

TENTH JUDICIAL CIRCUIT  
OF VIRGINIA

J. WILLIAM WATSON, JR.  
JUDGE



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In re: Richard Hawkins, Plaintiff vs. Town of South Hill, Defendant  
Mecklenburg County Circuit Court Case No.: CL20000144-00


Letter Opinion

Counsel:

This matter comes before this Court on remand from the Virginia Supreme Court. The procedural posture of this case has been clearly stated by both parties and is included in Hawkins v Town of South Hill, VA., 878 S.E. 2d 408 (Va. 2022).<sup>1</sup> Therefore, this Court will not again set forth the history of this proceeding. Suffice it to say, the Mandate requires this Court to reexamine five documents previously ordered to be withheld from disclosure and apply the definition of "personnel information" recently supplied by The Virginia Supreme Court in Hawkins Id.

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<sup>1</sup> References to the Hawkins opinion are to pages in the original official opinion. The citation to page 12 of that opinion corresponds to 878 S.E.2d at 416. The citation to pages 15-16 of that opinion corresponds to 878 S.E.2d at 417

Filed in the Circuit Court  
Mecklenburg County Virginia  
Date: 5-26-2023  
Michelle G. Gordon, Clerk  
  
Deputy Clerk

## THE DEFINITION

The Virginia Supreme Court in Hawkins opined that, "personnel information" as set forth in Section 2.2-3705 of the Code of Va. (1950), as amended, means "data, facts, or statements within a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual's employment relationship with the entity and are private but for the individual's employment with the entity. Hawkins at 13. In coming to this conclusion, the Court noted, "reading the definitions narrowly, we recognize that the only content exempt from disclosure is that which is tied to the employment of the individual in some way, and which otherwise would not be disclosed to the employer. Hawkins at 12.

FOIA was enacted by the General Assembly to ensure the "people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees." Code Section 2.2-3700(B). All public records. . . shall be presumed open, unless an exemption is properly invoked." Code 2.2-3700 (B). "By its own terms, the statute puts the interpretive thumb on the scale in favor of disclosure: 'The provisions of [FOIA] shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.'" Fitzgerald v Loudoun County Sheriff's Office, 289 Va. 499, 505 (2015).

Armed with the new definition of "personnel information" and mindful of the tenets stated above, the Court now reviews the documents in question.

## THE SIX PAGE EMAIL

1. The first page is an email from Bill Wilson to Glen Allen and others. This email should be produced in its entirety. No content in this document meets the definition of "personnel information." There is no private information contained in the Town's proposed redaction. The statement in the proposed redaction is not "content. . . which is tied to employment of the individual in some way, and which would not otherwise be disclosed". See Hawkins Id. This document is not an evaluation. It is the voluntary republication, by the employee, of an event tied solely to the author's employment. In order to be private, the disclosure of this information would have to constitute an "unwarranted invasion of personal privacy to a reasonable person under the circumstances". Hawkins Id. While "personnel information" is defined in Hawkins, the phrase "unwarranted invasion of personal privacy" is not. Webster's New Collegiate Dictionary defines "unwarranted" as "not justifiable" or "inexcusable". Synonyms include indefensible, unforgivable, unpardonable, gratuitous, unnecessary, and

unreasonable. Black's Law Dictionary defines "invasion" as "an encroachment upon the rights of another". "Personal" is defined as "of or relating to or affecting a person". Webster's New Collegiate Dictionary. "Privacy" is defined as "quality or state of being apart from company or observation". Webster's New Collegiate Dictionary.

Viewing this document in context, this Court concludes the email should be produced without redactions.

