VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ACCOMACK

WILLIAM H. TURNER, Plaintiff,	)	
v.	)	Case No. CL17-279
OFFICE OF THE EXECUTIVE SECRETARY et al., Defendants.	)	

THE EXECUTIVE SECRETARY'S MOTION TO DISMISS

COMES NOW the Executive Secretary of the Supreme Court of Virginia and his office (the "Executive Secretary"), by counsel, and pursuant to Rule 3:8 of the *Rules of the Supreme Court of Virginia*, respectfully moves the Court for an order dismissing with prejudice the petitions for mandamus of Plaintiff William H. Turner ("Dr. Turner"), originally filed in Accomack General District Court as Case Nos. GV17-0673 and GV07-0637, and which petitions have been appealed *de novo* to this Court. The reasons this Court lacks subject matter jurisdiction to adjudicate Dr. Turner's claims, which are barred as a matter of law, can be summarized as follows:

- First, the Virginia Freedom of Information Act ("VFOIA") does not apply to the judiciary, including the Executive Secretary, based on the plain meaning of the statute;
- Second, the doctrine of the separation of powers prohibits the application of VFOIA to the Executive Secretary;
- Third, the records sought by Dr. Turner are entitled to an absolute privilege, known as the judicial deliberative process privilege, which Virginia should adopt; and
- Fourth, the doctrine of sovereign immunity has not been waived by the judiciary with respect to VFOIA.

I.
PROCEDURAL BACKGROUND

The General Assembly established VFOIA as a law that "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees . . . ." Va. Code § 2.2-3700(B). When a citizen believes a public body has violated VFOIA, the Act recognizes enforcement against the public body through a petition for mandamus or injunction in general district or circuit court. *See* Va. Code § 2.2-3713. Dr. Turner has pursued this remedy in a purported attempt to enforce VFOIA against the judiciary, including the Executive Secretary.

On March 30, 2017, Dr. Turner filed his first petition against the Executive Secretary, Case No. GV17-0637, Accomack General District Court, in which he made the following statements "2.2-3704.1 requires that information be available on website and by mail (see attached)"; "failure to provide all information required by 2.2-3704.1"; and "my requests of 2/12/17 and 3/18/17 were not answered." On April 10, 2017, Dr. Turner filed another petition against the Executive Secretary, also naming as a respondent the Office of the Attorney General, in which he made the following statements, "multiple violations of 2.2-3704"; failure to answer 2.2-3704 with a proper response"; and "2.2-3704 states that you must cite a specific code when claiming an exemption."

After the Accomack General District Court ordered Dr. Turner to file a bill of particulars in each case, which cases were consolidated, Dr. Turner responded with spreadsheets and copies of his letter requests. These filings reflected Dr. Turner's underlying pursuit of records related to judicial expense reimbursements afforded to circuit court judges, including his desire to enforce VFOIA for supposed violations regarding these multiple requests against the judiciary, including the Executive Secretary and individual judges. Generally, he claims, among other things, that

many of his requests were improperly denied in violation of VFOIA's specific requirements governing responses to requests and website compliance issues.

Ultimately, after a five-hour trial in the consolidated matters, on August 3, 2017, the Accomack General District Court issued a written opinion and Final Order granting judgment in part and denying judgment in part to the Executive Secretary. Both Dr. Turner and the Executive Secretary appealed the August 3, 2017, Final Order to this Court. Accordingly, Dr. Turner's petitions are now before this Court for a *de novo* appeal. To date no pleadings have been ordered, and no pretrial scheduling order has been entered. No such orders are necessary, however, because Dr. Turner's petitions for mandamus against the Executive Secretary are barred as a matter of law, as set forth below.

II.
STANDARD OF REVIEW

It is well established that

> Subject matter jurisdiction is the power of a court to adjudicate a class of cases or controversies. Article III, Section 1 of the Constitution of Virginia provides, in pertinent part: "The legislative, executive, and judicial departments shall be separate and distinct, so that none shall exercise the powers properly belonging to the others . . . ." Because of that basic constitutional principle, subject matter jurisdiction exists in the courts only when it has been granted by a constitution or statute. *In re: Commonwealth of Virginia*, 278 Va. 1, 11, 677 S.E.2d 236, 240 (2009). The lack of subject matter jurisdiction cannot be waived and such jurisdiction cannot be conferred on a court by the litigants. The lack of subject matter jurisdiction may be raised at any time. *Id.*

