

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VPM NEWS and BEN PAVIOUR,

Petitioners,

v.

VIRGINIA DEPARTMENT OF
EDUCATION

Serve:

Rebecca Askew, Office of Policy
The James Monroe Building, 25th Floor
101 N. 14th Street
Richmond, VA 23219

Respondent.

Case No. _____

PETITION FOR WRIT OF MANDAMUS

Petitioners VPM News and Ben Paviour (together, “Petitioners”), by and through their undersigned counsel, state as follows:

1. This case arises from an improper denial by the Virginia Department of Education (“VDOE” or “Respondent”) of a request for access to records that are required to be disclosed under the Virginia Freedom of Information Act, Virginia Code § 2.2-3700, *et seq.* (“VFOIA” or the “Act”). On September 16, 2022, VDOE promulgated a new set of model policies pertaining to the treatment of transgender students in public schools (the “2022 Model Policies”).

2. On September 19, 2022, Petitioners—a journalist and news organization—requested records related to the 2022 Model Policies from VDOE pursuant to VFOIA. VDOE claimed that 87 records responsive to that request—including, but not limited to, a list of talking points on “Transgender Guidance” circulated among VDOE officials on September 16, 2022 and a weekly report circulated by VDOE officials in July of 2022—were exempt from mandatory

disclosure and denied Petitioners access to them. Because the exemption cited by VDOE—which is reserved for “working papers,” *i.e.*, those records created for certain officials’ personal or deliberative use—does not apply to the records requested by Petitioners, the records must be released. At minimum, the information provided by VDOE regarding certain of the responsive records it withheld was insufficient; all of the withheld records responsive to Petitioners’ request must be identified with “reasonable particularity.”

3. Petitioners seek the issuance of a writ of mandamus and other relief pursuant to Virginia Code § 2.2-3713 to require the Virginia Department of Education to comply with the provisions of the Virginia Freedom of Information Act, Virginia Code § 2.2-3700, *et seq.*

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to Virginia Code § 2.2-3713(A).

5. This Court is the proper venue for this motion pursuant to Virginia Code § 2.2-3713(A)(1) because VDOE is an agency of the Commonwealth’s government and because Petitioners are residents of Richmond, Virginia.

PARTIES

6. Petitioner VPM News, Virginia’s home for public media, operates public television stations and public radio stations throughout Virginia, serving nearly 2 million people across Central Virginia and the Shenandoah Valley. VPM News delivers award-winning coverage of statewide politics, local government, education, and legal issues from its Richmond newsroom.

7. Petitioner Ben Paviour (“Paviour”) is a citizen of the Commonwealth of Virginia, and a resident of Richmond. Paviour is a reporter for VPM News covering state politics, with a focus on government accountability.

8. Respondent VDOE is the administrative agency for Virginia’s public schools.

9. Respondent is a “public body” of the Commonwealth of Virginia and is therefore governed by the disclosure requirements of VFOIA. Va. Code Ann. §§ 2.2-3700, 2.2-3701.

FACTS

VDOE Promulgates New Model Policies Regarding Transgender Students:

10. On September 16, 2022, VDOE released a new set of model policies titled “2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools” to replace the Department’s 2021 Model Policies for the Treatment of Transgender Students in Public Elementary and Secondary Schools. *See* 2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools (Sept. 16, 2022), <https://perma.cc/G56E-GX4K>. Exhibit A.

11. No written executive order by Governor Glenn Youngkin pursuant to Va. Code Ann. § 2.2-104 designated or empowered VDOE to promulgate the 2022 Model Policies. *See* Office of the Governor, Executive Actions (last visited October 19, 2022), <https://www.governor.virginia.gov/executive-actions/>.

12. The 2022 Model Policies redefine “transgender student” to refer to “a public school student whose parent has requested in writing, due to their child’s persistent and sincere belief that his or her gender differs with his or her sex, that their child be so identified while at school.” Exhibit A at 5.

13. The 2022 Model Policies further state that “[s]chools shall defer to parents to make the best decisions with respect to their children,” including “to determine (a) what names, nicknames, and/or pronouns, if any, shall be used for their child by teacher and school staff while their child is at school, (b) whether their child engages in any counseling or social transition at

school that encourages a gender that differs from their child’s sex, or (c) whether their child expresses a gender that differs with their child’s sex while at school.” *Id.* at 2.

14. VDOE directed local school boards to “adopt policies that are consistent with” the 2022 Model Policies. *Id.* at 6.

Petitioners’ VFOIA Request and Respondent’s Partial Denial of Petitioners’ Request:

15. On September 19, 2022, Petitioners submitted a VFOIA request to VDOE via email to Rebecca Askew (“Askew”), a VFOIA Officer at VDOE, seeking:

All drafts of the 2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools, alongside any email correspondence related to those drafts.

Any mentions of the word “trans” or “transgender” in the emails (sent or received) of Superintendent Jillian Balow from Aug. 1, 2022 – Sept. 19, 2022.

Exhibit B (the “VFOIA Request”).

