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December 18, 2017
VIA HAND DELIVERY

Liezelle A. Dugger, Clerk
Charlottesville Circuit Court
315 East High Street
Charlottesville VA 22902

Re: *Natalie Jacobsen and Jackson Landers v. City of Charlottesville, Department of State
Police, and Office of the Secretary of Public Safety and Homeland Security*
Charlottesville Circuit Court Case No.: CL17000592-00

Dear Liezelle:

Enclosed please find Respondent City of Charlottesville's Demurrer and Motion to Dismiss the First Amended Petition for a Writ of Mandamus for filing on behalf of the City of Charlottesville in the above styled case.

Thank you for your assistance. Please call should you have any questions.

Sincerely,



Richard H. Milnor

RHM/kmt
Enclosure

cc: Caitlin Vogus, Esquire
Michael A. Jagels, Sr. Asst. Attorney General
Victoria N. Pearson, Dep. Asst. Attorney General
S. Craig Brown, City Attorney
Lisa Robertson, Deputy City Attorney

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

NATALIE JACOBSEN and
JACKSON LANDERS,

Petitioners,

v.

Case No.: CL17000592-00

CITY OF CHARLOTTESVILLE,
DEPARTMENT OF STATE POLICE, and
OFFICE OF THE SECRETARY OF PUBLIC
SAFETY AND HOMELAND SECURITY,

Defendants.

**RESPONDENT CITY OF CHARLOTTESVILLE'S DEMURRER AND MOTION TO
DISMISS THE FIRST AMENDED PETITION FOR A WRIT OF MANDAMUS**

Petitioners Natalie Jacobsen and Jackson Landers (“Landers”) seek an order compelling Respondent, the City of Charlottesville (the “City”), to release, in response to a Freedom of Information Act (FOIA”) request, “the Charlottesville Police Department’s Safety Plan that was used for the rally on Saturday August 12, 2017”¹. (“Requested Record”)

Exercising its discretion permitted under §2.2-3706(A)(2)(e), Va. Code Ann. (1950), as amended, the City declined to release the Requested Record because the Requested Record is a specific police department tactical plan, the disclosure of which would jeopardize the safety and security of law-enforcement personnel or the general public. This tactical plan also has intertwined within it criminal intelligence provided by the Virginia Fusion Intelligence Center, which is excluded from the provisions of FOIA pursuant to §52-48, Va. Code Ann. (1950), as amended. Specifically §2.2-3706(A)(2)(e), Va. Code Ann. (1950), as amended, allows an exemption from

¹ As requested by Petitioner, no such stand-alone plan exists in the possession of the City of Charlottesville.

FOIA for records that contain specific tactical plans. FOIA does not require the City to redact the withheld record, as explained further herein below.

For these reasons, the City respectfully requests that this Court sustain its demurrer and dismiss the First Amended Petition for a Writ of Mandamus.

STATEMENT OF FACTS

1. On August 15, 2017, Respondent City's FOIA officer received an email attached as Exhibit 1 to Landers' First Amended petition, requesting Charlottesville Police Department's Safety Plan for the rally on August 12, 2017.
2. On August 22, 2017, the City responded to Landers FOIA request with Exhibit 2 to the First Amended Petition, advising him that, "The 'safety plan' was the operation plan for the event. Documents and plans related to the protest are tactical plans and pursuant to Va. Code § 2.2-3706(A)(2)(e), are exempt from disclosure."
3. Additionally, §52-47, Va. Code Ann. (1950), as amended, establishes the Virginia Fusion Intelligence Center, the purpose of which is "to receive and integrate terrorist-related intelligence and information". The Charlottesville Police Department's Operation Plan for the August 12, 2017 event has intertwined in it criminal intelligence provided by the Virginia Fusion Intelligence Center which is excluded from the provisions of FOIA pursuant to §52-48, Va. Code Ann. (1950), as amended.
4. Petitioners Jacobsen and Landers filed their First Amended Petition for Writ of Mandamus with this Court also seeking disclosure, pursuant to FOIA, related documents from the Department of State Police and the Office of the Secretary of Public Safety and Homeland Security.

APPLICABLE LAW

Enacted in 1968, the Virginia Freedom of Information Act, §2.2-3700 *et seq.*, “ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees ...”² The “primary purpose” of FOIA “is to facilitate openness in the administration of government”.³ To that end, “[a]ll public records and meeting shall be presumed open, unless an exemption is properly invoked”.⁴

FOIA specifies approximately 144 separate categories of exclusion, exceptions, and exemptions to the Act.⁵

As pertinent to this case, FOIA contains the following exemptions:

- §2.2-3706(A)(2)(e), Va. Code Ann. (1950), as amended: “Records of law enforcement agencies, to the extent such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public.”
- §52-48(A), Va. Code Ann. (1950), as amended: “Papers, records, documents, reports, materials, databases, or other evidence or information relative to criminal intelligence or any terrorism investigation in the possession of the Virginia Fusion Intelligence Center shall be confidential and shall not be subject to the Virginia Freedom of Information Act (§2.2-3700, *et. Seq.*)...”

