

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Mark J. McBurney, Roger W. Hurlbert, and)	
Bonnie E. Stewart)	
)	
Plaintiffs,)	
v.)	Civ. No. 3:09cv044 (JRS)
)	
Hon. William C. Mims, Attorney General,)	
Commonwealth of Virginia,)	
)	
Hon. Nathaniel L. Young, Deputy Commissioner)	
and Director, Division of Child Support)	
Enforcement, Commonwealth of Virginia,)	
and)	
)	
Hon. Samuel A. Davis, Director, Real Estate)	
Assessment Division, Henrico Country,)	
Commonwealth of Virginia,)	
)	
Defendants.)	

FIRST AMENDED VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is a complaint for declaratory relief and injunctive relief pursuant to 42 U.S.C. § 1983. The Plaintiffs bring this action because the Virginia Freedom of Information Act, Virginia Code § 2.2-3704 (FOIA), violates the Plaintiffs’ rights under the Privileges and Immunities Clause of Article IV, Sec. 2, cl. 1, and the dormant Commerce Clause of the United States Constitution. The Virginia FOIA states that “all public records shall be open to inspection and copying” but restricts access to public records to “citizens of the Commonwealth.” This citizens-only provision impermissibly discriminates against the Plaintiffs by denying them access to public records solely because the Plaintiffs are not Virginia citizens.

Jurisdiction

2. This Court has jurisdiction under 28 U.S.C § 1331.

Parties

3. Plaintiff Mark McBurney is a citizen of Rhode Island. From 1987 to 2000, Mr. McBurney was a citizen of Virginia. Mr. McBurney has attempted to obtain records under Virginia's FOIA from the Virginia Division of Child Support Enforcement relating to child support obligations. Mr. McBurney's requests were denied solely because he is not a citizen of the Commonwealth of Virginia.

4. Plaintiff Roger Hurlbert is a citizen of California. Mr. Hurlbert is the sole proprietor of Sage Information Services, which is in the business of obtaining real estate tax assessment records. Mr. Hurlbert submitted a FOIA request to the Real Estate Assessor's Office (Assessor's Office) in Henrico, Virginia. Mr. Hurlbert's request was denied solely because he is not a citizen of the Commonwealth of Virginia.

5. Plaintiff Bonnie E. Stewart is a citizen of West Virginia. She is an Assistant Professor at West Virginia University in the Perley Isaac Reed School of Journalism. In support of her activities as an educator, Professor Stewart submitted FOIA requests to Virginia Commonwealth University (VCU) in Richmond, Virginia, and Virginia Polytechnical Institute and State University (Virginia Tech), in Blacksburg, Virginia. Her requests were not processed under Virginia's FOIA because she is not a citizen of the Commonwealth of Virginia.

6. Defendant William C. Mims is Attorney General of the Commonwealth of Virginia. By virtue of his office, Attorney General Mims is the chief law enforcement official in the Commonwealth and is responsible for interpreting and executing the laws

of Virginia, including Virginia Code § 2.2-3704. By enforcing the facially discriminatory citizens-only provision of Section 2.2-3704, Defendant Mims has deprived the Plaintiffs of their constitutional rights under the Privileges and Immunities Clause and the dormant Commerce Clause. Defendant Mims is sued in his official capacity.

7. Defendant Nathaniel Young is Deputy Commissioner and Director of Virginia Division of Child Support Enforcement (DCSE). Defendant Young is responsible for the supervision of DCSE and its employees. DCSE denied Mr. McBurney's FOIA request, thereby depriving Mr. McBurney of his constitutional rights under the Privileges and Immunities Clause. Defendant Young is sued in his official capacity.

8. Defendant Samuel A. Davis is Director of the Real Estate Assessor's Office in Henrico, Virginia. Defendant Davis is responsible for the supervision of the Assessor's Office and its employees. The Assessor's Office denied Mr. Hurlbert's FOIA request, thereby depriving Mr. Hurlbert of his constitutional rights under the Privileges and Immunities Clause and the dormant Commerce Clause. Defendant Davis is sued in his official capacity.

Plaintiffs' FOIA Requests

9. Mr. McBurney was a citizen of the Commonwealth of Virginia from 1987 to 2000. During that time, Mr. McBurney married Ms. Lore Mills, and the couple had a son. Mr. McBurney and Ms. Mills divorced in 2002. From the time of the divorce until March 2006, Ms. Mills retained custody of their son.

10. In 2006, Mr. McBurney and Ms. Mills decided that their son would live with Mr. McBurney and Ms. Mills would pay Mr. McBurney child support. Mr. McBurney

and Ms. Mills did not seek a court order altering the original custody and child support decrees.

