DEBORAH C. WELSH
JUDGE

LORRIE A. SINCLAIR TAYLOR
JUDGE

MATTHEW P. SNOW
JUDGE

COMMONWEALTH OF VIRGINIA

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Loudoun County General District Court
18 East Market Street
Leesburg, Virginia 20176

July 15, 2022

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Civil Case # GV21012768-00
Petition for Injunction or Mandamus – Freedom of Information Act

MEMORANDUM OPINION[1]

Dear Counsel,

The Court extends its thanks and appreciation to each of you for your advocacy and professionalism. The Court, having previously taken this case under advisement, now rules on the issues presented via this Memorandum Opinion and associated Final Order.

This matter came before the Court on Petitioner's Petition for Injunction and Mandamus, filed pursuant to Virginia Code § 2.2-3713, part of the Virginia Freedom of Information Act ("VFOIA" or "Act")(Va. Code § 2.2-3700, et seq.). The Petition was filed on or about November 17, 2021. Petitioner waived her right to an expedited trial within seven (7) days (Va. Code § 2.2-3713(C)). A trial was ultimately conducted in this matter on July 8, 2022. Petitioner, Caitlin Keefe ("Petitioner" or "Keefe") was present at trial with Counsel for Petitioner, Andrew Bodoh; Respondent Candi Choi ("Choi") and Respondent Samuel Finz ("Finz") were present at trial with

[1] The General District Court of Loudoun County is a court not of record, and as such this memorandum opinion has no specific precedential weight outside of this district court. However, the Court also believes that providing clarity in the reasons for its rulings has value to the parties, either for evaluating their future legal decisions or for assessing potential changes to how VFOIA matters are handled.

Counsel for all Respondents, Heather Bardot. Petitioner and Respondents each presented testimony and documentary evidence to the court, and each further presented legal and factual arguments in support of their respective positions.

Petitioner seeks relief in the form of:

1) a Writ of Mandamus to compel the Town of Lovettsville ("Town") to fully respond to the Petitioner's VFOIA records request of August 30, 2022;

2) an Injunction to prohibit the Town from refusing to process or respond to future VFOIA requests of the Petitioner;

3) civil penalties to be imposed upon Choi and Finz for alleged willful and knowing violations of the VFOIA laws;

4) a determination and disposition of VFOIA response costs related to Keefe's records request at issue in this case, previously paid by Keefe into trust with the Court Clerk's Office;

5) an award of reasonable attorney's fees and costs incurred in bringing the Petition for enforcement of VFOIA rights.

Respondents oppose the requested relief and, in addition to various factual and legal defenses presented at trial, take the overall position that the records do not meet the definition of "public records" pursuant to VFOIA, and are thus not subject to VFOIA.

Petitioner presented testimony from Keefe, presented stipulations and admissions, and introduced nine (9) exhibits. Respondents presented testimony from Choi and Finz, and introduced nineteen (19) exhibits. In light of the twenty-eight (28) documentary exhibits introduced at trial and additional case law cited at trial, the Court took the matter under advisement to fully consider all evidence and authority cited.

Having now considered all evidence, argument and authority, the Court finds, opines and rules as set forth herein.

Background and Factual Findings

Although the parties have presented evidence about the Town FOIA Policy (P Ex. 7) and/or Social Media Policy (P Ex. 8), Va. Code § 2.2-3700 provides that any local ordinance that conflicts with VFOIA under state law is void. Therefore, for simplicity, the Court cite directly to state law for controlling authority for purposes of this case.

The purpose and intent of VFOIA is set forth in Virginia Code § 2.2.-3700, and the directives provided therein are helpful in understanding and interpreting the various provisions of VFOIA, to-wit in relevant part:

> "B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees… Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this

> chapter or any other statute, ...all public records shall be available for inspection and copying upon request. All public records ... shall be presumed open, unless an exemption is properly invoked."
>
> "The provisions of this chapter 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. Any exemption from public access to records ... shall be narrowly construed and no record shall be withheld ... unless specifically made exempt pursuant to this chapter or other specific provision of law."
>
> "All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested."
>
> (Va. Code § 2.2-3700)

The court finds that the Town of Lovettsville is a "public body" pursuant to VFOIA and that Choi and Finz are employees of that public body. See Va. Code § 2.2-3701. There was no dispute on this issue presented at trial. The court further finds based on the evidence presented at trial (and also the lack of any dispute on the issue), that the Town council member referenced in this case, Renee Edmonston ("Edmonston"), is a member of a public body (Lovettsville Town Council), and is an elected official. The Court finds that in that capacity, Edmonston is also an agent of Town, as the term "agent" is used within the Act. These determinations are relevant to the disputed "public records" issue.

