

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE**

NATALIE JACOBSEN and JACKSON LANDERS, )  
Petitioners, )

v. )

CHARLOTTESVILLE POLICE DEPARTMENT )  
Chief Al S. Thomas Jr. )  
606 East Market Street )  
Charlottesville, VA 22902 )

DEPARTMENT OF STATE POLICE )  
Colonel W. Steven Flaherty )  
7700 Midlothian Turnpike )  
North Chesterfield, VA 23235 )

Case No. CL17-592

OFFICE OF THE SECRETARY OF )  
PUBLIC SAFETY AND HOMELAND SECURITY )  
Brian Moran )  
Patrick Henry Building )  
1111 East Broad Street )  
Richmond, VA 23219 )

Defendants. )

**RESPONDENT DEPARTMENT OF STATE POLICE’S DEMURRER AND MOTION  
TO DISMISS THE PETITION FOR A WRIT OF MANDAMUS**

Petitioner seeks an order compelling Respondent, the Virginia Department of State Police, to release, in response to a Freedom of Information Act (“FOIA”) request, “the Operational Plan that was devised, authored, and approved by Governor McAuliffe prior to the (United The Right) rally” on August 12.<sup>1</sup>

Exercising its discretion permitted under Virginia Code § 2.2-3706(A)(2)(e), the Department of State Police declined to release documents in its possession related to its

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<sup>1</sup> As requested by Petitioner, no such plan exists in the possession of the Department of State Police.

Operational Plan, because the records in question include contain specific tactical plans, devised and authored by the Department of State Police, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public. In addition, the Department of State Police's Operational Plan contains criminal intelligence provided by the Department of State Police's Fusion Intelligence Center, which are excluded from the provisions of FOIA pursuant to Va. Code 52-48. Accordingly, Va. Code § 2.2-3706(A)(2)(e) allows for an exemption of the "record containing" tactical information. Additionally, the Department of State Police was under no obligation to redact the withheld record.

For these reasons, the Department of State Police respectfully requests that this Court sustain its demurrer and dismiss the Petition for a Writ of Mandamus.

#### **STATEMENT OF FACTS**

On October 25, 2017, Respondent received an email containing a Writ of Mandamus from Petitioner's counsel, which asserted, among other things, the following:

1. Respondent Virginia State Police is a board, bureau, commission, authority, district, institution, or agency of the state government and a public body governed by the disclosure requirements of FOIA. Virginia Code §§ 2.2-3700, 2.2-3701.
2. Virginia Code § 52-47 establishes the Virginia Fusion Intelligence Center, the purpose of which is "to receive and integrate terrorist-related intelligence and information." The Virginia Fusion Intelligence Center is operated by the Department of State Police.
3. By email of September 18, 2017 with the subject line "FOIA Request, Charlottesville," Petitioner stated "I am trying to accurately depict police response on August 12<sup>th</sup> to the planned United The Right rally. To do so, without speculation, I would like to submit a

FOIA request to look over the Operational Plan that was devised, authored, and approved by Governor McAuliffe prior to the rally.” Petition for Writ of Mandamus, Exh. 4.<sup>2</sup>

4. In the same email, Petitioner stated “Va. Code Ann. § 52-48 should not apply, as the State already has jurisdiction over being able to withhold or strike certain information when revealing it to the media authority or civilian.”
5. Petitioner also stated, “I understand there may be some concerns under Va. Code Ann. § 2.2-3706(2), but due to this Operational Plan be [sic] regarding a past event, in a contained situation, that does not effect [sic] or relate to other upcoming events, using this to create an exception for the plan should be moot.”
6. On September 19, 2017, David L. Ostwinkle, First Sergeant with the Department of State Police, emailed Petitioner, stating “The materials you are requesting are law-enforcement ‘records contain[ing] specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public’ and are being withheld under § 2.2-3706 (A)(2)(e). Additionally, the records may contain criminal intelligence and are governed by specific statutory authority and are excluded from the provisions of FOIA pursuant to § 52.48 [sic].”
7. On October 31, 2017, Petitioner filed its Petition for Writ of Mandamus with this Court, also seeking disclosure pursuant to FOIA for related documents from the Charlottesville Police Department and the Office of the Secretary of Public Safety and Homeland Security.

#### **APPLICABLE LAW**

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<sup>2</sup> As requested by Petitioner, no such plan exists in the possession of the Department of State Police.

Enacted in 1968, the Virginia Freedom of Information Act, Code §§ 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 . . . .”<sup>3</sup> The “primary purpose” of FOIA “is to facilitate openness in the administration of government.”<sup>4</sup> To that end, “[a]ll public records and meetings shall be presumed open, unless an exemption is properly invoked.”<sup>5</sup>

FOIA specifies approximately 144 separate categories of exclusions, exceptions, and exemptions to the Act.<sup>6</sup>

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

- Code § 2.2-3706 (A)(2)(e): “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.”
- Code § 52-48 (A): “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.)...”

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

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<sup>3</sup> Va. Code § 2.2-3700(B).

<sup>4</sup> *Am. Tradition Inst. v. Rector and Visitors of the Univ. of Va.*, 756 S.E.2d 435, 440 (2014).

<sup>5</sup> Va. Code § 2.2-3700(B).

<sup>6</sup> *See, e.g.*, Va. Code §§ 2.2-3703, -3705.1, -3705.2, -3705.3, -3705.4, -3705.5, -3705.6, -3705.7, & -3706.

