

ELEVENTH JUDICIAL CIRCUIT

PAUL W. CELLA, JUDGE
POWHATAN COUNTY COURTHOUSE
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POWHATAN, VIRGINIA 23139
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COMMONWEALTH OF VIRGINIA

CIRCUIT COURT OF AMELIA COUNTY
CIRCUIT COURT OF DINWIDDIE COUNTY
CIRCUIT COURT OF NOTTOWAY COUNTY
CIRCUIT COURT OF THE CITY OF PETERSBURG
CIRCUIT COURT OF POWHATAN COUNTY

April 19, 2017

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Batterson v. Voorhees/Powhatan Circuit Court Case Number CL18-436

Gentlemen:

I am writing to follow up on the hearing that was held April 16, 2018.

Closed Meetings

Virginia Code §2.2-3712(A) says that in order to go into a closed meeting, a public body must, in an open meeting, take a vote that:

- (i) Identifies the meeting's subject matter;
- (ii) States the meeting's purpose, as authorized under Virginia Code §2.2-3711(A) or other applicable law; and
- (iii) Cites the applicable exemption from open meeting requirements under Virginia Code §2.2-3711(A) or other applicable law.

Count One of the Petition for Mandamus and Injunction (the Petition) that the petitioner, Nelson Batterson (Batterson), has filed alleges that respondent The Board of Supervisors of Powhatan County (the Board) has, on numerous occasions, violated Virginia Code §2.2-3712(A) by holding closed meetings without specifying the meetings' subject matter. Among other things, Batterson relies upon an opinion of the Virginia Freedom of Information Advisory

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Council (the Advisory Council) (Petitioner's Exhibit 1). In that opinion, the Advisory Council points out several situations in which the Board stated the meeting's purpose and cited an exemption from the open meeting requirements but failed to identify the meeting's subject matter. As that opinion notes, quoting the last sentence of Virginia Code §2.2-3712(A), "A general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting." For example, the opinion cites a closed meeting that the Board held May 22, 2017. The minutes for that meeting make conclusory statements regarding the exemptions regarding investment of public funds (Virginia Code §2.2-3712(A)(6)) and consultation with legal counsel (Virginia Code §2.2-3712(A)(7)) but do not identify the meeting's subject matter.

At the hearing, Mr. Lacheney conceded that in the past the Board has held some closed meetings that did not comply with Virginia Code §2.2-3712(A), and he stated that this problem is being corrected. He provided a copy of a recent authorization for a closed meeting (Defendant's Exhibit 2) regarding consultation with legal counsel (Virginia Code §2.2-3712(A)(7)) that, instead of following the Board's former practice of making a conclusory reference to the statutory exemption, specifically identifies the meeting's subject matter as "actual or probable litigation concerning performance of a franchisee under a franchise agreement, potential litigation involving an illegal use pursuant to the zoning ordinance and possible litigation concerning the opioid [sic] crisis." If I understood Mr. McSweeney correctly, he indicated that in light of this concession, Batterson will not, at this time, pursue his request for an injunction, as described in paragraph 63(c) of the Petition. My holding regarding this issue, then, is that Batterson's request for an injunction will be dismissed without prejudice.

The Deadline for the County's Response

Virginia Code §2.2-3704(B) says that within five working days of receiving a request under the Virginia Freedom of Information Act (FOIA), a public body must either produce the records that were requested or offer one of the other responses that that Code section permits, one of which is an automatic extension of seven working days.¹ In addition, under Virginia Code §2.2-3704(H), if the public body determines that the cost of producing the requested records is likely to exceed \$200.00, the public body may request a deposit from the requester, and the public body's response deadline is tolled till the requester responds.

In Count Two of his Petition, Batterson argues that the County failed to meet its deadline under this Code section, and in Count Three of his Petition, Batterson alleges that the County

¹ Beyond the automatic extension of seven working days, the public body may, under Virginia Code §2.2-3704(C), petition the court for additional time "when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search." That was not done here.

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improperly tried to ask for two separate seven-day extensions, when it was entitled to only one. The County disagrees.

Batterson filed his FOIA request January 8, 2018. After some discussion between Mr. McSweeney and Mr. Lacheney regarding the scope of Batterson's request and the County's fee for complying with the request, by electronic mail message dated February 15, 2018, Mr. McSweeney told Mr. Lacheney, "I agree that the County should proceed with production." (Defendant's Exhibit 19.) Mr. Lacheney provided some documents on February 21, 2018 (Defendant's Exhibit 3). This production met the initial deadline of five working days from February 15, 2018. As to the remaining documents, Mr. Lacheney invoked the automatic seven-day extension. *Id.* Mr. Lacheney produced the remaining documents March 1, 2018. This production met the extended deadline of seven working days from February 15, 2018.

The parties are familiar with the chain of correspondence between Batterson's initial filing and the County's production of documents, and I do not believe that it is necessary for me to provide a detailed explanation of every piece of correspondence that went back and forth. Generally speaking, however, in light of the negotiations between Mr. McSweeney and Mr. Lacheney regarding the scope of Batterson's request and the County's fee for complying with the request, the time when the County's response deadline started to run is debatable. Since Batterson did not give the County unequivocal permission to proceed till February 15, 2018, however, I am not going to hold the County in violation. In addition, I will note that any dispute regarding the timing of the production is now moot, since the documents have been produced.