Choi, Town Clerk, is also the Town's designated VFOIA Officer. The evidence shows that in August 2021 Keefe submitted multiple successive VFOIA requests to the Town, through Choi. The evidence also shows that the Town, through Choi, responded in a timely and appropriate manner to several of such requests. The Town, via Choi, in its discretion did not bill Keefe for any actual costs in the production of various responses. During this August 2021 timeframe, Finz also reached out to Keefe on multiple occasions to discuss her records requests. Finzes' efforts were consistent with the directive of Va. Code § 2.2-3700 quoted above (despite Finzes' stated lack of familiarity with the details of VFOIA), and per Finzes' testimony, also consistent with his long-held practice of citizen-centered service. Keefe, however, declined to speak with Finz about her requests.

The specific records request at issue in this proceeding was a request "made" or clarified by Keefe to the Town (to Choi) via e-mail on August 30, 2021 at 12:41 p.m. (P Ex. 1.) The parties (via Choi and Keefe) agreed to "restart" any VFOIA timelines for the August 30 records request as of that date. (P Ex. 1.) The next day, on August 31, Choi sent an e-mail to Keefe with a written estimate of $115 as actual costs for production of requested records and requested a "deposit" prior to processing the request. Keefe responded to Choi by e-mail the same day, asserting that the deposit request was improper, and *inter alia* stated an intention to "forward" the issue to the

Virginia FOIA Advisory Council ("Council")[2]. (P Ex. 1.) Choi responded to Keefe via e-mail the same day, advising Keefe that due to what the Town perceives as a "threat," the "Town will no longer address your e-mails re: FOIA requests." (P Ex. 1; R Ex. 18.) Later on August 31, Finz also responded to Keefe via e-mail, concurring with Choi's stated position, and adding *inter alia* that the Town will await any VFOIA advisory opinion. (P Ex. 4; R Ex. 19.)

Keefe's August 30 records request was a request for "public records" as that term is defined under VFOIA

The relevant request on August 30 related to a) a social media post(s) by Town Councilman Edmonston to a private social media group, and all posts and comments thereto, related to a survey seeking public input on the topic of Town sponsored events and to be reported back to the town council; and b) a social media post(s) by Town Councilman Edmonston to the same private social media group referencing a shared screenshot from her official town council social media page. (See, P Ex. 1; R Ex. 16.) Respondents assert that the requested records do not constitute "public records" as defined under VFOIA. The Court finds otherwise.

A "public record" for purposes of VFOIA is defined as, "all writings and recordings ... regardless of physical form or characteristics, ***prepared or owned by, or in the possession of a public body or its officers***, employees ***or agents*** in the transaction of ***public business***." Va. Code § 2.2-3701 (in relevant part only, emphasis added). While the testimony of Choi was that the "Town" did not create, control or have access to Edmonston's relevant social media post, there was no dispute at trial that the subject matter of the post was related to public business and prepared by Edmonston in her role and capacity as a town council member. Given this Court's finding that Edmonston is a public official and an agent of the Town and/or town council in her capacity as a town council member, and that Edmonston prepared and posted the social media post(s) regarding public business, those written communications thus are a "public record" as that term is defined under VFOIA. In short, an officer or agent of public body plus creating a written communication regarding public business equals public record. It is also noteworthy that prior to litigation, the Town (nor Choi or Finz) never claimed the requested records by Keefe was not subject to VFOIA. While the actions of elected officials, such as posting to social media on matters of public concern, can create a unique retention and production challenge for public bodies and VFOIA compliance, this Court finds that such writings are in fact covered by VFOIA.