Virginian-Pilot Media Cos., LLC v. Dow Jones & Co., 280 Va. 464, 467-68, 698 S.E.2d 900, 901–02 (2010). Indeed, a judgment or order entered by a court devoid of subject matter jurisdiction is a nullity. *See, e.g.*, *Humphreys v. Commonwealth*, 186 Va. 765, 772, 43 S.E.2d 890, 893 (1947). Thus, a motion to dismiss for lack of subject matter jurisdiction "may be raised at any time during the proceeding," *Early v. Landsidle*, 257 Va. 365, 371, 514 S.E.2d 153, 156

(1999). The lack of subject matter jurisdiction may be raised "in any manner, before any court, or by the court itself." *Humphreys*, 186 Va. at 772, 43 S.E.2d at 893. Further, "[t]he point may even be raised for the first time on appeal by the appellate court *sua sponte*." *Morrison v. Bestler*, 239 Va. 166, 170, 387 S.E.2d 753, 756 (1990).

III.
ARGUMENT

A. The Executive Secretary Serves as Administrator of Virginia's Judiciary.

As a threshold matter, it is important for the Court to recognize the unique role of the Executive Secretary, which role should inform the outcome of this case. Pursuant to Va. Code §17.1-314, the Executive Secretary is appointed by the Chief Justice of the Supreme Court of Virginia and serves at the pleasure of the Supreme Court. He is not a public body, but rather a person. *See id.* The Chief Justice is the administrative head of the judiciary, which, of course, is a separate branch of government. *See* VA. CONST. art. VI, § 4 ("The Chief Justice of the Supreme Court shall be the administrative head of the judicial system."); *see also* VA. CONST. art. I (*Bill of Rights*), § 5 (*Separation of legislative, executive, and judicial departments*, in part); art., III (*Division of Powers*), § 1 (*Departments to be distinct*); art. VI (*Judiciary*), § 1 (*Judicial power; jurisdiction*). The Executive Secretary assists the Chief Justice with the administration of the judiciary's constitutional powers. Va. Code § 17.1-315. Further, Va. Code § 17.1-502 recognizes the Executive Secretary as the "administrator of the circuit court system."

Accordingly, the Executive Secretary supports the judiciary, which the Virginia Constitution recognizes as one of the three branches of government in the Commonwealth. VA. CONST. art. III, § 1 ("The legislative, executive, and judicial departments shall be separate and

distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . . .").

References to the judiciary, therefore, namely to the Chief Justice of the Supreme Court, corresponds with the Executive Secretary, for the Executive Secretary cannot exist separate and apart from this independent branch of government. In fact, the Supreme Court of Virginia has recognized the interchangeable nature of references to Virginia's high court with that of the Executive Secretary. *See Judicial Inquiry & Review Comm'n v. Taylor*, 278 Va. 699, 706, 685 S.E.2d 51, 55 (2009) ("Although Judge Taylor repeatedly asserted that the clerk's office should have contacted the Supreme Court of Virginia to obtain guidance, she was presumably referring to the Office of the Executive Secretary (OES) . . . .").

B. VFOIA Plainly Does Not Apply to the Judiciary.

A plain reading of VFOIA reveals that it does not apply to the judiciary, including the Executive Secretary. The statute explains:

> By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to ***public records in the custody of a public body or its officers and employees***, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

Va. Code § 2.2-3700 (emphasis added). The statute goes on to define "public body" to mean

> "Public body" means ***any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth*** or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and ***other organizations, corporations or agencies in the Commonwealth supported wholly***

> ***or principally by public funds***. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) ***any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body***. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.
>
> For the purposes of the provisions of this chapter applicable to access to public records, ***constitutional officers and private police departments as defined in § 9.1-101 shall be considered public bodies and, except as otherwise expressly provided by law,*** shall have the same obligations to disclose public records as other custodians of public records.

Va. Code § 2.2-3701 (emphasis added). The current definition of "public body" begins with the adjective "legislative," which modifies each noun that follows before the first semi-colon. The judiciary is not subject to VFOIA because it is not legislative or executive in nature; it is distinct in its function as the branch of government of providing judicial review, i.e., "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). As a separate, co-equal branch of government, the judiciary plainly does not fall within this list of entities in the definition of "public body" under VFOIA.