The Cost of the County's Production of Documents

By electronic mail message dated January 16, 2018, the County gave Batterson an estimate of \$896.00 as the cost of complying with his request (Defendant's Exhibit 1). After the discussion between Mr. McSweeney and Mr. Lacheney regarding the scope of Batterson's request, the County provided a revised estimate of \$200.00, and the County offered to waive the prepayment requirement.² By letter dated March 1, 2018, Mr. Lacheney told Mr. McSweeney that the actual cost would be \$1,356.33.³ In Count Four and Count Five of his Petition, Batterson argues that the estimate of \$896.00 and the final amount of \$1,356.33 are unreasonable because they exceed the County's actual costs. In Count Six of his Petition, Batterson argues that there was an "implied agreement" that the fee would not exceed the \$200.00 estimate.

I believe that the following language from the Advisory Council's opinion is persuasive:

² "You were provided a cost estimate on your production on February 13 of \$200.00, and on February 14 I wrote you and agreed to waive any required prepayment." (Electronic mail message from Mr. Lacheney to Mr. McSweeney, February 15, 2018, Defendant's Exhibit 18.)

³ This letter is attached to Batterson's Memorandum of Law as Exhibit 1.

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While only a court can rule on whether particular costs are “reasonable,” on its face it does not seem reasonable to charge more than ten times the amount of the original estimate when the public body could have stopped, informed the requester of the additional charges, and required an advance deposit when it knew that the charges would exceed \$200.00.⁴

In fairness to the County, the Advisory Council heard only Batterson’s side of the story when it wrote its opinion. Nevertheless, I agree that since Batterson was given an estimate of \$200.00, the County should be held to that, and I will cap the County’s fee at \$200.00.

What the County Withheld

In his letter of March 1, 2018, Mr. Lacheney stated that certain records were being withheld under Virginia Code §2.2-3705.1(1) (personnel information) and Virginia Code §2.2-3705.1(2) (written advice of legal counsel). In Count Seven of his Petition, Batterson argues that Virginia Code §2.2-3705.1(2) does not authorize Mr. Lacheney to withhold documents that he reviewed (though on page 10 of his Memorandum of Law, Batterson acknowledges that this exemption would cover the “actual written advice of the County Attorney or documents reflecting communications from and to his client regarding legal advice”). In Count Eight of his Petition, Batterson argues that the County’s reliance on Virginia Code §2.2-3705.1(1) is misplaced. His position, as noted on page 11 of his memorandum of Law, is that “[n]ot every record that contains the name of, or reflects the participation of, an employee is a ‘personnel record’” within the meaning of that Code section.

At the hearing, Mr. Lacheney said that there is actually only one document that the County withheld. That document is a report that Mr. Lacheney’s office sent to the County Administrator, defendant Theodore L. Voorhees (Voorhees). He said that the County did not withhold any documents that he reviewed. The County’s position is that the report is exempt from production under Virginia Code §2.2-3705.1(2) as information that is protected by the attorney – client privilege.⁵ The County appears, then, to have abandoned its argument regarding the exemption for personnel records, and the County is now relying solely on the argument that

⁴ The Advisory Council’s comment regarding “ten times the amount of the original estimate” was based on Batterson’s statement to the Advisory Council that the original estimate was \$100.00 to \$125.00. The figures of \$100.00 and \$125.00 were mentioned in a February 6, 2018, electronic mail message from Mr. Lacheney to Mr. McSweeney (Defendant’s Exhibit 14). Regardless of whether one considers the estimate to have been \$200.00 or \$100.00 to \$125.00, however, the final amount of \$1,356.33 was much higher than the estimate.

⁵ My recollection is that Mr. Lacheney may have made a brief reference to some written communication with County staff regarding legal advice that was rendered in connection with his preparation of the report, though my notes are not clear on this, and we do not, of course, have a transcript. If there were such communications, I believe that they would be subject to the same analysis regarding attorney – client privilege as the report itself.

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written communications between Mr. Lacheney and Mr. Voorhees are exempt from disclosure because of the attorney – client privilege.⁶

Under Virginia Code §2.2-3713(E), the County has the burden of proving a claimed exemption by a preponderance of the evidence. As noted above, Batterson himself stated in his Memorandum of Law -- correctly -- that “actual written advice of the County Attorney or documents reflecting communications from and to his client regarding legal advice” are exempt from production under Virginia Code §2.2-3705.1(2). In my opinion Mr. Lacheney’s report to Voorhees falls squarely within that exemption. Therefore, as to Count Seven and Count Eight, I will find that the County is not in violation of FOIA.⁷

I would infer that the existence of Mr. Lacheney’s report to Mr. Voorhees is public knowledge and that some members of the public want to see it. Perhaps others share Mr. Batterson’s curiosity, and perhaps that curiosity is understandable. As one of the cases that Mr. McSweeney cited at the hearing put it, “the public may have an interest in knowing that a government investigation itself is comprehensive, that a report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.” Newark Morning Ledger Co. v. Saginaw County Sheriff, 204 Mich. App. 215, 514 N.W.2d 213 (1994). I am required to make decisions according to what the law is, however, and in my opinion, while Batterson’s position is understandable, the County has met its burden of establishing that the report is protected by the attorney – client privilege.

Please prepare an appropriate order.

Thank you.

Sincerely,



Paul W. Cella

⁶ My notes indicate that Mr. Lacheney said that his report involved an investigation concerning two County employees, but the legal argument that was made was attorney-client privilege, rather than personnel information. Mr. Lacheney also referred to the work product privilege under Virginia Code §2.2-3705.1(3), though this privilege was not asserted in his letter of March 1, 2018.

⁷ Because I believe that Virginia Code §2.2-3705.1(2) is dispositive as to the document that was withheld, I do not believe that it is necessary to conduct an in camera review.