11. Ms. Mills defaulted on her child support obligations. Mr. McBurney filed an application for child support with DCSE on July 7, 2006. Because Mr. McBurney and Ms. Mills had not obtained a court order altering the original custody or child support orders, Ms. Mills could not be liable for child support until Mr. McBurney filed in court a petition for child support. Mr. McBurney elected to have DCSE file the petition on his behalf. DCSE failed to file the petition in the proper court until April 2007. As a result, Mr. McBurney was denied nearly nine months of child support payments.

12. DCSE is in possession of documents that Mr. McBurney believes will help him resolve the issues surrounding his child support application. By letter dated April 8, 2008, Mr. McBurney submitted a FOIA request to DCSE pursuant to Virginia Code § 2.2-3704. In that letter, Mr. McBurney requested “all emails, notes, files, memos, reports, policies, [and] opinions” pertaining to him, his son and his former wife. Mr. McBurney also requested all documents regarding his application for child support.

13. By letter dated April 11, 2008, DCSE denied Mr. McBurney’s FOIA request stating, “You are not entitled to the information as you are not a Citizen of the Commonwealth of Virginia.”

14. Mr. McBurney submitted to DCSE a second FOIA request by letter dated May 16, 2008, asking for the same materials he had sought in his first request. DCSE denied Mr. McBurney’s second request by letter dated May 23, 2008, stating “you are not a citizen of the Commonwealth of Virginia . . . therefore, you are not eligible to obtain information under the Virginia Freedom of Information Act.”

15. Plaintiff Roger Hurlbert is the sole proprietor of Sage Information Services. Mr. Hurlbert is in the business of obtaining real estate tax assessment records. Mr. Hurlbert obtains these records by submitting FOIA requests to state governmental agencies.

16. Mr. Hurlbert submitted a FOIA request to the Henrico County Real Estate Assessor's Office pursuant to Virginia Code § 2.2-3704. The request was made by telephone on June 5, 2008. In that telephone conversation, an official from the Assessor's Office denied Mr. Hurlbert's FOIA request. The only reason the official gave for denying the request was that Mr. Hurlbert is not a citizen of Virginia.

17. Plaintiff Bonnie Stewart is a professor of journalism at West Virginia University (WVU).

18. Among the courses Professor Stewart teaches is Public Affairs Reporting, which is required for all students majoring in newspaper or broadcast journalism at WVU. The course requires the students to write four stories over the course of the semester and to use at least one public document as a source for each.

19. During the Fall 2008 and Spring 2009 semesters, Professor Stewart has assigned her students a class-wide project requiring them to draft requests for public information from government entities in different states. Professor Stewart uses this exercise to teach students how to go about seeking public information; how to deal with government agencies and write request letters; how to analyze data obtained; how to understand various economic, legal, and political differences between states; and how to write stories based on the information gathered. Professor Stewart intends to continue this exercise in future semesters.

20. Professor Stewart's students are engaged in a comparative project concerning the administration of public universities. WVU has been conducting a search for a new president for the University, and Professor Stewart has asked her students to determine whether the salary and other terms WVU has offered presidents are comparable to that offered by public universities in other states. Ms. Stewart and her students hypothesized that WVU offered lower salaries than competing public universities in other states and that this might negatively affect the quality of applicants and quality of the education offered by WVU. Depending on what the students learned from neighboring states, Ms. Stewart and her students planned that several of the students would write an article in the school's newspaper relaying their findings.

21. To obtain information about the salaries, benefits and responsibilities of university presidents in other states, the students drafted requests for copies of the contracts of the presidents of twelve different public universities.

22. Based on the students' drafts and pursuant to the open government laws of the relevant states, Ms. Stewart filed a request for the president's contract with each of twelve public universities located in Connecticut, Florida, Indiana, Iowa, Kentucky, Michigan, Ohio, Virginia, and Wisconsin.

23. Professor Stewart sent a request for the contract of the president of VCU to VCU and a request for the president of Virginia Tech to Virginia Tech, in February 2009, pursuant to Virginia Code § 2.2-3701.

24. All but two of the public universities to which Professor Stewart submitted requests for presidents' contracts agreed to provide the requested information, with nine waiving all fees and one requesting a nominal amount.

25. The only two schools that refused were public universities of the Commonwealth of Virginia.

26. By letter dated February 17, 2009, VCU refused to provide the records, stating that Virginia's FOIA "provides access to certain records . . . but such access is limited to citizens of the Commonwealth of Virginia. Since you write from an address in the State of West Virginia, it appears you do not qualify as a citizen of the Commonwealth of Virginia. Accordingly, your request is denied."

