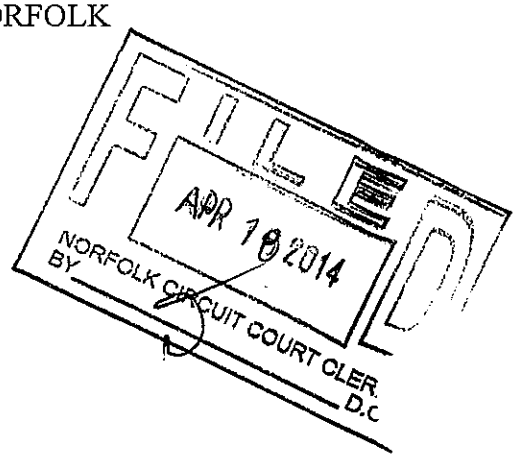
VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,	)	
Petitioner,	)	
v.	)	No. CL14-75
CITY OF NORFOLK,	)	
Respondent.	)	



PETITIONER'S BRIEF IN OPPOSITION TO DEMURRER

INTRODUCTION

This case concerns the City of Norfolk's obligation under the Freedom of Information Act (FOIA), Va. Code §§ 2.2-3700, *et seq.*, and the Public Records Act (PRA), Va. Code §§ 42.1-76, to preserve text messages created by public officials in the course of public business, and to produce those records when requested.

The City does not deny that such text messages are "public records" under both the PRA and FOIA. Instead, it argues that this action must be dismissed because petitioner People for the Ethical Treatment of Animals, Inc. (PETA) has not alleged that the records it requested "existed" at the time of the requests. As the allegations in the Petition and the attached exhibits make clear, however, the City's responses to PETA's requests and related correspondence never stated that city officials had not generated text messages responsive to the requests. Nor did the City ever inform PETA that the records did not "exist," as it was required to do if that were the case. Va. Code § 2.2-3704(B)(3). Instead, the City responded that it did "not have access to text messages" (Pet. ¶ 19 and Ex. 5); the City does not "log and retain text messages" (Pet. ¶ 22(e) and Ex. 17); or simply failed to acknowledge the request for text messages (Pet. ¶¶ 25, 27 and

Ex. 22, 24). Later correspondence confirmed that "[t]he City has not adopted a policy regarding the retention of text messages." (Pet. ¶, Ex. 26.) In other words, to the extent that responsive texts did not "exist," it was because the City had not preserved them. Neither FOIA nor the PRA allows public bodies to evade their responsibility to produce public records by simply failing to maintain them.

The City further argues that it cannot be held accountable for its violations under the PRA because that statute does not provide a cause of action. But the remedy of mandamus allows this Court to enforce the statute regardless of whether it creates a separate cause of action. Moreover, the City's claim that text messages are the equivalent of "phone logs" that need not be preserved under the PRA is meritless. For these reasons, the Court should overrule the City's demurrer and order it to answer PETA's complaint.

ARGUMENT

I. STANDARD OF REVIEW

In considering a demurrer, Virginia courts apply the following standard:

> A demurrer tests the legal sufficiency of a [complaint] and admits the truth of all material facts that are properly pleaded. The facts admitted are those expressly alleged, those that are impliedly alleged, and those that may be fairly and justly inferred from the facts alleged. The trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a [complaint], but only may determine whether the factual allegations of the [complaint] are sufficient to state a cause of action.

Bd. of Supervisors v. Davenport & Co. LLC, 285 Va. 580, 585 (2013) (quoting *Harris v. Kreutzer*, 271 Va. 188, 195-96 (2006)).

II. THE FACTS ALLEGED IN THE COMPLAINT ESTABLISH THAT 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, OR SOME COMBINATION OF THE THREE.

The City's argument that PETA cannot state a FOIA claim without alleging the actual existence of the requested text messages is specious for three reasons: first, if the records did not exist at the time of PETA's request, it is because the City failed to preserve them, in violation of the FOIA; second, if the records did not exist, the City failed to notify PETA that they did not exist, also in violation of the FOIA; and third, it may be fairly inferred from the allegations in the petition that the records did, in fact, exist.