Prior iterations of this term "public body" have been interpreted by the Supreme Court of Virginia to "clearly refer to entities to which responsibility to conduct the business of the people is delegated by legislative or executive action." *Connell v. Kersey*, 262 Va. 154, 161, 547 S.E.2d 228, 231 (2001) (finding a Commonwealth's Attorney derived his authority from the Constitution such that VFOIA did not apply to compel disclosure); *see Christian v. State Corp. Comm'n*, 282 Va. 392, 400, 718 S.E.2d 767, 771 (2011) (citing *Connell* in support of its conclusion that the State Corporation Commission (the "SCC") is exempt from VFOIA). Notably, the General Assembly responded to *Connell* by amending VFOIA in 2002, but did not extend VFOIA to the judiciary.

Rather, in 2002, the General Assembly first clarified that VFOIA applied only to a "public body or its officers and employees" and expressly included the five constitutional officers of each locality, i.e., the sheriff, clerk of court, treasurer, commissioner of revenue, and the commonwealth's attorney. *See* VA. CONST. art. VII (*Local Government*), § 4 (*County and city officers*). The General Assembly's omission of the judiciary is entitled to a presumption that this was a deliberate act by the legislature. *See, e.g., Gov't Employees. Co.* v. Hall, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (explaining the maxim *expression unius est exclusion alterius* provides that "mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute"); *GEICO v. Hall*, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)). This omission is stark when compared with other laws demonstrating that the legislature knows how to identify the judiciary. For instance, when comparing VFOIA's definition of "public body" the same defined term in the Virginia Public Procurement Act, it is conspicuous that the General Assembly omitted "judicial body" from VFOIA's definition. *Compare* VFOIA, Va. Code §§ 2.2-3701, *with* Virginia Public Procurement Act, Va. Code § 2.2-4301 (defining "Public body" to mean "any legislative, executive or judicial body . . ."). Clearly, the General Assembly knows how to properly refer to the judiciary, but under VFOIA it declined to do so.

Second, in 2002, the General Assembly strengthened the use of the term "legislative" as a modifier for the entities identified in the definition of "public record," by eliminating a semicolon and the word "any," together which—before their deletion—arguably limited the use of the adjective (but which semicolon the Supreme Court of Virginia nonetheless ignored in *Connell* while concluding that VFOIA applies only to legislative and executive entities). *See*

2002 Va. Acts 393, H.B. 729 (Apr. 1, 2002), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?021+ful+CHAP0393. These 2002 amendments strengthen the conclusion that the judiciary, including the Executive Secretary, simply is not contemplated to fall within the scope of VFOIA.

Further, it is plain that judges are not "organization[s], corporation[s], or agenc[ies]" even though they are supported by public funds, nor are they "committee[s], subcommittee[s], or other entit[ies] however designated, of the public body created to perform delegated functions of the public body or to advise the public body." Moreover, Karl Hade, the Executive Secretary, is an individual person and not a "public body" or any other entity described in the definition of "public body." *See* Va. Code § 17.1-314. On his own, he has no policymaking or spending authority, and he and those he has hired to assist him are not—even collectively—a legislative body, authority, board, bureau, commission, district, or agency of the Commonwealth or of any political subdivision. None of these categories found in Va. Code § 2.2-3701 apply to the Executive Secretary.

In *Christian*, the Supreme Court of Virginia recognized that the State Corporation Commission had a separate and parallel structure of laws concerning disclosure of records to the public in support of its holding that VFOIA did not apply to the SCC. *See Christian*, 282 Va. at 399, 718 S.E.2d at 770–71. Similarly, the Supreme Court of Virginia has express authority from the Constitution to engage in its own rulemaking. VA. CONST. art. VI (*Judiciary*), § 5 (*Rules of practice and procedure*). For example, the Supreme Court of Virginia has made all employees of the judiciary—except those who are subject to the Canons of Judicial Conduct for the Commonwealth of Virginia or the Magistrate Canons—subject to the Rules of Conduct for Judicial System Employees, since 2012. These Rules require a high degree of confidentiality

and strictly prohibit disclosure of communications among Justices, judges, law clerks, and other judicial staff to any third party unless expressly permitted by a Justice or judge. VFOIA should not be extended to defeat these internal rules of the judiciary.