27. By letter dated February 17, 2009, Virginia Tech refused to provide the records, claiming that its president operated without a contract. Professor Stewart telephoned Virginia Tech and orally requested copies of a contract or other public documents reflecting the terms of the president's employment. Ms. Bobbie Jean Norris, Special Assistant to the Associate Vice President of Virginia Tech, claimed that Virginia Tech possessed no responsive records and that Virginia Tech would not provide her with any such records under Virginia's FOIA because Professor Stewart is not a citizen of the Commonwealth of Virginia.

28. Professor Stewart found it implausible that Virginia Tech was not in possession of any records reflecting the terms of employment of its own president. She inquired further, but still Virginia Tech provided no records in response to her requests. Ms. Norris claimed that Virginia's FOIA did not require Virginia Tech to provide any such records because Professor Stewart is not a citizen of the Commonwealth. Ms. Norris referred Professor Stewart to a website that revealed some public records of prior presidents' employment terms and reflected the existence of other public records not

available on the website, and yet Virginia Tech provided none of these records to Professor Stewart because she is not a citizen of Virginia.

29. Because of Ms. Norris's assertion that Professor Stewart would be unable to obtain records under Virginia's FOIA due to her non-citizenship, Professor Stewart did not make any further requests under the statute.

Claims for Relief

Joint Claims under the Privileges and Immunities Clause

30. The citizens-only provision in Virginia Code § 2.2-3704 violates the Plaintiffs' rights under the Privileges and Immunities Clause. Article IV, Section 2, of the U.S. Constitution provides that "[t]he Citizens of each State shall be entitled to the all the Privileges and Immunities in the several states." A state law violates the Privileges and Immunities Clause if it unjustifiably burdens one of the privileges and immunities protected by the Clause.

31. The Privileges and Immunities Clause ensures that all Americans can claim the protections inherent in a democratic and federalist system of government. The right to participate in state governmental and political processes that directly affect individual Americans is such a protection. Accordingly, a state law violates the Clause if it denies non-citizens the right to participate in that state's governing processes regarding matters that directly affect both citizens and non-citizens.

32. The citizens-only provision in Virginia Code § 2.2-3704 denies the Plaintiffs their right to participate in Virginia's governmental and political processes. Access to information is essential to meaningful participation in a state's governmental and political processes. The citizens-only provision bars the Plaintiffs from obtaining information

from Virginia's government, thereby excluding the Plaintiffs from participating in Virginia's governmental and political processes and violating Plaintiffs' rights under the Privileges and Immunities Clause.

Mr. McBurney's Privileges and Immunities Clause Claim

33. A state law that bars non-citizens from using that state's procedures for advocacy and dispute resolution violates the Privileges and Immunities Clause. Each state maintains procedures through which private persons can advocate on their own behalf. These procedures allow private persons to resolve disputes they may have with state government. These procedures include state court systems, administrative systems and systems for alternative dispute resolution. These systems are indispensable for both citizens and non-citizens alike.

34. A state law that denies non-citizens access to these dispute resolving systems contravenes the core purpose of the Privileges and Immunities Clause. The Clause ensures that all U.S. citizens, regardless of state citizenship, are able to enjoy the rights and privileges that inhere in a democratic system of government. Among those rights and privileges is the right to use states' dispute resolution procedures to resolve disputes arising from contacts within that state.

35. Virginia Code § 2.2-3704 denies Mr. McBurney this constitutional right. Section 2.2-3704 denies Mr. McBurney access to information pertaining to his child support application with DCSE. Without that information, Mr. McBurney cannot advocate effectively on his own behalf, cannot invoke any of Virginia's dispute resolution procedures for dispute resolution, and cannot resolve the issues surrounding

his child support application. By denying Mr. McBurney this avenue of redress, Section 2.2-3704 violates Mr. McBurney's rights under the Privileges and Immunities Clause.

Mr. Hurlbert's Privileges and Immunities Clause Claim

36. A state law that denies non-citizens the right to pursue their common calling violates Article IV's Privileges and Immunities Clause. The Henrico County Assessor's Office denied Mr. Hurlbert access to public records based on the citizen-only provision in Virginia Code § 2.2-3704. Section 2.2-3704 makes it impossible for Mr. Hurlbert to pursue his common calling by obtaining Virginia public records through Virginia's FOIA on an equal basis with Virginia's citizens. This discrimination contravenes the Privileges and Immunities Clause.

