

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

THOMAS A. BLACKSTOCK, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	CL24-301
	)	
VIRGINIA DEPARTMENT OF	)	
TRANSPORTATION	)	
	)	
Respondent.	)	

**LETTER OPINION AND ORDER**

On January 29, 2024, the parties came, by counsel, on Petitioner’s Petition for Mandamus and Respondent’s Demurrer and Motion to Dismiss. Petitioner appeared in person and was represented by Richard F. Hawkins, III, Esq. Respondent was represented by Thomas J. Sanford, Esq. Petitioner sought mandamus under the Virginia Freedom of Information Act (hereinafter “VFOIA”) against the Virginia Department of Transportation (hereinafter “VDOT”) concerning an audit report prepared by VDOT’s Assurance and Compliance Office (hereinafter the “Report”). Evidence was presented and oral arguments were made. The Court took the matter under advisement. The Court determined that an *in camera* review was appropriate and ordered that the Report be provided to the Court for an *in camera* review under seal. The Court now issues this Letter Opinion and Order.

**FACTS**

From August 10, 2005 to April 1, 2022, Petitioner worked in various human resources management roles at VDOT. In 2022, Petitioner worked as an Assistant Division Administrator in VDOT’s Human Resources Division. One of Petitioner’s duties as an Assistant Division Administrator at VDOT was to review personnel actions and ensure new hires complied with

various guidelines from VDOT and the Commonwealth of Virginia. In early 2020, Petitioner reviewed a personnel action for a proposed hire, which allegedly involved hiring either a friend or relative of Petitioner's immediate supervisor, the VDOT Human Resources Director. Petitioner's supervisor instructed him to approve the personnel action. However, Petitioner raised his concerns with the VDOT Commissioner, Stephen Brich. Consequently, Commissioner Brich held meetings with both Petitioner and Petitioner's supervisor and instructed Petitioner not to approve the hiring action. Petitioner claims that as a result of his actions, his supervisor began retaliating against him, e.g., taking away Petitioner's review authority and making false accusations about him at work.

Petitioner then filed a grievance against VDOT. In doing so, he requested VDOT review whether the proposed hiring action was consistent with VDOT's guidance and agency practices. Subsequently, the VDOT Assurance and Compliance Office (hereinafter "ACO") conducted a review and audit of the hiring decision at issue. On August 10, 2020, the Assurance and Compliance Office prepared a Report following this review and audit.

Petitioner ultimately made three requests for the Report and received three redacted versions of the Report. As part of Petitioner's grievance process, Petitioner learned of the Report and requested a copy from Respondent. After Petitioner's grievance closed, Petitioner again requested a copy of the Report on December 10, 2021, in an e-mail to VDOT personnel. Respondent treated this correspondence as a VFOIA request and produced a redacted version of the Report. On January 3, 2022, Petitioner again requested a copy of the Report in an e-mail to VDOT personnel. On January 10, 2022, Respondent again produced a redacted version of the Report. Following Petitioner's retirement on April 1, 2022, the Supreme Court of Virginia issued its decision in *Hawkins v. Town of South Hill*, 301 Va. 416, 878 S.E.2d 408 (2022). In light of the

Court's decision, Petitioner again requested an unredacted version of the Report on January 27, 2023. Respondent again produced a redacted version of the Report.

Petitioner now seeks mandamus against Respondent for an unredacted version of the Report under VFOIA § 2.2-3700 et seq. Respondent argues that the Report is exempt under the Investigative Notes and Personnel Information exemptions under Va. Code §§ 2.2-3705.3(7) and 2.2-3705.1(1), respectively.

### ANALYSIS

First, the Court finds that there was no waiver as to the investigative notes exemption. The various VFOIA communications between Petitioner and VDOT were part of cumulative and ongoing correspondence regarding the same Report. *See* Pet'r's Ex. 3 and 5. Thus, Respondent claimed both the investigative notes and personnel information exemptions.

As to the personnel information exemption, the statute calls for an exemption to “[p]ersonnel information concerning identifiable individuals.” Va. Code § 2.2-3705.1(1). The Supreme Court in *Hawkins* defined “personnel information” as “data, facts, or statements within a public record relating to a specific government employee, which are in possession of the entity solely because of the individual’s employment relationship with the entity, and are private, but for the individual’s employment with the entity.” *Hawkins*, 301 at 432. “[D]ata, facts, and statements are private if their disclosure would constitute an ‘unwarranted invasion of personal privacy’ to a reasonable person under the circumstances.” *Id.* In the present case, the redacted information is identifying information, i.e., names, job titles, etc. The redacted information contained in the Report is not private information that the employer would have but for the individual’s employment with the entity and which would constitute an unwarranted invasion of personal privacy to a reasonable person under the circumstances. Therefore, the Court finds that the redacted

information does not meet the “personnel information” definition under *Hawkins* because it is not private information that the employer would not have but for the individual’s employment with the entity.

Additionally, the statute goes on to provides that “[n]o provision of this chapter or any provision of Chapter 38 . . . shall be construed as denying public access to . . . (ii) records of the **name, position, job classification . . . [of] any officer, official, or employee of a public body.**” Va. Code § 2.2-3705.1(1) (emphasis added). While the present situation may not relate to a situation in which VDOT is specifically denying public access to the name, position, or job classification of its employees, the statute expressly provides that its purpose is not to prevent any disclosure of such identifying information.

Finally, as to the investigative notes exemption under Va. Code § 2.2-3705.3(7), the statute calls for an exemption to “[i]nvestigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for . . . internal auditors.” The parties did not dispute whether the investigative notes exemption applied based on whether there was an internal audit or some other investigation. Rather, the present issue is whether the investigative notes exemption applies to the names and personal identifying information of individuals. Under this statute:

**Information contained in completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is excluded by this subdivision, the information disclosed shall include the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person.**

*Id.* (emphasis added).

The personally identifying information contained in the Report is clearly protected under Va. Code § 2.2-37-5.3(7). For one, the redacted information would “reveal the identity of the complainants or persons supplying information to investigators.” *Id.* Further, Amanda Haley, Assistant Director of Human Resources at VDOT, testified that no corrective action was taken to resolve the complaint. Haley also testified that the subject of the complaint did not consent to the release of his or her identity. Because the redacted information is part of the investigative notes, correspondence and information and because there has been no consent by the subject individual(s) to release his or her identity, the redacted information is protected from disclosure under the investigative notes exemption.

### CONCLUSION

For all the reasons set out above, the Court **FINDS** that the Respondent has sufficiently carried its burden to prove by a preponderance of the evidence that the redacted portions of the Report are protected from disclosure under the investigative notes exemption as established by Virginia Code § 2.2-3705.3(7).


It is hereby **ORDERED** that the Petitions for Mandamus against the Respondent seeking release of the entire VDOT Report is hereby **DENIED**.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties’ endorsement of this Order.

The Clerk is directed to forward a certified copy of this Order to all the parties.

It is so ORDERED.

ENTER: 2/11/24

  
W. Reilly Marchant, Judge