2. The next page is the first of an August 8, 2019, Memo to Bill Wilson from Kim Callis. It contains a total of three pages. The document purports to be a performance evaluation. Once again, this document was voluntarily published to the Mayor and the entire Town Council by the employee in question. Given this fact, it defies logic that a reasonable person would find this production to be an unwarranted invasion of personal privacy. Page 1 should be produced in its entirety. On page two, the names of the two individuals contained in the paragraph designated as paragraph 5 should be redacted. These redactions are required by the following analysis. Hawkins Id. establishes a "privacy" standard to aid this Court in the assessment of the scope of the exemption under FOIA. Application of the standard is straightforward where the document in question contains private information concerning the employee, who is the subject of the document. Where the document contains information relating to another employee, further analysis of the exclusion is required. This Court reads the Supreme Court's opinion to apply the same analysis and privacy standard to this secondary employee situation. Taking notice of the Court's balancing test and privacy standards for this document in question, this Court has concluded the identities of the secondary employees is a matter contained in this document solely because of the individual's employment relationship with the Town. Moreover, the identities of these individuals do nothing to advance the goal of transparency required by the Act. As this document does not pertain to these individuals, this Court feels they have a legitimate privacy expectation in their information under these circumstances. Disclosure would be an unwarranted invasion of that interest.

All the remaining portion of the email, not redacted as indicated herein, should be produced. There is no content in the portion of this document remaining after redaction which meets the definition of "personnel information." This email is from a supervisor to an employee of a municipality. The email sets forth certain claimed deficiencies in the employee's performance of his public job function. It relates solely to situations which occurred during the performance of public functions by a public employee. The evaluation does nothing more than set forth certain conduct allegedly deficient. Even though this is an evaluation of the employee in question, this Court finds that evaluations are not automatically excluded. There is nothing in this evaluation that would cause a reasonable person to feel disclosure of this document to be an unwarranted invasion of

personal privacy. This is especially true given the circumstances of the transmission of the document to the Mayor and entire Town Council by the employee. There is no unwarranted invasion of personal privacy. Given these circumstances, even if one could argue the information is private, there is no unwarranted invasion thereof. The provisions of FOIA shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Fitzgerald v Loudon County Sheriff's Office, 289 Va. 499, 505 (2015). These documents in question are certainly "governmental activities".

3. The next page is an August 10, 2019, Memo to Kim Callis from Bill Wilson. It appears to be a response to the email considered above. The email contains two pages. This document should be produced in its entirety except for the following redactions. On page one, in the paragraph designated as number one, the name of the individual set forth on line 6 should be redacted. On the next page the name of the individuals contained in the paragraph designated as 5 should be redacted. The individual's name in paragraph six should be redacted. There is no information in the unredacted content of this document which meets the definition of "personnel information". A reasonable person would not deem a response by an employee to an evaluation, in which the employee explains his or her positions and denies the deficiencies, to be an unwarranted invasion of personal privacy. This is part of the packet of information sent to the Mayor and Town council.

While these emails may contain some unflattering comments concerning job performance and a rebuttal to those allegations, that performance is solely in relation to the function of a public duties by a public employee being compensated by public funds. The Court can find no content in the unredacted portions of these documents, the disclosure of which, would constitute an "unwarranted invasion of personal privacy" to a reasonable person. If severely strained relationships exist between employees and supervisors which negatively impact the smooth and efficient performance of public responsibilities, the public should know. Obviously, this determination, in relation to the information examined above, is specific to the documents reviewed herein. This Court can certainly see situations in which employee evaluations may contain information which could be deemed private.

#### THE DEMAND LETTER

This document should be produced in its entirety subject to the following redactions:

1. Page two, paragraph one, line one, the name which is the sixth word of the first sentence should be redacted here and everywhere else in this document except page one and the unredacted portion of page 5 and the next to last

paragraph of page 7. Page two, paragraph one, line 9, the name of that person in that line is redacted here and everywhere else in this document. Page two, paragraph one, line six, redact from the word "to" to the word "without". This reference appears to refer to a private activity outside the scope of the public employment in question and is private and therefore exempt.

2. Page two, paragraph two, line two: commencing with the first word on line two the redaction should continue up and to the last word of that sentence. The first sentence in line three should be redacted in its entirety. Redaction should commence again on line 4 starting after the word "of" and continuing to the word "in" on the same line. The content in line 5 should be redacted commencing after the word "see" and continuing to the end of that sentence. The redactions noted above are required as this content references certain medical or emotional diagnoses and includes the names of prescription medication which this Court deems to be private information the disclosure of which would constitute an unwarranted invasion of personal privacy. It is clearly information which would not otherwise be disclosed to the employer. Hawkins at 12.

3. All of paragraph three, page two, should be redacted. These redactions are required under the same analysis as utilized in paragraph two above.