Professor Stewart's Privileges and Immunities Clause Claim

37. VCU and Virginia Tech refused to process Professor Stewart's FOIA requests based on the citizen-only provision in Virginia Code § 2.2-3704. Section 2.2-3704 prevents Professor Stewart from pursuing her common calling by having her Virginia FOIA requests processed on an equal basis with those of Virginia citizens. Section 2.2-3704 interferes with Professor Stewart's access to information essential to performing her role as an educator, in improving the quality of her educational institution and the education she provides directly to her own students, on an equal basis with Virginia citizens. This discrimination contravenes the Privileges and Immunities Clause of Article IV.

38. As a journalism professor at a public university, Professor Stewart's calling has a special place in our democracy. Professor Stewart's role is to educate students, of diverse states, who depend upon her to develop the skills and knowledge they need to

pursue their own common calling of journalism, vital to maintaining an informed citizenry knowledgeable about the political and economic activities of state and local government institutions throughout the nation. Section 2.2-3704 prevents Professor Stewart from obtaining Virginia source material for her students and teaching them how to obtain such material on their own, both of which are necessary to the students' pursuit of their calling, on terms equal to Virginia citizens. This discrimination violates the Privileges and Immunities Clause.

Mr. Hurlbert's Dormant Commerce Clause Claim

39. Henrico County Assessor's Office officials violated the dormant Commerce Clause by denying Mr. Hurlbert access to records based on Virginia Code § 2.2-3704. Article I, Section 8, of the U.S. Constitution grants Congress the power to "regulate Commerce among the several States." The "dormant" or "negative" aspect of the Commerce Clause prohibits States from enacting and enforcing laws that interfere with the free flow of interstate commerce.

40. A state law violates the dormant Commerce Clause if it gives that state's citizens a preferred right of access to local resources. A state's public records are a local resource because public records are a useful "product" for which there is a demand, they have potential economic value, and they are located exclusively within the state.

41. Virginia Code § 2.2-3704 violates the dormant Commerce Clause because it grants Virginia citizens an exclusive right of access to Virginia's public records. As a result, Mr. Hurlbert is barred from pursuing any business stemming from Virginia public records on substantially equal terms with Virginia citizens. This is impermissible

discrimination against Mr. Hurlbert and a denial of his rights under the dormant Commerce Clause.

Irreparable Harm

42. Deprivation of a constitutional right constitutes irreparable harm. The citizens-only provision in Virginia Code § 2.2-3704 denies the Plaintiffs access to information. As a result, the provision bars the Plaintiffs from participating in a range of economic, political, and social activities that are protected by Article IV's Privileges and Immunities Clause and by the dormant Commerce Clause. Because the citizens-only provision prevents the Plaintiffs from obtaining documents that they have a constitutional right to obtain, it has also caused the Plaintiffs irreparable harm.

Prayer for Relief

WHEREFORE, the Plaintiffs urge the Court to issue an order:

1. Declaring that Virginia Code § 2.2-3704 violates the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution;
2. Enjoining the Defendants from enforcing the citizens-only provision of Virginia Code § 2.2-3704;
3. Awarding the Plaintiffs their costs and reasonable attorneys fees pursuant to 42 U.S.C.A. § 1988(b); and
4. Granting the Plaintiffs such other relief as the Court may deem just and proper.

March 18, 2009

Respectfully submitted,

/s/ Stephen W. Bricker

Stephen W. Bricker
VSB # 14564
Bricker Law Firm, P.C.
411 E. Franklin Street, Suite 504
Richmond, VA 23219
Tel: 804-649-2304
Fax: 804- 649-3380
Email: bricker@brickerlawfirm.com

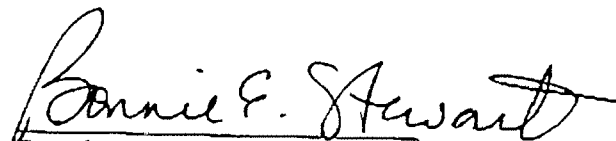
/s/ Kathryn A. Sabbeth

Kathryn A. Sabbeth
David C. Vladeck
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9546

Attorneys for Plaintiffs

VERIFICATION:

Pursuant to 28 U.S.C. § 1746, I, Bonnie E. Stewart, do hereby declare under the penalty of perjury that the factual statements made in ¶¶ 5, 17-32, and 37-38, of the foregoing First Amendment Verified Complaint for Declaratory and Injunctive Relief are true and correct and based on personal knowledge. Executed on this 18th day of March 2009, in Morgantown, West Virginia.


Bonnie E. Stewart