

**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 OFFICE OF THE SECRETARY OF PUBLIC SAFETY AND  
HOMELAND SECURITY DEMURRER AND MOTION  
TO DISMISS THE PETITION FOR A WRIT OF MANDAMUS**

Petitioner seeks an order compelling Respondent, the Office of the Secretary of Public Safety and Homeland Security ( the “Secretary”), to release, in response to a Freedom of Information Act (“FOIA”) request, “the safety plan or ‘Operations Plan’ for the ‘Unite the Right’ rally on August 12, 2017 in Charlottesville, Virginia.”

The Secretary oversees 11 state agencies, including the Department of State Police, and assists those agencies in planning and coordinating the state's emergency preparedness, response, recovery and mitigation efforts. The Secretary, by counsel, responded to and denied the request,

citing exemptions including “working papers of the Office of the Governor “ under Va. Code § 2.2-3705.7(2), and “law enforcement sensitive information” under “Va. Code § 2.2-3706.” Because the documents in question, which were created by and for use by the Department of State Police, include “records contain[ing] specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public,” the refusal to release the documents was appropriate as a discretionary exclusion under § 2.2-3706(A)(2)(e) of FOIA. Because the records sought by petitioner are the same as those sought by the Department of Virginia State Police, the arguments of the Secretary supporting non-disclosure mirror those of the Department of State Police.

For these reasons, the Secretary respectfully requests that this Court sustain its demurrer and dismiss the Petition for a Writ of Mandamus.<sup>1</sup>

### **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. Petitioner is “a freelance journalist and resident of Charlottesville Virginia.”
2. Petitioner wrote to the Secretary, “[t]his is a Virginia Freedom of Information Act (VA FOIA) request to the Office of the Secretary of Public Safety and Homeland Security. I am writing to request the safety plan or “Operations Plan” for the “United the Right” rally on August 12, 2017 in Charlottesville, Virginia.”
3. “If some portion of the records I have requested is excluded from disclosure by the VA FOIA or another provision of law, Virginia Code § 2.2-3704.01 requires that you

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<sup>1</sup> An in camera review by the Court is welcome by the Department to verify the contents of the documents withheld by the Department.

withhold only those portions of the record containing information subject to an exclusion.

All portions of the record that are not subject to an exclusion must be disclosed.”

4. On October 11, 2017, Noah P. Sullivan, Counsel to Virginia Governor McAuliffe, responded to the FOIA request. Petition Exhibit 5. The response stated: “The records that you request are exempt as working papers of the Office of the Governor (Va. Code § 2.2-3705.7(2)), as well as law enforcement-sensitive information (Va. Code § 2.2-3706). We therefore will be denying your request.” *Id.*
5. 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 Department of Virginia State Police.

#### APPLICABLE LAW

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>2</sup> The “primary purpose” of FOIA “is to facilitate openness in the administration of government.”<sup>3</sup> To that end, “[a]ll public records and meetings shall be presumed open, unless an exemption is properly invoked.”<sup>4</sup>

FOIA specifies approximately 144 separate categories of exclusions, exceptions, and exemptions to the Act.<sup>5</sup>

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

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<sup>2</sup> Va. Code § 2.2-3700(B).

<sup>3</sup> *Am. Tradition Inst. v. Rector and Visitors of the Univ. of Va.*, 756 S.E.2d 435, 440 (2014).

<sup>4</sup> Va. Code § 2.2-3700(B).

<sup>5</sup> *See, e.g.*, Va. Code §§ 2.2-3703, -3705.1, -3705.2, -3705.3, -3705.4, -3705.5, -3705.6, -3705.7, & -3706.

- 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 “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>6</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>7</sup>

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<sup>6</sup> Va. Code § 2.2-3704(B).

<sup>7</sup> Va. Code § 2.2-3704(B)(1).

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.

Counsel for the Secretary, in his response to petitioner, cited as an exemption “law-enforcement sensitive information under § 2.2-3706” as his reason for denying petitioner’s request. 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”).

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 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 Office of the Secretary of Public Safety and Homeland Security.

#### **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>8</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

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<sup>8</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.

[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>9</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.

**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

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<sup>9</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.

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**

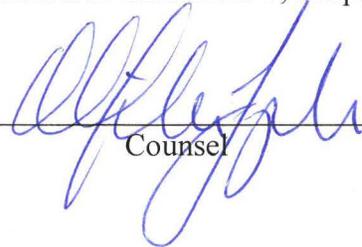
FOIA specifically makes release of the Operation Plan discretionary by the Secretary. The Secretary, like the Department of State Police, chose to exercise its discretion to not release the records. Additionally, the Operation Plan contains Fusion Center intelligence information that is specifically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

For the foregoing reasons, the Office of the Secretary of Public Safety and Homeland Security respectfully requests that this Court DENY and DISMISS the Petition for a Writ of Mandamus.

Respectfully submitted,

THE OFFICE OF THE VIRGINIA  
SECRETARY OF PUBLIC SAFETY &  
HOMELAND SECURITY, Respondent.

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



Counsel

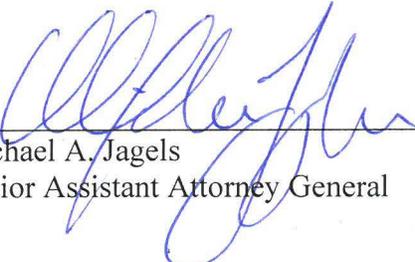
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**CERTIFICATE OF SERVICE**

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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