The City cannot hide behind its failure to both preserve and make available for inspection public records to defeat PETA's claim, because that failure itself violates the FOIA. The statute requires that custodians of public records "take all necessary precautions for their preservation and safekeeping" and that "all public records shall be available for inspection and copying upon request." Va. Code Ann. § 2.2-3704(A). In correspondence with PETA, the City repeatedly acknowledged to PETA that the City had no procedure to access and preserve text messages and, further, that it did not intend to create one. *See* Petition ¶¶ 19, 20, 22(e). At no point did the City represented to PETA that records responsive to its requests did not exist, only that the City has failed to implement any measures to access and retain them. To allow the City to prevail in the argument that its own violation of the FOIA, and its resulting inability to determine if records exist,[1] can create a defect in PETA's cause of action and deny PETA its remedy under FOIA would allow the City and (other public bodies) to continually evade compliance with the FOIA.

Further, the City is expressly required by the FOIA to advise requesters if "[t]he requested records could not be found or do not exist." Va. Code § 2.2-3704(B)(3). In none of its responses to PETA's requests did the City so advise. In response to PETA's first request, the

[1] Petitioner notes that Respondent could have easily determined if responsive records existed when PETA submitted its FOIA requests by making inquiries with members of the City Council who could then have reviewed their text messages, and, in fact, the City had a duty to make these inquires, as set forth below. The City has not indicated at

City responded that it did not have "access" to the text messages. (Pet. ¶ 19 and Ex. 5.) In response to PETA's second and third requests, the City apparently chose to ignore that aspect of PETA's requests and failed to mention text messages at all. (Pet. ¶¶ 25, 27; Ex. 22, 24.)

Finally, 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. *Davenport & Co.*, 285 Va. at 585. Thus, even if the Court concludes that the "existence" of the records is a necessary element of PETA's FOIA claim, the Petition alleges such existence sufficiently to survive a demurrer.

In sum, regardless of whether the requested text messages currently exist, or existed at the time of PETA's requests, the City has violated the FOIA. If the records did not exist, the City violated the FOIA by failing to preserve them and by failing to notify PETA of their nonexistence. If the records did exist, the City violated FOIA by failing to provide them to PETA. In either case, the City has violated PETA's rights under the FOIA, and PETA has suffered an injury that entitles it to injunctive relief. Va. Code § 2.2-3713(D).

III. PETA MAY PURSUE A WRIT OF MANDAMUS AGAINST THE CITY'S VIOLATION OF THE PRA EVEN IF THE STATUTE PROVIDES NO CAUSE OF ACTION.

The City seeks dismissal of PETA's claim under the PRA because that statute does not provide a cause of action. If the City is correct (which PETA does not concede), PETA is still entitled to a writ of mandamus, which is specifically designed for situations in which other relief is not available. The function of mandamus is to enforce duties growing out of public concern, or imposed by statute, or in some respect involving a trust or official duty. *T.D. Bank N.A. v.*

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any time that it undertook even this simple step to confirm the existence or nonexistence of records responsive to PETA's FOIA requests.

Frey, 83 Va. Cir. 68, 71 (Cir. Ct. 2011); *Carolina, C. & O. R. Co. v. Bd. of Supervisors,* 109 Va. 34, 37 (1909) (citing *Richmond Ry. & Elec. Co. v. Brown*, 97 Va. 26 (1899)). That is exactly what PETA seeks in this case.

To issue a writ of mandamus, a court must find: (1) the existence of a clear right in plaintiff to the relief sought, (2) the existence of a ministerial legal duty on the part of defendant to do the thing that the plaintiff seeks to compel, and (3) the absence of another adequate remedy at law. *Cartwright v. Commonwealth Transp. Comm'r*, 270 Va. 58, 63-64 (2005); *Hertz v. Times-World Corp.,* 259 Va. 599, 608 (2000) (quoting *Tyler v. Taylor*, 70 Va. (29 Gratt.) 765, 766-67 (1878)); *Accord Town of Front Royal v. Front Royal and Warren County Indus. Park Corp.,* 248 Va. 581, 584 (1994); *Greyhound Lines, Inc. v. Davis*, 200 Va. 147, 152 (1958); *Hall v. Stuart*, 198 Va. 315, 323-24, (1956). This case meets all of these conditions.