16. Jillian Balow (“Balow”) is the Superintendent of Public Instruction for the Commonwealth of Virginia. In that role, she serves as the executive officer for VDOE. In addition, Balow is the Secretary of the State Board of Education.

17. On October 5, 2022, Askew responded to Petitioners’ VFOIA Request. Exhibit B. The VDOE Response stated, in pertinent part: “The VDOE is withholding 87 records, constituting an estimated 315 page [sic] . . . pursuant to Section 2.2-3705.7(2) related to Governor’s Confidential Working Papers. Some information in the attached records are [sic] withheld pursuant to Section 2.2-3705.1 of the Code of Virginia related to personnel information.” *Id.*

18. VDOE has violated VFOIA by failing to produce records responsive to Petitioners’ VFOIA Request, which include the following two withheld records.

The Weekly VDOE Report

19. Among the records attached to the VDOE Response was an email dated July 21, 2022 from Jon Russell to Balow and Tammy Babbs with the subject line “Weekly VDOE Report”; the email references an attached document titled “Cabinet Report 7-22-22.docx.” Exhibit C.

20. The attachment titled “Cabinet Report 7-22-22.docx” (the “Weekly VDOE Report”) was withheld from the records produced by VDOE to Petitioners in response to the VFOIA Request. Exhibit B; Exhibit C.

21. Upon information and belief, Jon Russell (“Russell”) was a Senior Advisor within VDOE subordinate to the Superintendent of Public Instruction when he sent the email with the subject line “Weekly VDOE Report.”

22. The position of Special Advisor within VDOE does not require confirmation by the General Assembly or either house thereof.

The Talking Points

23. Also among the records attached to the VDOE Response was an email dated September 16, 2022 from Balow to Charles Pyle (“Pyle”) with the subject line “Fwd: Re-upping TG guidance talkers and notes.” Exhibit D.

24. Balow’s email to Pyle forwarded an email she had received earlier that morning from Ali Ahmad (“Ahmad”) attaching the Talking Points. *Id.* The text of Ahmad’s email reads, in relevant part: “Good Morning- The draft 2022 model policy goes live at 9 am. Attached you’ll find the Talking points shared with House/Senate, AG, and LG . . .” *Id.*

25. Balow’s email to Pyle contained an attachment titled “Talking Points Transgender Guidance – Copy.docx” that was withheld from the records produced by VDOE to Petitioners in response to the VFOIA Request. Exhibit B; Exhibit D.

26. Pyle is Director of Communications & Constituent Services, a role within VDOE subordinate to the Superintendent of Public Instruction.

27. The position of VDOE Director of Communications & Constituent Services does not require confirmation by the General Assembly or either house thereof.

* * *

28. On January 24, 2023, undersigned counsel for Petitioners provided VDOE a copy of this petition as required under Va. Code Ann. § 2.2-3713(C).

29. Pursuant to Va. Code Ann. § 2.2-3713(C), this petition “shall be heard within seven days of the date the same is made.”

**FIRST CAUSE OF ACTION
RESPONDENT HAS VIOLATED VFOIA BY FAILING TO PRODUCE
RECORDS RESPONSIVE TO PETITIONERS’ VFOIA REQUEST**

30. Petitioners reassert and adopt by reference paragraphs 1–29.

31. VFOIA defines “public records” as “all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, . . . or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” Va. Code Ann. § 2.2-3701.

32. VFOIA provides that “[a]ll public records . . . shall be presumed open, unless an exemption is properly invoked.” Va. Code Ann. § 2.2-3700(B).

33. VFOIA further provides that “all public records shall be available for inspection and copying upon request” unless “a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute.” *Id.*

34. Upon information and belief VDOE has violated VFOIA by failing to produce records responsive to Petitioners’ request including, but not limited to, the Weekly VDOE Report and Talking Points.

35. VDOE has denied Petitioners access to records responsive to Petitioners’ VFOIA Request.

36. In denying Petitioners access to these records, VDOE cited Va. Code Ann. § 2.2-3705.7(2) (the “Working Papers Exemption”)

37. The Working Papers Exemption, Va. Code Ann. § 2.2-3705.7(2), however, is not applicable to the Weekly VDOE Report and Talking Points. Further, VDOE has failed to show that any of the 87 requested records it withheld in full are a “working paper [or] correspondence of the Office of the Governor.” Va. Code Ann. § 2.2-3705.7(2).

38. Because VDOE has asserted no applicable exemption justifying the withholding, in full, of records responsive to Petitioners’ request, and because those records are public records under VFOIA, VDOE’s withholding violates Va. Code Ann. §§ 2.2-3704(A) and 2.2-3700(B).

**SECOND CAUSE OF ACTION
RESPONDENT HAS VIOLATED VFOIA BY FAILING TO PRODUCE REDACTED
RECORDS RESPONSIVE TO PETITIONERS’ REQUEST**

39. Petitioners reassert and adopt by reference paragraphs 1–38.

40. VFOIA prohibits a public body from “withhold[ing] a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law.” Va. Code Ann. § 2.2–3704.01. VFOIA provides that “[a] public record may be withheld from disclosure in its entirety only to the extent that an exclusion

from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.” Va. Code Ann. § 2.2–3704.01.

