all appropriate orders to enforce its judgment as to the disposition of the records, including awarding the Executive Secretary all such relief as the ends of justice may require;
- f. Require the return of all interpleaded records to the Executive Secretary at the conclusion of this case; and
- g. Enjoin Turner from seeking any records of the Executive Secretary pursuant to FOIA.

II. **PLEAS IN BAR**

The Executive Secretary, by counsel, states the following as and for his Pleas in Bar to the Complaint, for which the Executive Secretary reserves the right to file additional memorandum in support prior to a hearing in this matter.

1. The claims asserted by Turner, on present information and belief, are barred and precluded, in whole or in part, by the separation of powers among the judicial, legislative, and executive branches. *See* VA. CONST. art. I, § 5, art., III § 1, art. VI, § 1.
 - a. FOIA is not enforceable against the Executive Secretary under the plain terms of the FOIA statute.

b. The Executive Secretary is not a "public body" within the meaning of FOIA. *See* Va. Code § 2.2-3701.

c. Further, the Executive Secretary—not VITA—is the custodian of the records that are the subject of the Complaint. VITA has no authority to produce the Executive Secretary's records to third parties or the public, and no meaningful ability to review these records. The Chief Justice of the Supreme Court of Virginia is the administrative head of the judicial system, and the Supreme Court appoints the executive secretary to serve at the Supreme Court's pleasure. *See* VA. CONST. art. VI, § 4; Va. Code § 17.1-314.

d. Furthermore, the records of individual calls sought by Turner were created by individual judges and court staff, not VITA, and the transfer, storage, maintenance, archiving, compilation, or other manipulation of such records does not alter that fact.

e. The records in question are confidential as a matter of law.

f. Turner would have this Court permit the General Assembly to invade the province of the Judiciary in violation of the Constitution of Virginia, which requires that the legislative, executive, and judicial departments "be separate and distinct so that none exercise the powers properly belong to the others, nor any person exercise the power of more than one of them at the same time." *See* VA. CONST. art. I, § 5; art. III § 1.

2. The claims asserted by Turner, on present information and belief, are barred and precluded, in whole or in part, by the doctrine of sovereign immunity. The General Assembly has not expressly waived sovereign immunity as to the Judiciary with respect to FOIA.

WHEREFORE, the Executive Secretary respectfully requests the Court to sustain these Pleas in Bar, enter an Order dismissing Turner's claims against the Executive Secretary and VITA underlying the Complaint, and award the Executive Secretary other relief as the ends of justice may require.

III.
MOTION FOR BILL OF PARTICULARS

The Executive Secretary, by counsel, upon the event of this Court granting VITA's Motion for Interpleader, previously filed on December 20, 2017, and pursuant to Rules 3:7 and 3:8 of the *Rules of the Supreme Court of Virginia*, respectfully moves this Court for a bill of particulars from Turner, so as to amplify Turner's claims underlying the Complaint with respect to the factual bases of the claims he intends against the Executive Secretary, and to provide the Executive Secretary fair opportunity to respond to the same, for the following reasons and as set forth in additional memorandum in support, which the Executive Secretary reserves the right to submit prior to a hearing in this matter.

1. The Complaint seeks to interplead a dispute between the Executive Secretary and Turner regarding Turner's request for certain records in the possession of VITA. Turner has sought, and continues to seek, certain long distance phone call billing records for the Executive Secretary. The Executive Secretary has refused to produce these records because (a) FOIA is not applicable to or enforceable against the Judiciary, including the Executive Secretary; (b) the separation of powers under the Constitution of Virginia bars Turner's claims; and (c) the doctrine of sovereign immunity bars Turner's claims.

2. After Turner's initial request, he has continued to submit multiple, duplicative requests for the same records while asserting numerous and various allegations against the

Executive Secretary. Currently, these requests are being submitted nearly every few business days.

3. It serves judicial economy to require Turner to amplify his allegations against the Executive Secretary regarding the records that are the subject of the Complaint in order to adequately advise this Court and the Executive Secretary of Turner's claims.

WHEREFORE, the Executive Secretary respectfully requests that this Court grant this Motion and order Turner to file a Bill of Particulars setting forth his claims against the Executive Secretary with respect to the records that are the subject of the Complaint, and award the Executive Secretary all such other relief as the ends of justice require.

Date: December 22, 2017

OFFICE OF THE EXECUTIVE SECRETARY

By 
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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, I served a copy of the foregoing by email and first-class mail, postage prepaid on the following:

Mark Herring, Esq.
Cynthia E. Hudson, Esq.
John S. Westrick, Esq.
Joshua D. Heslinga, Esq.
Office of the Attorney General
202 North Ninth Street
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Counsel for VITA

and by facsimile to:

William H. Turner
27316 Lankford Highway
Onley, VA 23418
Pro se Defendant

A handwritten signature in black ink, appearing to be "J. Herring", written over a horizontal line.