² §2.2-3700(B), Va. Code Ann. (1950), as amended.

³ *Am. Tradition Inst. V. Rector and Visitors of the Univ. of Va.*, 756 S.E.3d 435, 440 (2014)

⁴ §2.2-3700(B), Va. Code Ann. (1950), as amended.

⁵ See, *e.g.*, 2.2-3700, -3705.0, -3705.2, -3705.3, 3705.4, -3705.5, -3705.5, -3705.7, & 3706, Va. Code Ann. (1950), as amended.

Upon receipt of a FOIA request, a public body must, within five business days, provide the requested records, or make one of the following responses: (1) that the requested records “are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records”; (2) that the “requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold the records”; (3) that the “requested records could not be found or do not exist”; or (4) that “[i]t is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period.”⁶ Where the public body elects to withhold records, the written response “shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorized the withholding of the records.”⁷

Regarding redaction; while §2.2-3704.01, Va. Code Ann. (1950), as amended, generally requires disclosure of non-exempt portions of a public record (*see, e.g.*, §§ 2.2-3705.1 through 2.2-3705.7), that statute also expressly states that a public record may be withheld from disclosure in its entirety to the extent that an exclusion applies to the entire content of the public record. § 2.2-3704.01.

⁶ §2.2-3704(B), Va. Code Ann. (1950), as amended.

⁷ §2.2-3704(B)(1), Va. Code Ann. (1950), as amended. Although FOIA provided that a failure to comply with its provisions entitles a mandamus petitioner to “relief”, the Virginia Supreme Court has held that failure to comply with FOIA’s procedural technicalities cannot, in and of itself, entitle a FOIA petitioner to records that could have been withheld under a properly-asserted FOIA exemption. Specifically, failing to identify with specificity the claimed exemption does “not operate as a waiver of [the respondent’s] otherwise valid exercise of an applicable exemption”. *Lawrence v. Jenkins*, 258 Va. 598, 603 (1999) (holding that the respondent did not waive his right to withhold, in his discretion, a portion of a public record, notwithstanding the fact that the respondent had failed to specify which exemption justified withholding of the records, reasoning that the procedural irregularity “did not operate as a waiver of [the respondent’s] otherwise valid exercise of an applicable exemption”).

Section 2.2-3704.01, Va. Code Ann. (1950), as amended, does not apply to the statutory provision that allows the exemption for police tactical plans, *see* §2.2-3706, Va. Code Ann. (1950), as amended. Subsequent to the enactment of § 2.2-3704.01, the General Assembly added language to §§ 2.2-3705.1 through 2.2-3705.7 stating “[r]edaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01”. Significantly, no such language was added to §2.2-3706, Va. Code Ann. (1950), as amended. “Well established principles of statutory construction require us to ascertain and give effect to the legislative intent.” *Brooks v. Commonwealth*, 19 Va.App 563, 566 (1995) (citation omitted). “When new provisions are added to existing legislation by amendment, we presume that. . .the legislature acted with full knowledge of and in reference to the existing law upon the same subject and the construction placed upon it by the courts[.]...that the legislature acted purposefully with the intent to change the existing law.” *Burke v. Commonwealth*, 29 Va.App. 183, 188 (1999) (citations omitted). When “the several provisions of a statute suggest a potential for conflict or inconsistency,” we must construe such “provisions so as to reconcile them and to give full effect to the expressed legislative intent”. *Herrel v. Commonwealth*, 28 Va.App. 579, 585 (1998) (citations omitted). Because 2.2-3706, Va. Code Ann. (1950), as amended, contains no reference to 2.2-3704.01, Va. Code Ann. (1950), as amended, the intent of the General Assembly is clear that it did not intend for the redaction requirements of 2.2-3704.01, Va. Code Ann. (1950), as amended, to apply to records covered by §2.2-3706, Va. Code Ann. (1950), as amended. The General Assembly also states, within § 2.2-3706(D) that:

“Conflict resolution. In the event of conflict between this section as it relates to requests made under this section and other provisions of law, this section shall control.”

ARGUMENT AND AUTHORITIES

The present case presents one fundamental legal question: Whether the records contained the Petitioner's request are exempted by FOIA from mandatory disclosure.

A. Tactical Plans, such as the Operation Plan employed by the City of Charlottesville Police Department, are not subject to mandatory disclosure under FOIA