Clear Right of the Plaintiff to the Relief Sought

PETA's right to mandamus relief to compel the City to comply with the PRA derives from PETA's statutory right under the FOIA to request and obtain from the City the information that the PRA requires the City to maintain. Va. Code § 2.2-3704. The FOIA and the PRA work in tandem: The PRA requires the government to preserve certain records, and the FOIA requires it to make those records available to the public. Unless the City complies with the PRA, PETA and other citizens are precluded from fully exercising their rights under FOIA. By failing to preserve text messages, the City has denied PETA's legal right to access those public records. A writ of mandamus is necessary to compel the City to comply with its legal duty under the PRA to preserve text messages so that PETA may exercise its legal right to receive them under the FOIA.

The City asserts that PETA's interest in its compliance with the PRA is "not immediate" and "no different [from] any other person or citizen in the Commonwealth." However, PETA regularly requests public records from the City, and as the Petition makes clear, PETA's right to obtain public records under the FOIA has already been violated on three distinct occasions, and will continue to be violated as long as the City fails to preserve public records. PETA has a particularized and direct interest in the outcome of this action to ensure that the City preserves public records in the form of text messages and is able to provide ready access when such records are requested by PETA under the FOIA, and accordingly, PETA has standing to bring this action. *Moreau v. Fuller*, 276 Va. 127, 134 (2008).

The Legal Duty of the Defendant

The City has a legal duty under the PRA to preserve public records in the form of text messages. The PRA provides that "each agency *shall* establish and maintain an active, continuing program for the economical and efficient management of the records of such agency. The agency *shall* be responsible for ensuring that its public records are preserved, maintained, and accessible throughout their lifecycle..." Va. Code § 42.1-85 (emphasis added). Additionally, "*[n]o agency shall* destroy or discard a public record unless . . . the record appears on a records retention and disposition schedule approved pursuant to § 42.1-82 and the record's retention period has expired. . . . ." Va. Code § 42.1-86.1(A) (emphasis added).

The City's legal duty to preserve public records under the PRA is "ministerial" and therefore susceptible to mandamus. "A ministerial act is 'one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment . . . .'" *Richlands Medical Ass'n v. Commonwealth of Virginia,* 230 Va. 384, 337 (1985) quoting *Dovel v. Bertram*, 184 Va. 19, 22

(1945). For example, in *Town of Front Royal v. Front Royal & Warren Cnty. Indus. Park Corp.*, 248 Va. 581 (1994), the Supreme Court considered a petition for a writ of mandamus to require the Town to construct certain sewer lines under an annexation decree. The decree provided that the town "shall proceed to construct interceptor and collector sanitary sewer line. . . as soon as they become reasonably necessary and it becomes economically feasible so to do. . . but said improvements . . . shall be completed within five years from the effective date of annexation." *Town of Front Royal*, 248 Va. at 583. Although the Town had some discretion over when to construct the sewer lines based on necessity and feasibility, that discretion was "limited by the express language in the decree requiring that the Town construct the sewer lines within five years." *Id.* at 585. Thus, the decree imposed a ministerial duty to construct the lines within five years.

Similarly, in this case, the City may have some degree of discretion as to *how* it goes about preserving text messages sent and received in the course of public business, but it has no discretion as to *whether* it does so. The PRA imposes a clear ministerial duty requiring the City to preserve public records according to the schedules promulgated by the Library of Virginia. Accordingly, this requirement may be enforced by mandamus.