Further, given the role of the Executive Secretary, who serves at the pleasure of the Chief Justice and the Supreme Court to administer the judiciary, permitting a writ of mandamus to issue against the Executive Secretary invades the ability of the Supreme Court to make its own rules. At least one circuit court judge has opined about the futility of attempting to issue and enforce such a writ because of this appointment relationship. *See Coggeshall v. Va. Dep't of the Treasury*, 87 Va. Cir. 402, 403 (Norfolk 2014) (ruling that despite the uncertainty of whether he had authority to issue a writ of mandamus against the Executive Secretary, that it would be futile to do so). This is further supported by *Christian*, in which the Supreme Court recognized its constitutionally-mandated, exclusive authority for providing judicial review over any action of the SCC as a determinative reason for ruling that VFOIA could not be enforceable against, and was therefore inapplicable to, the SCC. 282 Va. at 400–01, 718 S.E.2d at 771. Similarly, this Court should recognize the limitations that any enforcement under VFOIA would have against the Executive Secretary, who serves at the pleasure of the Supreme Court of Virginia and carries out the duties assigned by the Chief Justice. Without such enforcement, VFOIA cannot apply and dismissal of Dr. Turner's petitions is warranted.

C. The Separation of Powers Prohibits Mandatory Disclosure Under VFOIA.

In addition, the doctrine of the separation of powers protects the Executive Secretary from mandatory disclosure to Dr. Turner pursuant to VFOIA. This doctrine protects the supremacy and separate nature of each branch: the judiciary, the legislature, and the executive. Remarking on the federal separation of powers, the Supreme Court of the United States

("SCOTUS") has explained that, "'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others'" and "'[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.'" *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441–42 (1977) (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629, 630 (1935)). Similarly, Virginia's Constitution recognizes the separation of powers between these three branches. VA. CONST. art. I, § 5; art., III, § 1; art. VI, § 1.

> The Virginia Constitution directs that the government function through three equal but separate branches with specific responsibilities and powers assigned to each, and that no one branch may exercise the functions or powers of another except as specifically authorized by the constitution. This principle prevents one branch from engaging in the functions of another, such as the judicial branch performing a legislative function.

Taylor v. Worrell Enters., Inc., 242 Va. 219, 221, 409 S.E.2d 136, 137–38 (1991). In the case of the Executive Secretary, his role as an appointee of the Supreme Court underscores the potential for infringement on the judiciary's independence and separate powers posed by Dr. Turner's petitions or mandamus. Permitting such a remedy would intrude upon the function and authority of the Executive Secretary, who is the administrative arm of the Supreme Court of Virginia.

In *Taylor*, the Daily Progress sought itemized long-distance telephone calls from the Governor of Virginia, to which the Governor agreed to provide monthly summaries but not the itemization. *Id.* at 220, 409 S.E.2d at 137. The Governor explained that VFOIA recognized an exemption for "[m]emoranda, working papers and correspondence held . . . by the office of the Governor" to permit this nondisclosure. *Id.* (citing Va. Code § 2.1-342(B)(4) (1998) (currently found, as amended, at Va. Code § 2.2-3705.7(2))). In a plurality opinion, the Supreme Court of Virginia upheld the Governor's assertion of the doctrine of the separation of powers to defend against mandatory disclosure under VFOIA, stating that production of such data could have a

"chilling effect on the Governor's use of the telephone for conducting the Commonwealth's business." *Taylor*, 242 Va. at 222, 409 S.E.2d 136, 138–39 (1991). The Supreme Court explained further that "'[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.'" *Id.* at 223 (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)). After all, the SCOTUS recognized that regarding "the valid need for protection of communications between high Government officials and those who advise and assist them in the importance of their manifold duties," "the importance of this confidentiality is too plain to require further discussion." *United States v. Nixon*, 418 U.S. at 705. Thus, "[c]ompelled disclosure of [the itemized phone records] impairs, though it does not completely destroy, the ability of the executive to perform his constitutionally required duties." *Taylor*, 243 at 223, 409 S.E.2d at 139.