The General Assembly expressed its clear intent to allow exemptions from mandatory disclosure for numerous categories of law-enforcement records, including those which contain specific tactical plans, see 2.2-3706(a)(2)(e), Va. Code Ann. (1950), as amended. Although the purpose of FOIA is to allow the broadest practicable disclosure in government affairs, the legislature recognized that certain government records, if disclosed, can have adverse impacts on the ability of a law enforcement agency to protect public safety. "Records of law-enforcement agencies, to the extent that such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public" are specifically excluded from mandatory disclosure under 2.2-3706(A)(2)(e), Va. Code Ann. (1950), as amended. "Ordinarily, when a particular word in a statute is not defined therein, a court must give it its ordinary meaning." *Moyer v. Commonwealth*, 33 Va. App. 8, 35 (2000) (citing *McKeon v. Commonwealth*, 211 Va. 24, 27 (1970)). "While the use of 'plain and ordinary meaning' is, of course, a fundamental rule of statutory construction to be applied where a word or phrase is not otherwise defined by the Code, the rule also requires the courts should be guided by 'the context in which [the word or phrase] is used.'" *Protestant Episcopal Church v. Truro Church*, 260 Va. 6, 21 (2010) (citing *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 595, 514 (1999) (quoting *Dep't of Taxation v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658 (1980)). Tactical plan has been defined as "steps and tactics required to achieve goals defined in a strategic plan". BLACK'S LAW DICTIONARY FREE (2nd Ed. 2017); and "[r]elating

to or constituting actions carefully planned to gain a specific military end”. OXFORD DICTIONARY (2017).

The City of Charlottesville Police Department’s Operation Plan is an ever evolving living document, a tactical plan which can be strategically altered to apply to a host of situations. The Operation Plan is essentially a law enforcement “playbook” that is continually tailored to apply to new situations where tactical operation plans are required.

Petitioner alleges that the City of Charlottesville Police Department “[has] failed to show that the requested public records contain ‘specific tactical plans’ or that the disclosure of the requested public records ‘would jeopardize the safety or security of law-enforcement personnel or the general public’” to satisfy the exemption under 2.2-3706(A)(2)(e), Va. Code Ann. (1950), as amended. Petition at 12. However, other than citing an exemption to disclosure, there is no requirement in FOIA that a government body prove the contents of documents or make any such “showing”. See §2.2-3704, Va. Code Ann. (1950), as amended.

Regarding safety and security, the Virginia Supreme Court has given a great deal of deference to government bodies in making a determination of threatened harm with respect to security exemptions. As the Court stated in *Virginia Department of Corrections v. Surovell*, 290 Va. 255, 265-266 (2015), “the circuit court must make a de novo determination of the propriety of withholding the documents at issue, but in doing so the circuit court must accord ‘substantial weight’ to the [agency’s] determinations”.⁸ In assessing the potential harm, the Supreme Court determined that “[a] circuit court must take into account that an agency statement of threatened harm to security will always be speculative to some extent, in the sense that it describes a potential future harm rather than

⁸ In making a determination of whether release of execution protocol documents would compromise Department of Corrections’ operational security, Surovell court noted “[w]e give deference to the expert opinions of correctional officials charged with maintaining the safety and security of their employees, the inmates, and the public at large”. *Id.* at 266

an actual harm”. *Id.* at 265. The Court further added, “[a government agency] need not ‘prove exclusively that, if it responded [to a FOIA request], some [security] would in fact be compromised or jeopardized’”. *Id.* at 265 (citing *Gardels v. Central Intelligence Agency*, 689 F.2d 1100, 1106 (D.C.Cir. 1982); and *Halperin v. Central Intelligence Agency*, 629 F.2d 144, 149 (D.C.Cir. 1980) (“The purpose of...security exemptions to the FOIA is to protect [sensitive categories of information] before they are compromised and harmed, not after”.) As in *Surovell*, deference should be given to the public safety experts in the City of Charlottesville’s Police Department in this case to make public safety determinations regarding the release of its Operation Plan. As the Operation Plan may be adapted and utilized in the future, and reveals what tactics have been chosen to deal with specific circumstances, its disclosure would jeopardize the public safety of City of Charlottesville Police Department officers and the public by providing those seeking to do harm and commit crimes with tactical and strategic plans and the methodology behind those plans. .

B. Intelligence Information included in the Operation Plan is specifically exempted from FOIA by §52-48, Va. Code Ann. (1950), as amended.

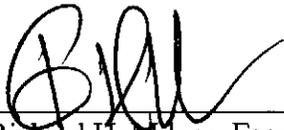
In addition to the applicable FOIA exemption discussed above, the Virginia Code specifically exempts intelligence information provided by the Virginia Fusion Intelligence Center. In enacting §52-48(A), Va. Code Ann. (1950), as amended, the General Assembly was clear in its intent. “Papers, records, documents, reports, materials, databases, or other evidence or information relative to criminal intelligence or any terrorism investigation in the possession of the Virginia Fusion Intelligence Center shall be confidential and shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) or the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.).” Incorporated in the Charlottesville Police Department’s Operation Plan is intelligence information derived from the Virginia Fusion Intelligence Center.

CONCLUSION

FOIA specifically makes release of the Operation Plan discretionary by the City. The City chose to exercise its discretion not to release the records. Additionally, the Operation Plan contains Fusion Center intelligence information that is specifically excluded from FOIA pursuant to §52-48, Va. Code Ann. (1950), as amended.

For the foregoing reasons, the City of Charlottesville, by counsel, respectfully request that this Court DENY and DISMISS the First Amended Petition for a Writ of Mandamus.

CITY OF CHARLOTTESVILLE
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2017, I mailed a true and exact copy of
the foregoing document to:

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