41. Respondent is required by VFOIA to release all portions of the records requested by Petitioners that are not covered by an exemption. If certain portions of a requested record are covered by an applicable exemption, the remainder of that record must be made available to Petitioners with the exempt portions redacted.

42. Respondent’s failure to disclose all non-exempt portions of the requested records violates Va. Code Ann. §§ 2.2-3704.1.

THIRD CAUSE OF ACTION
RESPONDENT HAS VIOLATED VFOIA BY FAILING TO IDENTIFY WITHHELD
RECORDS WITH REASONABLE PARTICULARITY

43. Petitioners reassert and adopt by reference paragraphs 1–42.

44. VFOIA requires that when “requested records are being provided in part and are being withheld in part,” or when “requested records are entirely withheld,” the custodian must “identify with reasonable particularity the subject matter of the records [or withheld portions], and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.” Va. Code Ann. § 2.2–3704(B)(1)–(2).

45. VDOE withheld 87 records in full pursuant to the Working Papers Exemption.

46. No information was provided by VDOE about the subject matter of those withheld records.

47. Because VDOE has failed to identify with reasonable particularity the subject matter of records it withheld in response to Petitioners' VFOIA Request, it has violated Va. Code Ann. §§ 2.2-3704(B)(1)-(2) and 2.2-3704(E).

FOURTH CAUSE OF ACTION
RESPONDENT HAS ABUSED ITS DISCRETION BY FAILING TO PRODUCE ALL
OR PORTIONS OF THE REQUESTED RECORDS

48. Petitioners reassert and adopt by reference paragraphs 1-47.

49. The Working Papers Exemption cited by Respondent as the basis for withholding the Weekly VDOE Report and Talking Points states, in pertinent part: "The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law." Va. Code Ann. § 2.2-3705.7 (West).

50. The Working Papers Exemption is not applicable to records withheld by VDOE in response to the VFOIA Request. In the alternative, if the Working Papers Exemption is applicable to any of the records withheld by VDOE in response to the VFOIA Request, VDOE abused its discretion by denying Petitioners access to those records in their entirety or to a redacted version of them in violation of Va. Code Ann. § 2.2-3705.7.

PRAYER FOR RELIEF

Wherefore, Petitioners pray that this Court will:

A. Hold a hearing on this matter within seven days of the filing of this Petition, as required by VFOIA.

B. Issue a writ of mandamus ordering Respondent to release the 87 records withheld in full in response to Petitioners' VFOIA Request, including the Weekly VDOE Report and Talking Points, or, alternatively, to show cause why any portion of those records may not be produced pursuant to an applicable VFOIA exemption.

C. Order Respondent to produce the 87 records withheld in full in response to Petitioners' VFOIA Request, including the Weekly VDOE Report and Talking Points, to the Court for *in camera* review.

D. Issue a writ of mandamus ordering Respondent to identify with particularity (i) whether each record is an email, an attachment to an email, or another type of record; (ii) for each email or email attachment, all senders and recipients of that record; (iii) for each email, the date and subject line of the email or the date and a description of its contents made with reasonable particularity; and (iv) for each email attachment, an identification of the email to which it was attached and the name of the attachment or a description of the attachment's contents made with reasonable particularity (v) for records that are not emails or email attachments, a description of that record's contents made with reasonable particularity.

E. Order Respondents to pay Petitioners' costs, including attorneys' fees, as Petitioners have substantially prevailed on the merits of the case and no special circumstances make an award of fees unjust. Va. Code Ann. § 2.2-3713(D).

F. Grant any further relief as this Court deems just and proper.

Respectfully submitted,

VPM NEWS and
BEN PAVIOUR

By: 
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Counsel for Petitioners

CERTIFICATE OF STATUTORY NOTICE

I certify that, pursuant to Va. Code § 2.2-3713(C), a copy of this Petition for Writ of Mandamus was sent by UPS on January 23, 2023 for delivery January 24, 2023, to the following address:

Virginia Department of Education, *Respondent*
c/o Rebecca Askew, Office of Policy
The James Monroe Building, 25th Floor
101 N. 14th Street
Richmond, VA 23219

rebecca.askew@doe.virginia.gov
policy@doe.virginia.gov
service@oag.state.va.us

I certify that a copy of this Petition for Writ of Mandamus was sent by email to the email addresses listed above on January 24, 2023.

CERTIFICATE OF SERVICE

I certify that on or before January 31, 2023, a copy of the foregoing will be served by email upon the following address:

tsanford@oag.state.va.us
Thomas Sanford, Virginia Attorney General’s Office
Counsel for Respondent

If additional service is not waived by counsel for respondent, a copy will also be served by private process server upon:

Virginia Department of Education, *Respondent*
c/o Rebecca Askew, Office of Policy
The James Monroe Building, 25th Floor
101 N. 14th Street
Richmond, VA 23219

/s/ Lin Weeks
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