

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

NATALIE JACOBSEN,

Petitioner,

v.

DEPARTMENT OF STATE POLICE

OFFICE OF THE SECRETARY OF
PUBLIC SAFETY AND HOMELAND
SECURITY

Respondents.

Case No.: CL17-592

**RESPONDENTS' RESPONSE TO THE COURT'S REVIEW
OF PROPOSED OPERATIONAL PLAN REDACTIONS**

Respondents Virginia State Police (“VSP”) and Office of the Secretary of Public Safety and Homeland Security, by counsel, hereby submit this response to the Court’s letter opinion, dated March 24, 2020 regarding its review of Respondent’s proposed redactions to the Operational Plan.¹

Background

Petitioners filed a Petition for Writ of Mandamus pursuant to FOIA on October 31, 2017. Respondents Virginia Department of State Police (VSP) and Secretary of Public Safety and Homeland Security filed Motions to Dismiss on November 6, 2017, based on separate FOIA

¹ The Court originally ordered a response within 10 days of the opinion. However, due to Covid-19 related declarations of judicial emergency by the Virginia Supreme Court, all court deadlines were tolled from March 16, 2020 through July 19, 2020.

exemptions. The VSP specifically cited Va. Code Section 2.2-3706 A.2.(e) [now 2.2-3706 B.5] (“specific tactical plans”) and 52-48 A. (Fusion Center criminal intelligence information).

On March 13, 2018, motions were argued and the Court issued a letter opinion on March 30, 2018. In the letter ruling, the Court directed Respondents to reexamine and reconsider its operational plan, then turn over to Petitioners what Respondents believed would not jeopardize the safety or security of the VSP or the general public, and file with the Court those portions of the plan that Respondents still believed were protected under FOIA. These would be reviewed *in camera* by the Court.

Respondents appealed this ruling in April 2018 to the Virginia Supreme Court, which denied the appeal on November 18, 2018 as premature because the Court’s order was not yet final. Respondents, subject to a continuing objection, filed the redacted Operational Plan with the Court on June 24, 2018 to compare to the unredacted copy previously filed under seal in the original hearing before the Court.

Petitioners filed their response on July 8, 2018, and Respondents filed a Reply on July 30, 2018. In their Reply, Respondents also asserted additional FOIA exemptions, including §§ 2.2-3706 B.7 (law enforcement cellular telephone numbers), -3706 B.8 (information regarding undercover operations), -3706 B.10 (identity of undercover officers and investigative techniques and procedures), and -3705.2(10) (information relating to the Statewide Agencies Radio System (STARS)). The matter was further argued May 22, 2019.

On March 24, 2020, this Court issued a letter opinion, in which it made page-by page determinations on the applicability of Respondent’s claimed exemptions to the remaining proposed redactions. In the letter opinion, the Court invited, within 10 days of the letter opinion, any response or argument from Respondents regarding any information ordered disclosed, or

which the Court ruled was not specific tactical information or did not cause a risk to safety or security, to the extent Respondents wished to do so “without revealing the information itself.”

Response to Rulings on Redactions Ordered Disclosed

Per the Court’s letter opinion, without revealing the information itself, Respondents respond as follows to the Court’s ruling on the following specific redactions to the Operational Plan relying on Virginia Code § 2.2-3706(B)(5)² and § 52-48 (and exemption for telephone numbers) :

- p. UR5 Under “Introduction,” the third sentence in the second paragraph contains information received from the Fusion Center and should remain redacted.
- p. UR5 Under “Introduction,” the fourth paragraph contains Fusion Center information and should remain redacted.
- p. UR8 The heading preceding the various platoons identifies tactical information which ties into further tactical information later in the Operational Plan. The disclosure of this information could identify specific tactical roles of a specific VSP group, which could jeopardize the safety and security of those performing such roles and should remain redacted.
- p. UR9 Under “Resources,” the last two phrases identify tactical information which ties into further tactical information later in the Operational Plan. The disclosure of this information could identify specific tactical roles of a group, which could jeopardize the safety and security of those performing such roles and should remain redacted.
- p. UR12 The phrase under 1.a. also identifies a specific tactical group, the disclosure of which could jeopardize the safety and security of those performing specific tactical roles and should remain redacted.
- p. UR13 Under 1.c., the portion of the sixth sentence from “to return to...” identifies a specific tactical group, the disclosure of which could jeopardize the safety and security of those performing specific tactical roles and should remain redacted.