Analysis of the responses to the records requests

Having found that the requested records are in fact "public records" subject to VFOIA, the Court now turns its attention to the responses by the Town, Choi and Finz. Respondents have raised no dispute at trial that Keefe's clarified request on August 30 was made with reasonable specificity, and the Court finds as such. Keefe did not make a request for a cost estimate in her August 30 records request. Choi, on behalf of the Town, responded to Keefe on August 31, providing *inter alia* a cost estimate and requesting an advance deposit in the amount of $115.

[2] The Court is familiar with the Council, and takes judicial notice that the Virginia FOIA Advisory Council is a state advisory entity created to provide advice, education and training on VFOIA matters, and to help resolve disputes related to VFOIA. (Rule 2:201, *et seq.*; Va. Code § 30-279.)

Choi's response is a clear violation of VFOIA; specifically, a violation of § 2.2-3704(H) which only allows a public body to request advance deposit when the estimated actual cost of production exceeds $200.[3] Although there is evidence that a prior version of Keefe's records request resulted in an estimate of $1500 for production of records and a legal opinion (R Ex. 8.), that issue is not before the court. When the parties agreed to "restart" the VFOIA response requirements as of August 30 as part of Keefe's clarified VFOIA records request, that became the only VFOIA request at issue. The violation is attributable to both Choi and the Town (via Choi).

Keefe then pointed out this error to Choi via e-mail on August 31. Choi responded with a statement that the Town would no longer respond to Keefe's FOIA request(s) given Keefe's "threat to take this up with the FOIA Board." In other words, the Town was refusing to respond further to Keefe's records requests, and via that e-mail effectively stopped participating in the VFOIA process. Choi's response on behalf of the town is a second violation of VFOIA; specifically, a violation of § 2.2-3704(B) which outlines the only four (4) types of responses to a VFOIA records request that are permitted. Choi's response to Keefe, stating a refusal to process any "FOIA requests," without identifying an applicable exemption under VFOIA, is not one of the four (4) permissible responses to a VFOIA records request. Ultimately, it matters not whether any "threat" of litigation or appeal was either intended or received; whether there was any sort of "threat" at all is of no consequence in this VFOIA analysis. The violation is attributable to both Choi and the Town (via Choi).

The subsequent communication by Finz concurring with Choi's e-mail response does not change or add to the violation committed by Choi. While Finzes' chosen response doesn't help the issue, the Court does not find his e-mail to Keefe later on August 31 to be a violation of VFOIA. The (second) violation already occurred. Whether Finz agreed with it, or even directed it, doesn't change the fact that Choi was the initial and primary responder to Keefe's VFOIA request. Choi and Finz are both agents and employees of the Town, which is the overall public body responsible for VFOIA responses. There is no intervening factual event after Choi's declaration that the Town would no longer respond to Keefe's VFOIA requests before Finz e-mailed his "concurrence" with that decision. Thus, no evidence supports a finding that Finz committed a violation separate and apart from Choi. This is not an analysis of a principle-agent, or a supervisor-staff theory, but rather a VFOIA analysis focused on a request-response structure. In short, a communication saying in effect, "I agree" is not adjudged to be a separate VFOIA violation. The Court finds no VFOIA violation is attributable to Finz.

Respondents' later production of records, redaction of records, and mandamus

This litigation commenced in November 2021. In December 2021 the Town did provide various records, via legal counsel, in response to Keefe's August 30 records request. The Town also produced various records (largely the same records) at other times thereafter, as part of an Answer and Grounds of Defense filing, and in response to a subpoena *duces tecum*. In the various

[3] As testified to at trial, the Town had elected not to bill Keefe for her VFOIA requests prior to August 30. As there was no bill for VFOIA production then pending or arguably overdue, the "tolling" provision of § 2.2-3704(I) does not apply.

productions, the Town (via Choi) partially redacted produced records to "remove" certain names and social media profile photos of citizens participating in the social media dialogue.

