

Virginia:

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

VPM NEWS)

and)

BEN PAVIOUR,)

Petitioners,)

v.)

Case No.: CL 23-536

VIRGINIA DEPARTMENT OF)
EDUCATION,)

Respondent.)

ORDER

On March 3, 2023, Petitioners and Respondent appeared, by counsel, on Petitioners' Petition for Writ of Mandamus under the Virginia Freedom of Information Act ("VFOIA"). Respondent presented evidence in support of its position that all documents identified by the Court in Appendix B of the February 17, 2023 Order ("Appendix B") are covered by the Va. Code § 2.2-3705.7(2) exemption ("Working Papers and Correspondence exemption").

Upon consideration of the documents reviewed by the Court *in camera* and the arguments of counsel, the Court **FINDS** as follows:

First Category of Documents¹

As to the first category of documents, the weekly Cabinet reports and accompanying correspondence that are identified on Appendix B in the rows containing 0003-0005 through 0023-0025, the Court finds that the documents are protected under Va. Code § 2.2-3705.7(2) as working papers and correspondence of the Office of the Governor. Specifically, the Court is satisfied that

¹ The Court adopts the Commonwealth's grouping of documents and identifies the documents solely by Bates stamp to preserve their integrity.

the document labeled “Cabinet Report 7-22-22.docx,” which was identified by Petitioners in their Brief in Support of Petition for Writ of Mandamus as the “Weekly VDOE Report” and was identified by this Court as the Weekly DOE Report on its Appendix B² of the February 17, 2023 Order, is a document that is prepared specifically for the personal and deliberative use of the Governor. The testimony provided makes it clear that each Cabinet Secretary submits a Cabinet Report to the Governor’s Office for compilation into a weekly Cabinet Report that the Governor reviews, marks up, and uses as a point of discussion in the weekly Cabinet meetings. This was demonstrated by the Commonwealth’s witness, Richard Cullen, who is counselor to the Governor and is an advisor and member of his Cabinet. Mr. Cullen demonstrated that the Governor’s weekly Cabinet Report is confidential among the Governor and his Cabinet members so that those involved in the weekly meetings can “tell it like it is.”

The Court further finds that the emails identified in the documents with Bates Stamps 0011, 0012, 0016, 0017, 0021, and 0022 are all correspondence with an individual protected by the exemption of Va. Code § 2.2-3705.7(2) because they fall within the definition of the “Office of the Governor.”

Because the Commonwealth has demonstrated by a preponderance of the evidence that documents 0003-0005 through 0023-0025 on Appendix B are part of the process to create the Governor’s weekly Cabinet report, and the Cabinet report is a document used in the Governor’s deliberative process, the Court finds it has met its burden to show the documents are exempt under the Working Papers exemption and the emails are exempt under the Correspondence exemption. *See Va. Freedom of Information Advisory Council, Advisory Op. AO-01-16 (July 11, 2016).*

² See Documents with Bates Stamps 0003-0005; 0008-0010; 0013-0015; 0018-0020 on Appendix B of the Court’s February 17, 2023 Order.

Second Category of Documents

As to the second category of documents, identified on Appendix B as the rows containing 0077 through 0112, the Court finds that these records are protected under Va. Code § 2.2-3705.7(2) as working papers and correspondence of the Office of the Governor. This grouping of records relates to the document titled “Talking Points Transgender Guidance – Copy.docx” that has been identified by the Court as Talking Points. As to this document and those related to it, the evidence provided by the Commonwealth establishes that agencies in the Commonwealth create talking points documents for the Office of the Governor and the Governor specifically as an abbreviated way to articulate and discuss a policy to assist the Governor in his analysis and understanding. Such documents are provided to the Governor after contribution by communications experts and experts in the topic at issue. Mr. Cullen testified that a document like this is not one that would be subject to wide dissemination, and they are for the Governor to help him communicate sensitive, legal, or political issues and unify the voice of the Commonwealth.

