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April 24, 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 Rebuttal Brief in Support of its Demurrer, which I ask that you file. The hearing is set for May 29, 2014 at 2:00 p.m. I am separately sending Judge Doyle a copy of the brief.

Sincerely yours,

Wayne Ringer
Chief Deputy City Attorney

WR:tbn

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.)

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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.

CITY OF NORFOLK'S REBUTTAL BRIEF

Defendant the City of Norfolk, by counsel, for its brief in rebuttal of the brief filed by plaintiff dated April 17, 2014, says as follows:

I. PLAINTIFF'S ARGUMENTS ARE NOT AN ADEQUATE SUBSTITUTE FOR AN ALLEGATION THAT THE RECORDS ACTUALLY FACTUALLY EXISTED.

The City has accurately pointed out that the Petition contains no factual allegation that the requested text messages either (1) actually ever existed or (2) were in existence at the times of the FOIA requests.

PETA argues that the City's FOIA responses were inadequate to allow the City to make its present objection. They admit that the City told them that it did "not have access to text messages." FOIA, Code §2.2-3704(B)(3), permits a public body to respond that a record "could not be found". One cannot find that to which one does not have access, and it is submitted that

the response given satisfies the substance of §2.2-3704(B)(3).[1]

PETA says, "In other words, to the extent that responsive texts did not 'exist', it was because the City had not preserved them." But this argument assumes the missing fact: that the text messages existed in the first place.

PETA now says, "The City violated the FOIA, either by failing to provide the requested records, failing to preserve the requested records, failing to notify PETA that the requested records did not exist." The first two "failings" could not have been committed unless the text messages existed in the first place.

And although PETA insists that its pleading supports the inference that they did exist, they also now say that we failed to tell them they did not exist. As noted, Code §2.2-3704(B)(3) allows the response that the records could not be found, and the response that we do not have access substantially complies with that section. It should be pointed out as well that the notion

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[1] PETA also complains that the City failed in responding to the second (Petitioner's Exhibit 18) and third (Petitioner's Exhibit 23) FOIA requests because it said nothing about the text messages being non-existent. Examination of the City's second (Petitioner's Exhibit 22) and third (Petitioner's Exhibit 24) responses shows that both responses produce requested records, so it would not have been factually accurate to say that records do not exist. When a requestor requests a large number of records and the public body responds with the production of records, §2.2-3704(B) of FOIA does not require the responder to descend into the minutiae of saying "here is x, we could not find y, here is z, a does not exist." All that is required is when records can be produced, they be produced, unless they are exempt. We would not be obliged to say that records did not exist unless no records at all existed. Only records withheld as exempt must be described in detail. Compare §2.2-3704(B)(3) with §2.2-3704(B)(1) and (2).

that the City violated FOIA by failing to say that the text messages "do not exist" is no part of PETA's claim. The Petition very clearly attacks the City for not producing text messages or explaining why they are withheld, but it is nowhere alleged that the City violated FOIA by failing to say the records do not exist. Specifically, see Petition, ¶¶34-36.

PETA says the City's argument is specious. Without pejorative adjectives, the City notes that absent an allegation that the text messages once existed, this entire controversy is hypothetical.

PETA says that "it may be fairly inferred from the allegations of the petition that the records did, in fact, exist." We don't see how, and PETA points to nothing in the petition that will support this inference. Then it says that "given that the City did not ever inform PETA that the requested records did not exist, and instead told PETA that it did not have access to the text messages and had no system for preserving them, it 'may be fairly and justly inferred' that the records did, in fact, exist." It cites Bd. Of Supervisors v. Davenport & Co., 285 Va. 580, 585 (2013), for this proposition. That case contains the quoted language, but the case has nothing to do with FOIA or the Public Records Act, or with anything at issue in this case.

The entire claim under the FOIA depends on the actual existence of the text messages. Without an allegation that the emails actually were sent or received, petitioner cannot proceed.

II. THE PETITION SHOWS NO "CLEAR RIGHT" IN PETITIONER THAT IS ANY DIFFERENT THAN THE INTEREST OF THE PUBLIC IN GENERAL.

PETA cites quite a number of cases in support of its argument that it is entitled to pursue mandamus relief. None of them address the issue pointed out in the City's opening brief, that in order to be entitled to relief to compel the government to comply with a law or regulation, the petitioner must have a personalized harm that is different from that suffered by the public in general. This rule has most recently been restated by the Virginia Supreme Court in Rappahannock v. Caroline County, 286 Va. 38 (2013)(declaratory judgment case).

For that reason, PETA's string-cite of cases is no help to it. The first case cited, Cartwright v. Commonwealth Transp. Comm'r, 270 Va. 58 (2005), is a Freedom of Information Act case holding that since the FOIA, § 2.2-3713, provides a statutory right to petition for mandamus, the common law requirements for mandamus do not apply. The City doesn't contest that, but it has no application to the Public Records Act.

