



NORFOLK

Office of the City Attorney

BERNARD A. PISHKO
City Attorney
WAYNE RINGER
MARY L. NEXSEN
NATHANIEL BEAMAN IV
MARTHA P. MCGANN
CYNTHIA B. HALL
CHARLES S. PRENTACE
JACK E. CLOUD
HEATHER A. MULLEN
DEREK A. MUNGO
TAMELE YVETTE HOBSON
NADA N. KAWWASS
ADAM D. MELITA
TASHA D. SCOTT
ANDREW R. FOX
HEATHER L. KELLEY
ERIKKA M. MASSIE
ZACHARY A. SIMMONS
MICHELLE G. FOY

March 31, 2014

The Honorable George E. Schaefer III
Clerk, Norfolk Circuit Court
100 St. Paul's Boulevard
Norfolk, VA 23510
Hand delivered

Re: People for the Ethical Treatment of Animals v.
City of Norfolk
Case No. CL14-175
Our File No. 14-4238-WR

Dear Mr. Schaefer:

Enclosed for filing please find Respondent's Brief in Support of its Demurrer, which I ask that you file. Argument on the Demurrer is scheduled before Judge Doyle on May 29, and I am separately sending him a copy of the brief.

Sincerely yours,

Wayne Ringer
Chief Deputy City Attorney

WR:tbm

Enclosure

cc: Rebecca K. Glenberg, Esq. by U.S. mail and email (w/encl.)
The Honorable John R. Doyle III **Hand delivered** (w/encl.)
Ms. Wendy Spivey, Judicial Docket Administrator (w/o encl.)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

PEOPLE FOR THE ETHICAL TREATMENT
OF ANIMALS, Inc.,

Petitioner,

v.

Case No. CL14-175

THE CITY OF NORFOLK,

Respondent.

RESPONDENT'S BRIEF IN SUPPORT OF DEMURRER

Respondent City of Norfolk, by counsel, in support of its Demurrer previously filed, says as follows:

FACTS

Petitioner People for the Ethical Treatment of Animals ["PETA"] filed this action in January 2014 asserting two causes of action against the City of Norfolk. Summarizing the facts as set forth in paragraphs 18-32 of the Petition, the case arises from three requests for records under the Virginia Freedom of Information Act, each of which sought records relevant to issues of concern to PETA, and each of which requested, among many other things, text messages between members of the City Council and certain identified members of the public, or in one case, also between Council members and City employees.

The City responded to each request and tendered material other than text messages. The responses to the first FOIA request advised PETA that the City had no access to text

messages. Although other material was produced, no text messages were produced.

Of significance is that petitioner nowhere alleges that the text messages it requested ever actually existed. And even if the text messages once existed, there is no allegation that the text messages existed at the time the requests were made.

After reciting the facts, the Petition asserts two causes of action. The first claims violation of the Freedom of Information Act, alleges a failure to preserve records, failure to provide access to records, and a failure to give notice that text messages had been withheld and to explain why. Petition ¶¶34-36.

The second cause of action sounds under the Public Records Act and contends that text messages are public records which the State Librarian's regulations require to be saved for two years, and contends that the City has failed to preserve what the Public Records Act requires to be preserved. Petition ¶38.

Petitioner's prayer for relief seeks declaratory and injunctive relief and also a writ of mandamus requiring the City to produce text messages.

Respondent filed its Demurrer on February 3, 2014. Argument is scheduled before Judge Doyle on May 29, 2014.

ARGUMENT

I. THE PETITION'S FAILURE TO ALLEGE THE ACTUAL EXISTENCE OF THE TEXT MESSAGES MAKES THE CAUSE OF ACTION DEFECTIVE.

The Virginia Freedom of Information Act ["FOIA"] provides access to public records. If the requestor makes a request, he is entitled to be provided the records if the custodian has them, unless they are wholly or partly exempt. Virginia Code §2.2-3704(B). A person denied any "rights and privileges conferred by" FOIA may proceed to enforcement via a petition for mandamus or injunction. Code §2.2-3713(A). To be entitled to relief, the petitioner must show a violation.

A fortiori, the custodian of records can produce only those records which he possesses, and records which do not or never did exist cannot be produced. In this case, plaintiff alleges that the City responded to the first FOIA request by saying that it did not have access to text messages, Petition ¶19, and explaining that the cell-phone provider does not maintain copies of them for more than five days and that the City does not have access to Verizon's data-base. Petition ¶20.

This case, as a violation of FOIA, is hypothetical only unless there actually were some text messages responsive to the requests and unless they remained in existence at the time the requests were made. Courts do not decide hypothetical cases.

PETA contends that the City should do something to try to record and preserve text messages in general, but unless it can show that it was denied a right or privilege by not being furnished a record that the custodian could have furnished to it, it has no injury which would support such injunctive relief.