The test for determining whether a disclosure will invade the constitutional powers of a branch is the "extent to which [the regulation or disclosure] prevents the . . . [b]ranch from accomplishing its constitutionally assigned functions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 443. In *Taylor*, the Supreme Court of Virginia applied this test to conclude that although VFOIA's objective is to encourage and facilitate a policy of openness in government, the potential for disruption imposed on the Governor by mandating the disclosure of itemized phone records was ***not*** outweighed by this open government policy. *Taylor*, 242 Va. at 224–25, 409 S.E.2d at 139. The Court concerned itself with the "chilling effect" such disclosure would have "not only on the Chief Executive but . . . also . . . to individuals he might wish to consult via this communication medium." *Id.* at 222. The Supreme Court of Virginia prohibited the disclosure in recognition of both the Executive's privilege and VFOIA exemption. Indeed, the protection of

communications between high positions of public power, including the judiciary, and their staff should be preserved as important facets of Virginia's system of government.

Notably, *Taylor* has been used in foreign jurisdictions to prevent the mandatory disclosure of administrative documents such as itemized phone records for similar reasons. For example, in *Des Moines Register & Tribunal Co. v. Dwyer*, 542 N.W.2d 491, 499–500 (1996), the Iowa Supreme Court cited *Taylor* while recognizing that, given the Iowa Senate's ability to determine its own rules of proceedings, the disclosure of itemized phone records was not only inconvenient and harassing to the legislative branch, but also created negative inferences for those who contacted senators and refused comment publicly on such communications. Because the Iowa Senate determined for itself both through practice and written policy that a wholesale disclosure of such itemized phone records would harm both the public and the Iowa Senate's ability to perform its duties, the Iowa Supreme Court deferred to this interpretation and refrained from mandating disclosure. *Id.* at 500–501; *see also N.J. Newspaper Co. v. Freeholders*, 245 N.J. Super. 113, 584 A.2d 275, 276 (N.J. Super. Ct. App. Div. 1990) (prohibiting the disclosure of itemized phone records because of the intrusion into privacy interests, and the potential for "indiscriminate embarrassment or harassment" of both the public official and the citizen whose otherwise open communication would suffer from a chilling effect).

It is worth noting that SCOTUS has explained that a branch of government's interpretation of how a rule or law applies itself is entitled to due deference. *Nixon v. Adm'r of Gen. Svs.*, 433 U.S. at 442–43. Further, although SCOTUS recognized a long line of precedent, including the federal Freedom of Information Act, allowing for the regulation and mandatory disclosure of documents in the possession of the federal Executive Branch, a similar line of precedent is harder to find for either the federal or state judiciary branches. This tends to support

the Executive Secretary's contention that there should be a presumption of privilege afforded to his records held as administrator for the judiciary and/or a presumption against applying VFOIA to apply to the judiciary. Further, the failure to recognize the judiciary's control over its own records would wrest control over the preservation and safekeeping of such records away from this independent branch of government. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 444 (finding no separation of powers dilemma triggered by a request for Presidential records under the federal Presidential Recordings and Materials Preservation Act, in part, because the Executive Branch maintained control over the materials, which preserved the President's authority to ensure that materials would be released pursuant to that act only when not barred by a privilege inherent to the Executive Branch).

In Virginia, there are scant examples of the legislature invading the province of the judiciary. In *Carter v. Commonwealth*, 96 Va. 791, 815, 32 S.E. 780, 785 (1899), the legislature attempted to deprive the courts of the power to summarily punish for contempt by putting such power in the hands of a jury instead. The Supreme Court of Virginia ruled that this undermined the "inherent power of self-defense and self-preservation in the courts o this state created by the constitution. This power may be regulated by the legislature, but cannot be destroyed or so far diminished as to be rendered ineffectual." *Id.* Thus, the legislative regulation was deemed unconstitutional because it destroyed the "authority necessary to the exercise of the jurisdiction conferred" on the courts. *Id.* at 800, 32 S.E. at 7779.

The Supreme Court of Virginia does not tolerate disruption to a co-equal branch of government caused by the regulation of another. The judiciary is recognized as independent, speaking only through its orders and opinions. Further, the Supreme Court of Virginia has inherent authority to make its own rules, to be the master of its own house. *See* VA. CONST. art.

