



COMMONWEALTH of VIRGINIA

PAGE GENERAL DISTRICT COURT
116 SOUTH COURT STREET, SUITE B
LURAY, VIRGINIA 22835

W. DALE HOUFF
JUDGE

NICOLE G. DINGES
CLERK

PHONE (540) 743-5705

FAX (540) 743-5334

February 19, 2010

David Zachary Kaufman, Esq.
Kaufman Law
11350 Random Hills Road, Suite 800
Fairfax, Va. 22030

Blair D. Mitchell, Esq.
Attorney for Warren County
220 North Commerce Avenue, Suite 100
Front Royal, Va. 22630

Re: Selover v. Warren Dept. of Social Services
Warren Gen. Dist. V08-1724

Dear Mr. Kaufman and Mr. Mitchell:

I have finally completed a review of all documents, evidence and written arguments submitted and reached a decision in this matter. Believing that counsel are well familiar with all evidence in the case I am omitting many specific references to testimony and exhibits on which the court bases each finding or observation.

I do apologize for my delay in resolving this matter but note as Mr. Kaufman stated in his "Reply" filed July 30, 2009, that "This lawsuit has been protracted far beyond what the authors of Virginia's Freedom of Information Act ... could possibly have anticipated." This is not the fault of any one party, but has involved an action filed by the plaintiff (sometimes herein petitioner) pro se on May 15, 2008, later prosecuted for her by two successive attorneys, involved proceedings heard by two judges, encompassed hearings on July 18, 2008, September 5, 2008, December 19, 2008, January 30, 2009, February 6, 2009, April 17, 2009 and on June 5, 2009, culminating in five "final" written arguments by the parties all resulting in exhibits and documents filed which appear to total about 1,400 pages.

The court has reviewed the provisions of the Virginia Freedom of Information Act, i. e., Virginia Code Section 2.2-3700 et seq. (hereafter "the Act") and reviewed for further guidance the "Local Government Officials' Guide to the Virginia Freedom of Information Act" by Roger Wiley and published by the Weldon Cooper Center for Public

Service, University of Virginia, 4th ed., 2007. The court approaches the case with full recognition of the Act's guiding principles which include, but are not limited to, the concepts that the Act is to be liberally construed, records are presumed to be "open," exemptions from disclosure are to be narrowly construed, that the burden of proof is on the government to show an exemption or the basis for non-compliance, all reasonable efforts shall be made by the government to comply, that the requestor's motives are not relevant, and that if rights are denied under the Act, the plaintiff may have costs and attorneys fees if the plaintiff has substantially prevailed.

As hereafter explained I do find that the Warren County Department of Social Services has not been strictly faithful to the provisions of the Act and that some minimal attorney's fees should be assessed against the defendant, but cannot find that the plaintiff has substantially prevailed or that any violations of the Act were other than minor or that the Department has not made reasonable efforts to ascertain and comply with plaintiff's requests.

First, plaintiff alleges sanctions should be imposed not only against the Warren County Department of Social Services (WCDSS) but also against Mr. King, department director, and Ms. Mathews, chairman of the Social Services Board, personally. Notwithstanding plaintiff's argument of the mention of their names after the WCDSS name in the original petition, which the court finds to be as agent or representatives of the department, they are simply not named in the caption of the petition, are not mentioned in the brief statement of "good cause" for filing of the petition, and the petition shows they were not formally served, only a representative as "administrative manager" of the department was served. While each appeared at some of the hearings, all pleadings were filed and served on Mr. Mitchell as attorney for the WCDSS, never as attorney for Mr. King. Further, there is correspondence in the file that Mr. Mitchell was not representing Ms. Mathews, yet plaintiff never sent a copy of any document to Ms. Mathews and she, and Mr. King, personally, were not parties to the agreement of September 5, 2008, attempting to provide a framework for resolution of all issues in the case. To now claim, apparently for the first time, that Mr. King and Ms. Mathews were individual parties to this suit subject to sanctions is without any basis.