II. THE PUBLIC RECORDS ACT PROVIDES PETITIONER NO PRIVATE RIGHT OF ACTION.

Much of the relief petitioner seeks is by way of itself enforcing the Public Records Act, which it contends requires that the City employ some mechanism to capture and record and make available to citizens all public record "text messages sent or received on city-issued or personal devices", Complaint ¶42, even though this controversy involves only text messages that might have been sent or received by members of Council.

The Public Records Act, Code §§42.1-76 through -90.1 is a regulatory act that provides for retention and disposition of public records and appoints the Librarian of Virginia and the State Library Board to perform functions, including the making of regulations about records retention and destruction. Unlike the FOIA, the Public Records Act by its terms provides no private right of action to a citizen or to an organization such as PETA to claim damage as a result of violation of the Records Act or to enforce it prospectively.

It should be noted that the production of improperly withheld records, if they exist in the hands of the custodian, is a remedy specifically provided by FOIA and one which petitioner seeks pursuant to its First Cause of Action. Everything else that petitioner prays is directed to causing the City to comply with petitioner's interpretation of the Public Records Act. The remedy provided by the Act itself is auditing by the Librarian of Virginia. Code §42.1-90.1.

Much jurisprudence on the issue of imputing private causes of action into statutes or allowing private parties to enforce regulatory statutes by injunction is available in the reports of the Supreme Court of Virginia. The basic rules are that private rights of action for damages are generally not imputed into statutes without statutory language to provide for it and that suitors are not permitted injunctions for the violation of state codes unless they have an immediate personal interest in doing so. Also, the most liberal line of cases allowing private litigation are the cases that allow individual taxpayers standing to challenge *ultra vires* tax or spending acts of local governments. See generally, *Charlottesville Area Fitness Club Operators Assoc. v. Albemarle County*, 285 Va. 87 (2013); *Vasant and Gusler, Inc. v. Washington*, 245 Va. 356 (1993); *Gordon v. Board of Supervisors*, 207 Va. 827 (1967); *Kerman v. Fairfax County Water Authority*, 2006 WL 407780 (Fairfax Co. Circuit

Court 2/14/06) (those challenging government action must have immediate, pecuniary and direct interest in the subject matter and suffer a burden different from the burden imposed on the public generally); *Guy v. Tidewater Investment Properties*, 1996 WL 334 65397 (Norfolk Circuit Court 12/20/96). See also *A&E Supply Co. v. Nationwide Mutual Fire Ins. Co.*, 798 F.2d 669 (4th Cir. 1986).

Here, there is no challenge to taxation or the expenditure of public funds, and the only immediate interest plaintiff has is the production of the text messages it asked for (if they exist). That interest is satisfied by the remedy provided, if at all, by FOIA.

Petitioner's interest in prospective enforcement of the Public Records Act is not immediate. Petitioner, if it suffers any future burden from the alleged violation of the Public Records Act, is in no different position than any other person or citizen in the Commonwealth.

Accordingly, the court should find that petitioner has no right to sue for violation of the Public Records Act and dismiss the Second Cause of Action.

III. THE RECORDS RETENTION SCHEDULE REFERRED TO IN PETITIONER'S PARAGRAPH 17 DOES NOT APPLY TO THE TEXT MESSAGES UPON WHICH THE PETITION IS FOCUSED.

Paragraph 17 of the Petition relies on General Schedule No. GS-19, a records retention schedule promulgated by the Library

of Virginia for Administrative Records of county and municipal governments, attached to the Petition as Exhibit 1. Series 010038 "Correspondence/Subject Files: Other Officials", which petitioner cites, is found on page "4 of 14" of Exhibit 1 and requires retention of those records for two years. Petitioner asserts this applies to text messages. However, a scheduled series more nearly to the point of text messages is found in the same exhibit at page 13 of 14. Series 010106, "Telephone Logs and Messages" which includes "but is not limited to: message slips, voicemail messages, and call logs." Records in these series are to be retained not for two years but for "0 months after no longer administratively useful." Why text messages are not covered by this series is not apparent, and at best for petitioner's case, there is ambiguity about what the Librarian's regulations require with respect to text messages, enough of an ambiguity to preclude affirmative relief.

CONCLUSION

WHEREFORE, respondents pray that the Petition be dismissed, judgment be entered for respondents, together with their costs herein.

CITY OF NORFOLK

By Wayne Ringer
Of Counsel

Wayne Ringer
Chief Deputy City Attorney
810 Union Street
900 City Hall Building
Norfolk, VA 23510
Telephone: (757) 664-4529
Facsimile: (757) 664-4201
Counsel for respondent City of Norfolk

CERTIFICATE

I hereby certify that on the 31st day of March, 2014, a true copy of the foregoing was mailed by U.S. mail and emailed to Rebecca K. Glenberg, Esq., American Civil Liberties Union Foundation of Virginia, 701 E. Franklin St., Suite 1412, Richmond, Virginia, 23219, rglenberg@acluva.org, counsel for petitioner.

Wayne Ringer
Wayne Ringer
Chief Deputy City Attorney