The remaining cases cited all involve relief sought by persons who were suffering particularized harm different from that of the general public. Hertz v. Times-World Corp., 259 Va.

599 (2000)(newspaper seeking mandamus to compel open hearing in a particular criminal prosecution; even with standing, mandamus denied on ground that petitioner had available procedure that provided adequate remedy at law); Town of Front Royal v. Industrial Park Corp., 248 Va. 581 (1994)(lot owner in annexed part of town sought to compel extension of sewer lines per earlier annexation order); Greyhound Lines, Inc. v. Davis, 200 Va. 147 (1958)(holder of common carrier certificate to provide bus service sought to prevent arrangement giving rights to other bus carrier); Hall v. Stuart, 198 Va. 315 (1956)(election candidates sought to compel election judges to act).

PETA asserts that it has a "clear right" to the relief sought by contending that the Freedom of Information Act and the Public Records Act "work in tandem". PETA cites no authority for this argument, which is really just an attempt to piggyback a right to relief under the Public Records Act onto a simple FOIA action.

The General Assembly has done nothing to evince any determination that FOIA and PRA are to "work in tandem." There are no material ties between the Acts, which are found in far-separated titles of the Code. Each has its own definition of "public record", and the definitions are not identical. Compare Code §2.2-3701 with Code §42.1-77. The only reference in the Public Records Act to FOIA is at Code § 42.1-86.1(A)(iii), which

provides that records cannot be destroyed if there is a pending FOIA request. The only reference to the Public Records Act in the FOIA is the provision that once a public agency's records have been turned over to the state library, the state library is thereafter the custodian for FOIA purposes. Code §2.2-3704(J). Nothing in either act provides that they "work in tandem". If the General Assembly had intended for the Public Records Act to provide the measurement of the custodian's duty under FOIA, it knew how to do that. If the General Assembly had intended a private right of action under the Public Records Act, it knew how to do that. It did neither.

If PETA wants to contend that the City's obligations under FOIA are defined or measured by the Public Records Act, that will be an argument for another day. PETA today seeks to do more: it seeks to maintain a separate cause of action under the Public Records Act, and that is the cause of action the City contends does not exist in PETA.

If PETA can overcome the hurdle of failing to allege the existence of the text messages, it may proceed with the statutory remedy provided by the FOIA, which may include injunctive or mandamus relief. Code §2.2-3713. Any remedy or relief to which PETA may become entitled for anything that happened in the past will be completely provided by FOIA.

Any prospective relief sought by PETA under the Public Records Act will invoke a "right" in PETA that is no different from the right of the public in general. PETA says that it has a particularized interest to ensure that the city preserves public record text messages and is able to provide access when such records are requested by PETA, meaning, when they are requested in future by PETA. But PETA is in no different a position than anyone else who may request such records in future.

Thus, the Public Records Act provides PETA no right of action.

III. THERE IS A BASIS FOR THE ASSERTION THAT TEXT MESSAGES ARE COVERED BY THE RETENTION SCHEDULE FOR TELEPHONE LOGS AND MESSAGES.

The City relied on its opening brief on Records Retention and Disposition Schedule GS-19 series 010106, Telephone Logs and Messages. Petitioner's Exhibit 1, p.13 of 14. PETA says there is no basis for the City to assert that this series 010106 applies.

Its argument for why there is no basis is that text messages can be used for substantive communication and transaction of public business, whereas telephone logs do not provide substantive information. Assuming that PETA's evaluation of telephone logs is correct, that does not take text messages out of series 010106, which expressly includes "message

slips [and] voicemail messages". Quite a bit of substance can be packed into either a voicemail message or a message slip, yet they are expressly included in the series 010106, for which there is no retention period. On the other hand, a text message, while it could include matters of substance, might also say nothing more than "call me". So PETA's argument that one schedule or another should apply because of substantive content proves nothing.

A truly telling point about where text messages belong in the retention schedules is that series 010038 (Petitioner's Exhibit 1, p. 4 of 14) expressly includes such things as "e-mail", but is silent on text messages. And yet, General Schedule GS-19 (Petitioner's Exhibit 1) shows on its face an effective date of December 13, 2012. This case somewhat arises out of the struggle that comes about because technology outstrips the codes and regulations, but text messages were a well-known form of communication even in December 2012, and yet the State Library did not see fit to include them specifically in any series in GS-19. It is not at all clear that series 010038 applies or that it covers text messages.

CONCLUSION

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

CITY OF NORFOLK

By _____
Of Counsel

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900 City Hall Building
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Counsel for respondent City of Norfolk

CERTIFICATE

I hereby certify that on the 24th day of April, 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
Chief Deputy City Attorney