Respondents' argue that the ultimate production of records renders the case moot. The Court disagrees. Virginia Code § 2.2-3713(D) provides that a single violation of VFOIA is enough to allow a petitioner to invoke VFOIA's various statutory remedies, to include issuing civil penalties. By the time the Town even provided any records (via counsel) in response to the August 30 records request, litigation had already commenced. While Keefe had the option following the Town's December production to end litigation and waive her VFOIA claims at that point (assuming the production satisfied her request(s)), she was under no obligation to do so and could continue to seek relief for the prior violations of her rights under VFOIA.

Regarding the redactions made by the Town to the records that were ultimately produced, the Court finds any exemptions asserted by the Town were waived and/or erroneously asserted. Virginia Code § 2.2-3713(E) provides, "[a]ny failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter." With relation to the asserted redactions, the Town: a) failed to assert any exemption within any applicable the statutory response period(s) (5 days or other asserted period); b) in a later redacted production failed to cite the specific code section that authorizes the withholding of records as required by § 2.2-3704(B)(1)); and c) in yet another production cited a specific statutory exemption provision that was repealed and no longer existed. Each of these is a failure to follow VFOIA procedures and each constitutes a VFOIA violation. The Town cannot now retroactively assert an exemption right that it failed to assert properly, and has waived any and all potential exemptions associated with its records production in this case.[4]

Please note that the Court will not be treating the "redactions" issue as a violation subject to a civil penalty analysis, as each of the "redacted" productions was issued after and as part of ongoing litigation. The Court believes that analyzing potential civil penalties under VFOIA in the context of active civil litigation where the production is accomplished via pleadings and discovery tools is fraught with unclear legal standards, and not contemplated by VFOIA. The Court believes its analysis above and its finding that any and all late or erroneously asserted exemptions are waived as sufficient address the issue for purposes of this case.

To the extent that the Respondents believe that the mandamus relief sought by Keefe is moot given the later production, the Court disagrees. To date, there has been no production of records by the Town without redactions; and as explained above, any redaction (exemption) asserted by the Town at this point is waived and otherwise improper. Therefore, mandamus is relevant and the Court is compelled to grant the request for a writ of mandamus, as the Town has to date failed to provide a records production free of redactions.

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[4] To the extent that the Town was attempting to assert an exemption (a/k/a "exclusion") under § 2.2-3705.1(10) in its last production of materials (via counsel) in order to protect citizen names and profile pictures, such exemption would be incorrectly asserted. The reasons for such are well explained in Advisory Opinion AO-07-04 from the Virginia FOIA Advisory Council. VFOIA itself has been amended several times since AO-07-04 was issued, but the Court finds that the analysis presented therein continues to be valid in its logic and application to the current version of VFOIA.

The reasonable actual costs of records production billed

"A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." Va. Code § 2.2-3704(F). In connection with its late production of records on or about December 19, 2021, the Town provided an invoice to Keefe in the amount of $245.50. (P Ex. 5.) In an apparent attempt to show good faith but not concede liability for that cost, Keefe paid that sum to the Clerk of this Court to be held in trust pending resolution of this case.

The statute is clear that any costs passed on to the requestor need to be reasonable and be connected with actual cost incurred in the production process. Based on the evidence presented, the Court finds that the billed costs attributable to Choi and Edmonston are reasonable and supported by evidence. Both were involved in the "accessing, duplicating, supplying or searching" process of the production. While the records request appeared "simple," it was far from simple to access, duplicate, supply or search for specific online data records that were not in the possession or control of the public body receiving the request.

However, the Court finds that the billed costs attributable to Finz to be unreasonable. While Finz was clearly involved in many parts of the ongoing issues between the Town and Keefe in this case, all of which are seen as taken by Finz in good faith, it is not appropriate under VFOIA to bill a requesting party for his time to discuss with staff and to dialogue or respond to Keefe. Finzes' efforts were a part of his job as interim town manager. The billed time for Finz is not an actual cost incurred in the "accessing, duplicating, supplying or searching" process of the production in question. While Finz is to be complimented for his efforts to have a reasonable dialogue with Keefe regarding the issue, that does not make the value of his time recoverable under VFOIA. Therefore, only $115.50 of the December 14, 2021 invoice constitutes reasonable charges for the actual cost of production.