4. Paragraph five, page two, line three, redact following the word "to" up and to the conclusion of that sentence. Redact the seventh word in line 5. This references behavior symptomatic of some of the diagnoses mentioned above which have been properly redacted. This disclosure would be an unwarranted invasion of personal privacy.

5. Page three, paragraph two, line two, redact commencing after the word "that" and continuing up to the word "she" in line three. Line 5 redact commencing after the word "work" up and to the end of the sentence. The redacted portions contain references to medical conditions or diagnoses as well as treatment therefore and are not subject to disclosure as they contain private information and come within the definition of "personnel information".

6. Page three, paragraph four, line one, redact from the word "her" up and to the end of that sentence.

7. Page four, paragraph two, line 8, redact commencing after the word "already" and continuing to the word "by". See reasoning utilized in the above paragraph 5.

8. Page five, paragraph one, redact the entire paragraph. The second paragraph redact from the word "to" on line four and continue to the end of the sentence. Once again, the redacted portions refer to symptomatic conduct

related to certain medical diagnoses and therefore are not subject to disclosure. See Hawkins at 12.

9. Paragraph six, page five, line 4, redact the first four words of the fourth sentence. Line seven redact from "to" up to the word "in" which is the last word on line 7. This again is a reference to a medical diagnose and is within the definition of "personnel information".

10. Second full paragraph, page six, line one, redact the eighth word. Same rationale as set forth above.

As stated above, the entire contents of the Demand Letter save and except these redacted portions should be disclosed. While the nonredacted content may contain details of what appears to be allegations of improper treatment in the workplace of an employee by a supervisor, it involves an employee of a municipality and her supervisor and concerns events solely related to the workplace. Once again, even though there are negative comments about employee and supervisor contained in the content to be disclosed, this information is known to the employer because of the employment relationship and is not information which would "not otherwise be disclosed to the employer". Hawkins Id.

The public, in this Court's opinion, should be allowed to view, subject to privacy redactions, a claim for certain concessions in order to prevent further litigation. There is no unwarranted invasion of "personal privacy" by releasing the unredacted content. The letter in question was intentionally and voluntarily sent to the attorney for the Town of South Hill by the employee. A reasonable person under the circumstances surrounding this transmission could not, in this Court's opinion, find disclosure of the unredacted content to be an unwarranted invasion of personal privacy.

Why should a claim, which includes a monetary component to be paid from public funds be shielded from public view? By its own terms, the statute puts the interpretive thumb on the scale in favor of disclosure. See Hawkins Id. If there is a claim by an employee that could result in liability to the municipality in question, the public, subject to appropriate redactions, should be able to gain this information. An alternative would be to redact the employee's name entirely from the document, but the Town has not proposed any redactions to page one which contains the employee's name.

## RESIGNATION LETTERS

The first letter is dated 8/22/2019 and does not bear any suggested redactions by the Town so it shall be produced in its entirety.

The second letter is dated October 3, 2019. The only redaction applicable is the third word in the first sentence as well as the first nine words of the second sentence. This Court finds the first redaction of the single word appropriate as it refers to a clearly private ritual utilized by certain individuals under certain circumstances. It has nothing to do with the employment relationship and is private to the individual engaging in that process. As far as the second redaction, this is clearly information the employer would not have but for the employment relationship. Hawkins Id at 12.

The last letter is dated, December 2, 2019, and should be disclosed without redactions except the name of the individuals set forth in the second paragraph of page one. Those names should be redacted throughout this document. The name of the individual in paragraph four, page one, should also be redacted throughout. This Court has carefully analyzed the remaining portions of this document through the lens of the definition of "personnel information" contained in Hawkins and finds nothing therein which is properly classified as "personnel information". The employee resigning is setting forth the rationale for his resignation. The employee is not revealing any personal information and no reasonable person could an employee's rationale for leaving could somehow be private given the circumstances articulated in the letter. While this may contain unflattering comments about a third person, it is certainly not information, the disclosure of which, a reasonable person could find to be an unwarranted invasion of personal privacy.