² On February 26, 2018, the General Assembly enacted a statute that, among other things, reorganized Code § 2.2-3706, which was effective July 1, 2018. That legislation renumbered the provisions previously labeled Section 2.2-3706(A)(2)(e) as Section 2.2-3706(B)(5), while leaving the text of the provision unchanged. 2018 Va. Acts. Ch. 48.

- p. UR17 The first and second paragraphs refer to a specific VSP Orders of the State Police Manual (not in the public domain) which describe specific tactics/methods that VSP personnel are to use and have available for use under certain circumstances. Disclosure of this information would provide knowledge of such methods and information about VSP tactics, thereby jeopardizing the safety and security of VSP personnel and should remain redacted.
- p. UR27 The dates of lodging are tactical in this context and would jeopardize the safety and security of personnel by revealing specific information about when VSP personnel arrived and were housed in relationship to the rally and should remain redacted.
- p. UR35 Providing the names, ranks, and assignments would reveal specific information about the composition and size of the force assembled in response to the rally.
- p. UR36 The dates and times of lodging provide specific periods of time that VSP personnel will be assembled relative to an event and should remain redacted.
- p. UR36 The designations which identify groups of individuals and how they are grouped and assembled for lodging should remain redacted.
- p. UR36 The cellphone number of the supervisor should remain redacted.
- p. UR37 The cellphone number of the supervisor should remain redacted.
- p. UR37 The dates and times of lodging provide specific periods of time that personnel will be assembled. This would jeopardize the safety and security of the personnel by revealing when groups of personnel would be assembled relative to an event and therefore should remain redacted.
- pp. UR37-51 Identifying information, such as including names, would jeopardize the safety and security personnel, by revealing the number and types of personnel in each hotel, and the number of hotels utilized by the VSP and should remain redacted.
- p. UR57-58 Providing identifying information here would reveal the identities and composition of the unit and how many personnel are dedicated to medical support and available to respond to medical issues. If disclosed, this would jeopardize the safety and security of the personnel and those under their medical care by revealing overall capacity and should remain redacted.
- p. UR144 In Section 1.a, the first acronym in parentheses will remain redacted per the Court's order.
- p. UR145 Under subsection c., the language at the end of the next to the last sentence which begins "to return..." should be redacted as it identifies a specific tactical group, the disclosure of which could jeopardize the safety and security of those performing tactical roles.

- p. UR148 Subsection c. provides tactical information about the methods and procedures used by a specific personnel group. Disclosure of this information would provide knowledge of such methods and procedures which could jeopardize the safety and security of those performing tactical roles and should remain redacted.
- p. UR148 The eighth word in subsection d. should remain redacted as it provides tactical information about prisoner transport. Such information is tactical, the disclosure of which could jeopardize the safety and security of VSP personnel and others.

Respondents have no further responses to additional portions of the Operational Plan ordered by the Court to be unredacted. However, the above responses and lack of further responses to the Court's removal of redactions in their entirety remain subject to the Respondent's continuing objection that the entire VSP Operational Plan is exempt from disclosure under Virginia Code § 2.2-3706(B)(5)³ and § 52-48.

Respondents properly identified FOIA exemptions in its disclosure of the Plan

In its letter opinion of March 24, 2020, the Court noted:

Respondents have also raised new exemptions when they filed the redacted report—records containing “telephone numbers for cellular telephones, pagers or comparable portable communication devices related to their duties” (Va. Code §2.2-3706 B.7), and the Statewide Agencies Radio System (2.2-3705.10). But I think Petitioners are correct that Respondents should not now be heard to assert other exemptions that were not in the original motion or argued at either hearing (March 13, 2018, or May 22, 2019). Respondents did not file an additional or supplemental Motion to Dismiss, nor seek leave to amend the original Motion to Dismiss. The Court's ruling addressed only the “tactical plans” and “Fusion Center” exemptions. Briefs are not responsive pleadings and I do not believe that new grounds for relief can be raised or asserted for the first time in a brief when they have not been raised first in the responsive pleading (here the Motion to Dismiss), although Petitioners do not object to redacting telephone numbers and radio codes.