VI, § 5. In fact, every Chief Justice since the enactment of VFOIA has taken the position that VFOIA does not apply to the judiciary, an interpretation that is entitled to deference.[1] The Supreme Court is in the process of defining the parameters of records it already has a procedure of disseminating to the public and should be left to create and administer its own policies and procedures without being infringed upon by the legislature through VFOIA. And as mentioned above, any attempts to issue a writ of mandamus against the Executive Secretary may be futile, given the Executive Secretary's service at the pleasure of the Supreme Court of Virginia. *See Coggeshall v. Va. Dep't of Treasury*, 87 Va. Cir. at 403. Further, the remedy Dr. Turner tries to impose on the Executive Secretary through this and multiple other petitions for mandamus under VFOIA, including his onslaught of almost weekly, often duplicative, record requests purportedly under VFOIA, is disruptive and harassing to the Executive Secretary's operations. A clear ruling from this Court that it lacks subject matter jurisdiction to enforce VFOIA against the judiciary is needed to prevent further disruption and harassment. In fact, a requirement that Dr. Turner seek court approval before filing any new petitions against the Executive Secretary would protect the judiciary from Dr. Turner's conduct, which sanction is authorized by the Court's authority to prevent harassing behavior under Va. Code § 8.01-271.1.

D. Judicial Privilege Protects Records Sought By Dr. Turner from Mandatory Disclosure.

Another basis for prohibiting the mandatory disclosure of records held by the Executive Secretary stems from the common law privilege recognized in other jurisdiction known as the "judicial deliberative process privilege." The privilege exists to "protect[] confidential communications between judges and between judges and the court's staff made in the course of the performance of their judicial duties and relating to official court business." *Thomas v. Page*,

[1] Virginia Senate Live Session Video Stream, Courts of Justice Senate Room A, (Jan. 31, 2018 at 1:44:29), *available at* https://virginia-senate.granicus.com/ViewPublisher.php?view_id=3.

361 Ill. App. 3d 484, 491, 837 N.E.2d 483, 490–91 (2005). Although Virginia has not yet recognized this privilege, the authority in other jurisdictions counsel makes it plain that "'[t]he absence of . . . confidentiality is disruptive and inevitably impairs the operation of any court.'" *Gregorich v. Lund*, 54 F.3d 410, 417 (7th Cir. 1995). Further, public "disclosure of the workings of a judge's chambers, or any apprehension that this is likely to occur, can only undermine the personal relationships involved and tend to induce a formal and defensive atmosphere that will undermine collegiality in chambers." J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 340 (1988) (author Judge Daniel Mahoney of the Second Circuit Court of Appeals). Virginia should embrace this privilege and protect any records sought by Dr. Turner that would invade this time-honored confidence between judges and their staff.

Some courts even recognize the privilege as absolute (as opposed to qualified) so as to allow judges to confer with each other and their staffs freely and frankly without fear that their communications might be publically disclosed as the overriding factor. Indeed, "[a]nything less than the protection afforded by an absolute privilege would dampen the free exchange of ideas and adversely affect the decision-making process." *Thomas*, 361 Ill. App. 3d at 494. When a privilege is absolute, "the opposing party cannot defeat the privilege by an ad hoc, case-specific showing of need for the privileged information." *Id.* at 493, 837 N.E.2d 483, 492 (2005); *see also In re Enforcement of a Subpoena*, 463 Mass. 162, 174, 972 N.E.2d 1022, 1033 (2012) (the first state court recognizing the judicial deliberation privilege as absolute, not qualified); *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 535 S.E.2d 727 (W. Va. 2000) (appearing to recognize the privilege as absolute in nature based on the West Virginia Court's focus on the scope of the privilege and not on the balance between the need for disclosure and the court's right to confidentiality). Even where the privilege is recognized as a qualified privilege, the person

seeking to invade the privilege must demonstrate a sufficient need against the degree of intrusion upon the confidentiality of the privileged communications necessary to satisfy the need. *See, e.g., Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit (Williams v. Mercer)*, 783 F.2d 1488, 1520 (11th Cir. 1986). Even in such qualified jurisdictions, it is well recognized that "judges depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties." *Id.* at 1519–20.

Notably, to the extent the courts attempt to draw a bright line between the deliberation process (which attaches to records that are privileged) and purely administrative functions of the judiciary (which arguably may not have inherent privilege), it appears that courts are loathe to require the mandatory disclosure anything other than purely administrative records to the public. For example, in *Clerk of the Superior Court v. Freedom of Info. Comm'n*—unlike the Virginia General Assembly in VFOIA—the Connecticut legislature codified existing procedures of the judiciary by requiring disclosure under the Connecticut Freedom of Information Act from "public agencies," which expressly included "any judicial office, official, or body or committee thereof but only with respect to its or their administrative functions . . . ." 278 Conn. 28, 31 n.1, 895 A.2d 743, 744 n.1 (2006). The Connecticut Supreme Court recognized that the legislature intentionally carved out "administrative" documents but that this term could not permit disclosure of records that related to inherently judicial actions but had an "administrative character." *Id.* at 47, 895 A.2d at 753. To hold otherwise would permit every record kept by the judiciary to fall under Connecticut's Freedom of Information Act, which contradicts the express statement of the statutory carve-out. Instead, the Connecticut high court concluded that "the judicial branch's administrative functions consist of activities relating to its budget, personnel,