Civil Penalties and willful and knowing violations

The imposition of a civil penalty can only take place when the Court finds that a statutorily responsible individual has committed a violation of VFOIA, and that such violation was willfully and knowingly made. Va. Code § 2.2-3714(A). The terms "willfully" and "knowingly" have both been discussed in VFOIA related case law. "Conduct is 'willful' when it is intentional." RF&P Corp. v. Little, 247 Va. 309, 320 (1994)(citations omitted). "The term 'knowingly,' when used in a prohibitory statute, is usually held to import a knowledge of the essential facts from which the law presumes a knowledge of the legal consequences arising therefrom." Id. (quoting Gottlieb v. Commonwealth, 126 Va. 807, 810 (1920)).

Finz is not at risk in this analysis, as this Court finds no VFOIA violation has been committed by Finz.

Choi committed two (2) separate VFOIA violations as previously mentioned herein; however, for purposes of any penalty consideration, the Court is treating all of the actions by Choi as one (1) ongoing VFOIA violation event for penalty purposes. This in consistent with the Court's reading of the purpose and structure of VFOIA, which evidences an intention by the legislature to

have enhanced penalties for an individual who has previously been held accountable for a VFOIA violation. Having no evidence of a prior VFOIA violation event by Choi, the Court will review the violation(s) by Choi as a "first" and "single" violation event.

Choi testified that she was the Town's VFOIA officer, had received VFOIA training, and was familiar with VFOIA. The Court found her to be credible in her testimony, and in relevant context, appropriately responsive to Keefe with successive prior VFOIA requests and productions. The Court finds that all of Choi's actions were made in good faith. Unfortunately, Choi's actions on behalf of the Town were clearly unlawful.

The Court finds that both of Choi's responses to Keefe on August 31 were specific and clear actions by Choi. Choi intended the actions she took. The Court also finds that in both of Choi's responses to Keefe, Choi had a full understanding of all relevant facts that would have allowed her to apply her knowledge of the applicable law. There were no relevant facts essential to the VFOIA decisions that were unknown or withheld from her. Therefore, the Court is compelled to find that the VFOIA violation committed by Choi was made both willfully and knowingly, despite her good faith intentions. To restate the Court's finding differently, there is no reason to believe that Choi did not intend the action she undertook, did not understand the situation, or have knowledge (either actual or presumed) of the legal requirements at issue. She simply made the wrong decisions, but made her decisions willfully and knowingly.

In light of the context of Keefe's multiple successive and evolving VFOIA requests, Choi's repeated pre-August 31 compliance with VFOIA obligations, Choi's "behind the scenes" efforts to in fact secure the requested records from Edmonston during this period (R Exs. 14, 15.) and this Court's belief of that Choi's actions, albeit erroneous, were made in good faith, the Court finds that the minimum $500 civil penalty is appropriate. The penalty is assessable against Choi in her official capacity as Town Clerk.

Injunctive relief

Keefe request for injunctive relief is predicated solely upon the e-mail statements of Finz on August 31, 2021, in his concurrence with the earlier e-mail response of Choi. Keefe's suggestion that as a result of that e-mail, the Town has now undertaken an unofficially declared "policy" of refusing to process any potential VFOIA request submitted by Keefe is without merit on this record. Keefe's own evidence, as well as state law, establish this for the Court. First, Keefe introduced the Town's actual VFOIA policy (P Ex. 7.). Nothing in that established Town policy suggests that the Interim Town Manager has any authority to unilaterally change Town policy with regard to Keefe. Second, even if Finzes' e-mail statement was somehow considered by this Court as a new Town "policy," it would be in conflict with VFOIA law, and therefore void. Va. Code § 2.2-3700.

This Court finds that there is no merit to Keefe's request for injunction against the Town, and such request is denied.

Attorney's fees and costs

Although Keefe has not prevailed on all matters, the Court finds that Keefe has substantially prevailed in her Petition. Keefe is correct that VFOIA violations occurred; Keefe is correct that a portion of the billed costs related to the August 30 records request production were unreasonable and/or not actual costs; Keefe is correct that the Town's after-the-fact asserted redactions/exemptions were improper; and Keefe is correct that as of trial, the Town still had not fully complied with its VFOIA obligations related to Keefe's August 30 records request. Therefore, as the substantially prevailing party, Keefe is entitled to recover "reasonable costs," to include attorney fees and other costs, unless special circumstances would make such an award unjust. Va. Code § 2.2-3713(D).