If conditions exist in a public workplace which prevent the efficient operation of government or possibly cause the resignations of public employees, the public should know. The public has a vested interest in all aspects of governmental operations. The attachment includes a performance review which contains two pages. This document was voluntarily disclosed by attaching this to the resignation letter. It is not a necessary component of a typical letter of resignation. The only redactions required in the evaluation are in the paragraph which has the heading, Attendance/Punctuality/Adherence to Policy. The redaction is the third and fourth words in line two of the first sentence. There is no "personnel information" in this document. No private information is disclosed. This document relates solely to the characterization of work performed for a municipality by a public employee. There is no unwarranted invasion of personal privacy by releasing this document subject to the redaction. Also, attached is a six paged rebuttal to the aforesaid evaluation. Some redactions are required to this document.

1. The first page is not numbered but has the date of April 24, 2019. The names contained in paragraph one should be redacted here and throughout this document. The first paragraph should be redacted commencing with the first full sentence on line 8. The next sentence should be redacted in its entirety. The eighth word of line twelve should be redacted.

2. On the following page, the first paragraph under the heading Attendance/Punctuality/Adherence to policy, redact the twelfth word on line two and the same word on line 4 in the next paragraph. In the section below this one, designated as number 1, redact the names of individuals in the paragraph and anywhere else in this document. This paragraph continues over to the next page.

3. In the section designated as number two, redact all the names of individuals contained therein and anywhere else in this document.

4. In the section designated as number three, redact the names of the employees and anywhere else they may appear in this document.

5. In the section designated as number four, redact the names of the employees and anywhere else they may appear in this document.

6. On the next page, in the paragraph with the heading Communication/Listening/Interpersonal skills redact the name on the last line in that section. On the next page, in the first two paragraphs, redact all names in these paragraphs and redact the last seven words, line four of the first paragraph. Redact the first three words, line four and redact the eleventh word of last line of second paragraph. Also redact all of the names in the Conclusion, if not already directed to be redacted.

## SECTION 2.2-3713 (D) CODE OF VIRGINIA

Section 2.2-317 (D) of the Act states as follows, "A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorney fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust".

Petitioner claims that he has prevailed on the merits, both before the Supreme Court's ruling and after the Supreme Court's ruling. See Petitioner's Post-Remand Brief, p. 9.

The Town counters this assertion by claiming the Petitioner has waived this issue as well as the award of costs and attorney fees, as it those issues were not raised in the prior proceeding and therefore Petitioner is procedurally barred. See The Town of South Hill's Opening Brief at p. 7. The Town argues the only issue returned to this Court was whether the five documents withheld meet the definition of personnel information outlined by the Supreme Court. Brief Id. At p. 8.



The circuit court made no ruling on attorney's fees or on whether Hawkins 'substantially prevailed'. The absence of a ruling on either issue is understandable because Hawkins did not present either issue to the circuit court. He did not request fees and costs in his opposition to the Town's demurrer, or in his response to the Town's log of documents. Hawkins did not raise the issue of fees at all during either of his hearings before the circuit court. Even when the Town moved for entry of a final order, Hawkins did not raise a request for fees or file any response. Hawkins at 15 and 16.

The Town argues that Hawkins is procedurally barred because this Court's order disposing of this matter did not indicate whether Hawkins had substantially prevailed and if so, was he entitled to an award of attorney fees. As a general rule, the scope of the Circuit Court's role in a case remanded to it is limited to the matters contained in the mandate, consistent with the Supreme Court's analysis in its opinion in the case. This rule is founded on the finality of the Supreme Court's ruling as to all issues upon which it has acted. Thus, it is necessary to assess whether an issue was finally decided in the Supreme Court's opinion.

The case does not fall squarely within this rule because the Supreme Court did not make a ruling on the issues of whether Hawkins substantially prevailed or whether he was entitled to attorney fees which resulted in a waiver of that assignments of error relating to those issues. See Conclusion of the Supreme Court's opinion in Hawkins Id.

The Town correctly states the law of the case doctrine which stands for the proposition that where there have been two appeals in the case, between the parties, and the facts are the same, nothing decided in the first appeal can be re-examined in the second appeal. Steinman v Clinchfield Coal Corporation, 121 Va. 611, 93 S.E. 684 (1917). The issues of whether Hawkins has substantially prevailed was never addressed by this Court or the Supreme Court because the issues were waived on appeal.