facilities and physical operations and that records unrelated to those activities are exempt." *Id.* at 53, 895 A.2d at 757. This case is informative for its recognition that only "purely" administrative records include those related to budget, personnel, facilities and physical operations so as to imply that everything else may be related to the judiciary's adjudicative and deliberative process functions.

In this case, Dr. Turner's requests for records falling within the judicial deliberation process privilege should be kept protected and confidential as a matter of law.

E. Sovereign Immunity Has Not Been Waived for VFOIA By the Judiciary.

Statutory schemes affording the public with specific remedies against the sovereign must be strictly construed. *Charlottesville Fitness Club v. Albemarle County Bd. of Supervisors*, 285 Va. 87, 102–103, 737 S.E.2d 1, 9 (2013) (holding the Virginia Public Procurement Act offered a limited waiver of sovereign immunity in derogation of common law thereby requiring strict construction). The public's rights under VFOIA are not otherwise found at common law. The Supreme Court of the United States has even explained that there is no constitutional basis underlying the federal Freedom of Information Act, upon which VFOIA is modeled. *See McBurney v. Young*, 569 U.S. 221, 232 (2013) ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."). More specifically, "the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978). Thus, in the absence of any express statute, the judiciary cannot be held to have conceded to allowing the public a remedy for enforcement of VFOIA against it. As discussed

thoroughly in Section III.B., above, VFOIA does not apply to Karl Hade, the Executive Secretary, or the judiciary. They are not "public bodies" under VFOIA.

The General Assembly has not expressly waived sovereign immunity as to the Judiciary with respect to VFOIA and it has not expressly included the judiciary within the scope of VFOIA despite knowing how to do so in other legislation. *Compare* VFOIA, Va. Code §§ 2.2-3700 *et seq.*, *with* Virginia Public Procurement Act, Va. Code § 2.2-4301 (defining "Public body" to mean "any legislative, executive or judicial body . . ."). Moreover, as a co-equal branch of the Commonwealth's government, only the judiciary has the power to waive sovereign immunity for itself and its appointee, the Executive Secretary. *See* Section III.C., above. In the absence of such a waiver, it should be determined that the judiciary has not waived sovereign immunity as to VFOIA such that no disclosure of records or compliance with VFOIA can be mandated against the judiciary.

IV.
CONCLUSION

Dr. Turner's invocation of VFOIA as the legal basis for justifying his right to records sought from the judiciary, through the Executive Secretary, is unsupported by the law, as set forth above. His attempts to enforce VFOIA through petitions for mandamus have no merit. Although Dr. Turner purports to shed light on the inner workings of the judiciary for the benefit of the public, his duplicative, harassing, and bad faith conduct has cost the judiciary an inordinate amount of time, expense, and disruption to its operations. The time has come for a court of record to determine whether VFOIA applies to the judiciary when its plain meaning reveals it does not and where such disclosure would expose this independent branch of government to more disruption than is allowed under constitutional avoidance principles.

WHEREFORE, the Executive Secretary respectfully requests the Court:

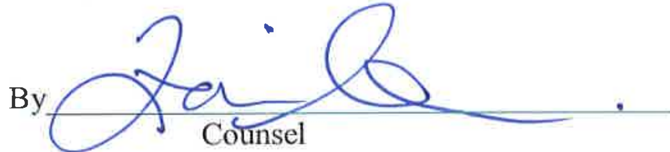
a. Dismiss Dr. Turner's claims against the Executive Secretary, with prejudice;

b. Enjoin Dr. Turner from filing any petition for a writ of mandamus or injunction against the Executive Secretary in any court of the Commonwealth under VFOIA; and

c. Award the Executive Secretary all such relief as the ends of justice may require.

Date: May 16, 2018

OFFICE OF THE EXECUTIVE SECRETARY

By 
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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2018, I served a copy of the foregoing by email and mail, postage prepaid on the following:

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