As part of the analysis of "reasonableness," the Court has fully considered Petitioner's Exhibit 9. The Court finds that counsel for Keefe, Mr. Bodoh, is well qualified as a highly experienced and accomplished attorney in the area of VFOIA law. The Court has no reservations about the Bodoh's hourly rate, his general billing practices, or the representations made in the attorney fees affidavit. However, this does not end the inquiry. The following special circumstances are important to the "reasonableness" determination:

By statute, Petitioner had the right to have this case heard within seven (7) days of being filed and served. Instead, Petitioner waived that priority right, and the case was scheduled for trial on a non-expedited docketing track. The case has been lingering on the Court's docket for more than six (6) months. While some delays in arriving at a trial date are not attributable to the decisions of the Petitioner, the Court believes it is relevant to consider the fact that more than ninety-five (95) percent of the legal fees incurred by Petitioner in this case were incurred after that statutory seven (7) day priority period. The Court has not observed any factual issue, nor any legal issue, to suggest why this case was not handled in an expedited manner, as is the default procedure by statute - other than for the convenience of the parties.

Both counsel in this case are accomplished litigators and well versed in both the law and legal tactics. Both sides made healthy use of their respective skills to engage in comparatively aggressive motions practices in this case; which in the end has had little to no impact on either the trial or the outcome of the case. As such, the Court has to consider to what extent the legal costs associated with such tactics in this case should be viewed as "reasonable costs."

The Court also notes that the VFOIA violations in this case, while important, were technical violations that could have been easily mitigated at any point in the process, pre or post litigation. The record is clear that Finz (the Town's highest level employee) made repeated efforts to try to meet or speak with Keefe with any eye toward mitigating or resolving any record production issues; and that Finzes' efforts were made months prior to litigation commencing. However, Keefe declined to engage with Finz. While Keefe was within her rights to decline to meet with Finz, that does not mean that her voluntary choice to refuse Finz and his resolution efforts is outside the consideration of this Court as a special circumstance in its determination how much of the thousands of dollars in legal fees billed is in fact "reasonable."

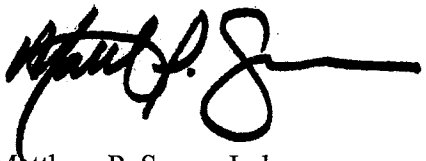
In addition, Keefe is within her rights to hire any competent licensed attorney of her choosing. In selecting Bodoh, she choose counsel with significant expertise in the area of VFOIA law and litigation. Bodoh's appearances in this Court, while welcome and appreciated, did also require extended travel time by Bodoh to attend hearings in this Court; and for which travel time Bodoh has billed at his hourly rate. The Court must consider whether Keefe's personal decision to hire counsel of her choice from outside the local area thereby automatically makes counsel's travel time – billed at his hourly rate – a "reasonable cost" for which she is entitled to recover from the Town.

Lastly, the Court's notes that by the purposes set forth in Virginia Code § 2.2-3700, the General Assembly of Virginia intended for VFOIA to be a shield, to protect and preserve the rights of citizens to have access to the workings of governmental bodies; VFOIA was not meant to be a sword, a means by which to draw financial blood from the limited resources of small local public bodies.

As stated above, the Court finds that Keefe is entitled to recover reasonable costs, to include reasonable attorney fees. In further consideration of the special circumstances presented by the context of pre and post litigation choices made by the parties, the nature of the violations at issue herein, and the factors identified hereinabove and thereafter weighed, the Court finds that a) not all of the requested attorney fees are reasonable, and b) that to make a full award of all requested fees and costs to Keefe would be unjust. Therefore, this Court finds it appropriate in this case to award Keefe court costs of $89.44 and attorney fees of $7,000.00.

The Court has prepared a Final Order, dated this same date, which incorporates this Memorandum Opinion.

Sincerely,



Matthew P. Snow, Judge
20th Judicial District
Loudoun County, Virginia