³ On February 26, 2018, the General Assembly enacted a statute that, among other things, reorganized Code § 2.2-3706, which was effective July 1, 2018. That legislation renumbered the provisions previously labeled Section 2.2-3706(A)(2)(e) as Section 2.2-3706(B)(5), while leaving the text of the provision unchanged. 2018 Va. Acts. Ch. 48.

Upon its disclosure of the redacted Plan to Petitioner, Respondents identified specific FOIA exemptions relied upon when making redactions. In its disclosure of the redacted Plan to Petitioner, Respondents included the following statement: “Exemptions relied on pursuant to the Virginia Freedom of Information Act include Virginia Code §§ 2.2-3706(B)(5)[Tactical Information], -3706(B)(7)[Telephone numbers and communication devices used by personnel in performance of their official duties], -3706(B)(8)[undercover operations], -706(B)(10)[undercover investigative techniques or procedures], 2.2-3705.2(10)[information relating to the Statewide Agencies Radio System (STARS)], and 52-48[Fusion Center Intelligence information].” Petitioner objected to the identification of these FOIA exemptions, arguing that they were waived by Respondents as not previously identified.⁴

As the Court is aware, Respondents have consistently argued that the entire Plan is exempt under FOIA under Va. Code §§ 2.2-3706(B)(5) and 52-48 because those portions of the Code do not provide for redactions, as opposed to some other sections in FOIA. Recognizing that the Court overruled the argument that the entire Plan is exempted in its entirety, and given the Court’s order that Respondents provide portions of the Plan to Petitioner, it was necessary to identify all exemptions that applied to redacted portions of the Plan released to Petitioner. The stated exemptions also apply to information contained within the Plan that, like § 2.2-3706(B)(5), if disclosed, would constitute a risk to the safety or security of law-enforcement personal or the general public. These exemptions were never waived by Respondents.

Moreover, the Virginia Supreme Court has rejected the concept of a waiver under FOIA when a public official generally invokes FOIA but does not initially and specifically cite to the

⁴ It should be noted that Noah Sullivan, counsel for the Secretary of Public Safety, originally relied on the exemptions contained in 2.2-3706 for denying Petitioner’s FOIA request. (See Tr. 3/13/18 at 176).

appropriate exception. *Lawrence v. Jenkins*, 258 Va. 598, 603 (1999). In *Lawrence*, a request was made to the local zoning administrator for documents associated with complaints made about the requester's property including the complaints themselves, identity of the complainants, and dates of the complaints. *Id.* at 600. The zoning administrator redacted complainant identities citing FOIA but did not provide the specific exemption until later, before the hearing. *Id.* at 600-601. The trial court found a violation and required production of un-redacted documents. The Virginia Supreme Court reversed the trial court, holding that a procedural violation did not constitute a waiver of a valid exception under FOIA. *Id.* at 601, 603. Therefore, when, over their objections, Respondents were first required by the Court to redact portions of the Plan, Respondents properly identified all other applicable FOIA exemptions with its redacted disclosure of the Plan. As such, the exemptions should not be deemed waived.⁵

Respectfully submitted,

VIRGINIA DEPARTMENT OF STATE
POLICE & SECRETARY OF PUBLIC
SAFETY & HOMELAND SECURITY

By: /s/ Michael A. Jagels
Counsel

⁵ After this Court previously ruled that redactions to the plan were required, it ordered VSP, over its objection, to release the redacted plan to Petitioners. To preserve its argument on appeal that the entire plan is excluded from disclosure, Respondents request that the Court not require Respondents to disclose further unredacted portions of the Operational Plan prior to the finality of an appeal.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was sent via electronic mail on this
30th day of July 2020, to:

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