Petitioners argue that the fact the document was shared with members of the General Assembly undermines its categorization as a document for personal and deliberative use, but the Court does not find this fact dispositive. While Mr. Cullen did state that the Talking Points document at issue in this matter was sent to certain members of the General Assembly, he also testified that it was sent to only a “couple of Republican Party leaders” in the General Assembly as part of the process of developing the Talking Points. Therefore, the fact that the document was shared does not undermine the fact that such dissemination was limited and consistent with the deliberative process of the Governor.

Because the Commonwealth has demonstrated by a preponderance of the evidence that documents 0077 through 0112 on Appendix B are documents created for the Governor, and the

Talking Points is a document used in the Governor's personal and deliberative process to assist in understanding the fundamentals of an issue and sharing the issue with the public, the Court finds it has met its burden to show the documents are exempt under the Working Papers exemption. *See* Advisory Op. AO-01-16 (July 11, 2016).

Third Category of Documents

As to the third category of documents, identified on Appendix B as the rows containing 0151-0153 through 0248-0267 and 0274 through 0515-0534, the Court finds that these records are protected under Va. Code § 2.2-3705.7(2) as working papers and correspondence of the Office of the Governor. These records contain the drafts of the 2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools ("2022 Model Policies").

The Court finds that these drafts were created by and with the Office of the Governor for the purpose of promulgating the Governor's policy. Mr. Cullen testified that the creation of the policy was initiated in the Office of the Governor. While members of the Department of Education contributed to the formulation of the policy as experts, those who worked on the policy itself were part of a small team whose review and work continued until the very last minute before promulgation on the Virginia Regulatory Town Hall website.

Because the Commonwealth has demonstrated by a preponderance of the evidence that documents 0151-0153 through 0248-0267 and 0274 through 0480-0499 on Appendix B are documents created by the Governor and arose out of the Governor's personal and deliberative process with regard to the promulgation of policy, the Court finds it has met its burden to show the documents are exempt under the Working Papers exemption. *See* Advisory Op. AO-01-16 (July 11, 2016).

Fourth Category of Documents

As to the fourth category of documents, identified on Appendix B as the rows containing 268 through 273, the Court finds that these records are protected under Va. Code § 2.2-3705.7(2) as working papers and correspondence of the Office of the Governor. The Court agrees that these emails and their respective email headers regard proposed action of the Department of Education and the editing and contribution to the 2022 Model Policies. As such, these emails are covered by the correspondence prong of the Working Papers exemption. *See* Advisory Op. AO-01-16 (July 11, 2016).

Dissemination

As to the issue of “wide dissemination” raised by Petitioners, the Court finds that none of these documents were widely disseminated such that their protection under the Working Papers exemption would be lost. Va. Freedom of Information Advisory Council, Advisory Op. AO-02-15 (Mar. 27, 2015). Further, the statute *on its face*, does not put a burden on the Commonwealth to show that a record has not been widely disseminated—to do so would require the Commonwealth to prove a negative. The Court agrees with the Commonwealth’s analysis that under the FOIA Council Advisory Opinions, dissemination concerns specific acts of showing a record, not speculative claims that unknown dissemination *could* have occurred, a claim that could be made about any record. *See* Advisory Op. AO-02-15. Rather, the relevant question as to the issue of wide dissemination is whether the document was so disseminated that the document is no longer for personal or deliberative use.

In considering the relevant inquiry outlined above, the Court finds that these documents were only disseminated to those who were contributing to the document within the realm of the Governor’s, or his Cabinet’s, personal and deliberative use.

Conclusion

For all the reasons stated above, the Court finds that all the records withheld by the Department of Education under the exemption outlined in Va. Code § 202-3705.7(2) were properly withheld, and the Commonwealth met its burden of proving the exemption on each document. The Court therefore **DENIES** Petitioners' Writ of Mandamus and dismisses this case.

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: 3/9/23

A handwritten signature in black ink, appearing to read "W. Reilly Marchant", written over a horizontal line.

W. Reilly Marchant, Judge