“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 a portion of 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.”<sup>7</sup> 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 authorizes the withholding of the records.”<sup>8</sup>

Generally, records that are otherwise exempt from disclosure may be disclosed by the custodian, in his discretion. However, if the custodian, in his discretion, elects not to provide the requested records, that exercise of discretion is non-reviewable.<sup>9</sup>

Regarding redaction, while Va. Code § 2.2-3704.01 generally requires governmental bodies to redact those portions of documents that contain FOIA exclusions, it also states that a

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<sup>7</sup> Va. Code § 2.2-3704(B).

<sup>8</sup> Va. Code § 2.2-3704(B)(1).

<sup>9</sup> Although FOIA provides 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”).

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.

The redaction statute, Va. Code § 2.2-3704.1, does not apply to § 2.2-3706. Subsequent to the enactment of this general redaction statute, the General Assembly added language to numerous FOIA exclusions, stating “[r]edaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01. *See* FOIA, Va. Code §§ 2.2-3705.1-3705.7. However, no such language was added to § 2.2-3706. “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 an 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 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 contains no reference to § 2.2-3704.01, the intent of the general assembly is clear that it did not intend for the redaction requirements of § 2.2-3704.01 to apply to § 2.2-3706. The General Assembly has also stated that if there is a conflict between the provisions of § 2.2-3706 and other provisions of law, the terms of § 2.2-3706 shall control. *See* § 2.2-3706(D).

## ARGUMENT AND AUTHORITIES

The present case presents one fundamental legal question: Whether the records contained in Petitioner's request are FOIA-exempt and subject to discretionary non-disclosure by the Department of State Police.

### **A. Tactical Plans, such as the Operational Plan employed by the Department of State Police, are not subject to mandatory disclosure under FOIA**

The General Assembly expressed its clear intent to exclude records of law-enforcement agencies, including specific tactical plans, from mandatory disclosure by making them subject to discretionary release under § 2.2-3706 (a)(2)(e). Although the purpose of FOIA is to allow the broadest practicable disclosure in government affairs, the legislature recognized that certain government materials must remain confidential. "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 Va. Code § 2.2-3706(A)(2)(e). "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 that the courts should be guided by 'the context in which [the word or phrase] is used.'" Protestant Episcopal Church v. Truro Church, 280 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 Department of State Police’s Operation Plan is an ever evolving living document, a tactical operation plan which can be strategically altered to apply to a host of operational situations. The Plan is essentially a law enforcement “playbook” that is continually tailored to apply to new situations where tactical operations plans are required.

Petitioner alleges that the Department of State Police “[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). 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.” 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 authorizes the withholding of the records.” Va. Code § 2.2-3704(B)(1).

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.”<sup>10</sup> 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 an actual harm.” *Id.* at 265. The Court further added, “[a government agency] need not ‘prove conclusively 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 Department of State Police in this case to make public safety determinations regarding the release of the Operational Plan. After all, the Department of State Police is obligated vested law, with the authority to provide public safety to the Commonwealth.<sup>11</sup> As the Operational Plan has been used in the past and is continually in use and will be utilized in the future, its disclosure would jeopardize the public safety of Department of State Police 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. Moreover, the plan may need to be utilized again in Charlottesville or elsewhere in the Commonwealth, as groups may plan more demonstrations.

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<sup>10</sup> In making a determination of whether release of execution protocol documents would compromise Department of Corrections operational security, the 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.

<sup>11</sup> “The Superintendent of State Police, his several assistants and police officers appointed by him are vested with the powers of a sheriff for the purpose of enforcing all the criminal laws of this Commonwealth...” Va. Code § 52-8.

**B. Intelligence Information included in the Operation Plan is specifically exempted from FOIA by Va. Code § 52-48.**

In addition to the applicable FOIA exemption discussed above, the Va. Code specifically exempts intelligence information provided by the Department of State Police's Fusion Intelligence Center. In enacting § 52-48(A), 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 Operation Plan is intelligence information derived from the Department of State Police's Fusion Intelligence Center.

**CONCLUSION**

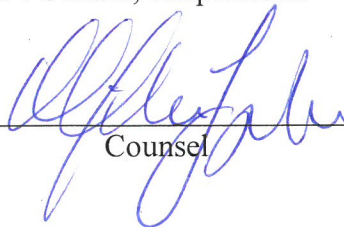
FOIA specifically makes release of the Operation Plan discretionary by the Department of State Police. The Department of State Police chose to exercise its discretion to not release the records. Additionally, the Operation Plan contains Fusion Center intelligence information that is specifically excluded from FOIA pursuant to Va. Code § 52-48.

For the foregoing reasons, the Department of State Police respectfully requests that this Court DENY and DISMISS the Petition for a Writ of Mandamus.

Respectfully submitted,

THE VIRGINIA DEPARTMENT OF  
STATE POLICE, Respondent.

By: \_\_\_\_\_



Counsel

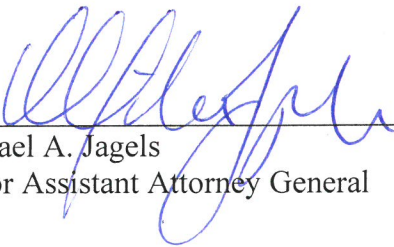
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 6th day of November, 2017, a true copy of the foregoing Demurrer and Motion to Dismiss the Petition for a Writ of Mandamus was emailed and mailed, postage prepaid, to counsel for the Petitioner:

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