Because the agreement of September 5, 2008, purportedly provided a framework to resolve issues in the case, the court sees no reason to provide any discussion of any prior proceedings. The remaining issues in the case revolve around paragraphs four and five of the agreement. Plaintiff contends she did not receive promptly all documents used or distributed at WCDSS meetings and believes she has never received some such documents. She also alleges under paragraph five of the agreement she has not received all documents and electronic communications generated between September 1, 2006, and

April 7, 2007, involving seven persons. Additional allegations are that WCDSS employees are not properly trained in all provisions of the Act and plaintiff seeks a mandamus ordering WCDSS to hereafter comply with the Act. Plaintiff has made a prima facie showing regarding these issues and to which defendant has made limited satisfactory response.

While there was some delay in responding to petitioner's requests this appears to be largely justifiable because of the scope and non-specific nature of the request. The court also had difficulty understanding what material petitioner sought. Further, in 'executing' paragraph two of the September 5, 2008, agreement petitioner needed months to review and 'identify' material sought. The court has difficulty finding WCDSS guilty of delay in providing material when it took petitioner many months to clarify her request and to state specifically what she wanted. Petitioner also cites in her 192 page compilation of documents mentioned in WCDSS board meetings the material she was never provided. But WCDSS has, to the court's satisfaction explained those issues. Many such references were not to documents, some were confidential matters exempted, some referred to documents previously furnished which petitioner didn't recognize and some references were to documents which appear to have been previously deleted or destroyed under the Virginia Public Records Act, the requirements of which petitioner has confused with the (FOI) Act. Plaintiff and others apparently on occasion offered documents at Board meetings, thereby claiming they became public records. The court finds no basis for this, and believes the Board is not obligated to receive and include in its "public records" such random and arguably irrelevant material. While WCDSS might have been more cautious in appropriately discarding records as petitioner's requests were being clarified, the court finds no intent or reckless action on the part of WCDSS.

The alleged failure of WCDSS to provide all non-exempt electronic communications is of some concern. No doubt the apparent use of employee ID numbers to search for documents may have failed to identify some relevant material which may have appeared only from a name search. It is clear WCDSS did incur significant expense in this search and some error in communication may have existed in getting the computer services "expert" to do what would have ensured every possible document. WCDSS has provided some explanation of any loss due to limited computer capacity and the schedule for discarding entries under the Records Act. While some loss or destruction of items may have occurred the court is satisfied it was not with any intent to evade the Act and WCDSS expended substantial funds and effort to comply.

Another issue raised by petitioner is a possible failure of WCDSS to properly train and inform all employees about the Act. Although some training was provided it was clear some key personnel were less than thorough in their understanding of Act and

some admit very limited training. While the court did not identify any "unevenness" of training as causing any non-compliance with the Act, it is clear WCDSS is somewhat better informed about requirements under the Act because of this litigation.

It is interesting that petitioner has not actually identified any document she was not provided or received. Some documents previously received by petitioner were not again later produced for various reasons satisfactorily explained. The court recognizes the irony in stating that the petitioner failed to prove she has not received all material due her under the Act when she may not know about it since she hasn't received it. The petitioner has asked the court to infer there is some failure to comply. I realize the difficulty imposed on petitioner to prove this assertion, but the court cannot conclude by speculation that any unknown or unspecified documents do exist.

Because of a very limited failure to provide some electronic communications and the failure of WCDSS to properly document all necessary training under the Act, the court finds there has been minor, technical and unintentional failure to comply with all aspects of the Act which justifies some very limited assessment of petitioner's attorneys fees under Section 2.2-3713.D of the Act in the sum of \$1,500. The court realizes petitioner will consider this sum to be meager. While the court has recognized some limited failure of WCDSS to comply with the Act, it has noted the department's extraordinary expenditure of time and funds to comply with petitioner's extensive and burdensome requests and therefore the assessment of other than the sum cited would be "unjust." Documents filed in the case and some of petitioner's statements have made clear her animosity toward the department for personal reasons and that her efforts in this case may involve the support other parties, but the court has recognized that petitioner's motives are not relevant under the stated policy and case law interpreting the Act and considered the issues in this case consistent with those principles. The court sees no reason to further order the WCDSS to comply with the Act, which it is otherwise obligated to do.

This case is unusual in its scope of time frame and materials filed, especially for General District Court, but I nonetheless thank counsel for your relative patience and civility under difficult circumstances. I regret I could not reach a resolution more satisfactory to both counsel. All documents will remain filed with the case, unless after an appropriate time, counsel present an agreed order on the release of exhibits.

Sincerely,

W. Dale Houff, Judge