The Town is also correct, and this Court agrees, Hawkins is foreclosed from claiming costs and attorney fees prior to the Supreme Court's mandate. The issue of whether Hawkins substantially prevailed and the entitlement to attorney fees was not part of this Court's prior order. Even if he were not barred from making this pre-remand claim at this point, this Court affirmatively finds that special circumstances exist which would make such an award pre-remand unjust. Neither party during the pre-remand proceedings had the benefit of the Supreme Court's definition of "personnel information" elucidated in Hawkins Id. The Town should not be required to pay costs or attorney fees for failing to adhere to a standard that did not exist at the time of its stated positions.

By the same token, the Court finds that the Town's argument that the pre-remand waiver of this issue forecloses this Court from addressing costs and fees post-remand is unpersuasive. The remand directs this court to conduct "further proceedings consistent with this opinion". The Petitioner, pre-remand would not have been able to argue he substantially prevailed on the five items this Court ordered withheld. It seems inconsistent with the intent and purpose of the statute to find that a successful appellant cannot request costs and attorney fees if he substantially prevails post-remand.

In carefully reviewing the positions stated by the parties' post-remand, this Court finds the Town claimed many more redactions than were necessary. In so finding, this Court readily acknowledges the difficulties in making these determinations, even with the benefit of the recently articulated standard. These are difficult issues for all involved. This is in no way a criticism of the Town's positions, simply an indication this Court feels that many of the redactions sought were not required under the new definition of "personnel information".

On the five issues returned to this Court for review, the Petitioner has substantially prevailed and is entitled to any reasonable post-remand costs incurred solely in relation to these five documents. Attorney fees are another issue.

#### ATTORNEY FEES

The attorneys have carefully and completely briefed this issue. After careful consideration this Court finds that a pro se litigant is not entitled to attorney fees even if he is a licensed attorney and substantially prevails as Hawkins did post-remand. In so finding, this Court adopts the rationale set forth in the several briefs filed by the Town herein. While not necessary to the opinion, this Court does not find there are special circumstances post-remand which would prevent an award of attorney fees.

#### CONCLUSION

The Supreme Court's opinion in Hawkins Id. heralded a new day for the processing of FOIA requests. The new definition of "personnel information" significantly limits the exemption in favor of disclosure. If there is any doubt as to this conclusion, it may be resolved by reviewing Suffolk City School Board, et al v Deborah K. Wahlstrom Record No. 220116, Virginia Supreme Court. Likewise, "in enacting VFOIA, the General Assembly evinced a strong preference for open government. See B. Allen Gloss, ET Al v Ann B. Wheeler, Et Al Record No. 210779, Virginia Supreme Court. These opinions came across this Court's desk while it was in the process of preparing this opinion. It is in keeping with this Court's interpretation of the ruling in Hawkins Id. that few, if any, documents are

automatically exempt. This includes employment evaluations and responses thereto.

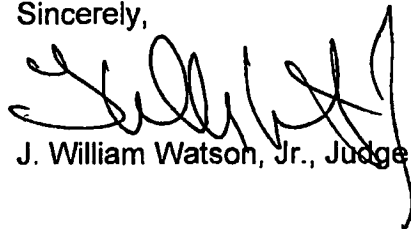
This Court has carefully reviewed each document line by line and attempted to faithfully apply the definition of "personnel information" recently supplied by our Supreme Court in Hawkins Id. In so doing this Court considered not only the contents of the document, but why and how it was generated and what was done with it after preparation. After so doing, the objective standard was applied, and the results are contained herein.

The rulings herein are limited to the documents and situations contained specifically in the record of this case.

This Court is thankful to Mr. Hawkins and Ms. York for the furnishing of vast amounts of information and authority. You have both done excellent jobs in representing your respective clients. Mr. Hawkins is to draw an order in keeping with this decision and send it on to Ms. York for endorsement.

Finally, Mr. Hawkins is to submit a list of post-remand costs solely related to the documents in question to counsel for the Town within twenty-one days from the filing of this opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "J. William Watson, Jr.", written over a printed name.

J. William Watson, Jr., Judge

JWW,Jr./pic

cc: Hon. Michelle G. Gordon, Clerk