The Absence of another Adequate Remedy at Law

If the City is correct that the PRA does not itself provide a cause of action, there is no other specific and adequate remedy available to PETA other than a writ of mandamus. Circuit courts have the jurisdiction to issue a writ of mandamus in any case where it is "necessary to prevent the failure of justice and in which mandamus may issue according to the principles of common law." Va. Code § 17.1-513. The purpose of the writ is "to prevent disorder from a failure of justice, and defect of police. Therefore, it ought to be used upon all occasions where the law has

established no specific remedy, and where in justice and good government there ought to be one." *In re: Commonwealth*, 278 Va. 1, 15 (2009) quoting *Commonwealth v. Justices of Fairfax County Court,* 4 Va. (2 Va. Cas.) 9, 13 (1815).

The City asserts that an audit by the Librarian of Virginia is the proper remedy provided by the PRA. But to be adequate, the legal remedy "must be equally as convenient, beneficial, and effective as the proceeding by mandamus." *Cartwright v. Commonwealth Transp. Comm'r*, 270 Va. 58, 64 (2005); *Carolina, C & O Ry. v. Board of Supervisors*, 109 Va. 34, 37 (1909). The statute provides that the Librarian may do no more than "compile a written summary of the findings of the audit and any actions necessary to bring the agency into compliance with [the PRA]." Va. Code § 42.1-90.1. The Librarian has no enforcement authority to compel the City to preserve text messages so that they can be accessed by PETA under the FOIA upon request. The remedy therefore is not "adequate" to protect PETA's rights. [2]

PETA has a clear right to access to the City's public records, which can only be realized if the City complies with the PRA. The PRA imposes a clear, ministerial duty to preserve those records. No alternative remedy exists. Thus, a writ of mandamus compelling the City to comply with the PRA is appropriate.

IV. TEXT MESSAGES PRODUCED IN THE COURSE OF PUBLIC BUSINESS ARE CORRESPONDENCE THAT MUST BE RETAINED FOR TWO YEARS UNDER THE PRA.

The PRA requires the City to retain records according to a schedule created by the Library of Virginia. That schedule provides that all non-routine correspondence must be retained for at least two years, including "incoming and outgoing letters, memoranda, faxes, notes, and their attachments, *in any format* including, but not limited to, paper and e-mail." (Pet. ¶ 17, Ex.

[2] Nor is any administrative remedy available to PETA. *Cf. Gannon v. State Corporation Commission*, 243 Va. 480 (1992).

1) (emphasis added). As noted above, the City does not deny that text messages are public records, but claims that they should be treated as "telephone logs and records," which "document[] incoming or outgoing routine telephone calls" and include "message slips, voicemail messages, and call logs," and may be destroyed whenever "no longer administratively useful" under the Library of Virginia schedule. (Ex. 1 at 13.) There is no basis for this assertion.

Text messages do not in any way "document ... routine telephone calls."[3] Instead, text messaging, like email and fax, is a medium that may be used for substantive communication and transaction of public business. Presumably, the Library of Virginia does not require telephone logs to be preserved because they do not provide substantive information about what the government is actually doing. Text messages, by contrast, may be used to discuss policy questions, to direct a course of action, to ask or respond to a question about public business, to order supplies, or to conduct any other business that may be accomplished through "correspondence."

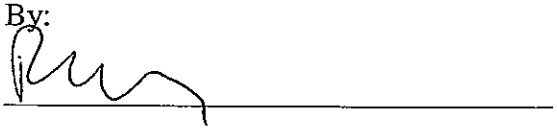
The introductory page of the Library of Virginia's records retention schedule confirms that it is the function of a record, not its physical format, that determines its category: "The retentions and dispositions listed . . . apply regardless of physical format, i.e., paper, microfilm, electronic storage, optical imaging, etc. . . . Whether the required preservation is through prolongation of appropriate hardware and/or software, reformatting, or migration, it is the obligation of the agency or locality to do so." (Ex. 1 at 1.) Accordingly, the fact that text messages are sent and received using telephones is irrelevant. Because text messages are used to convey substantive information from one person to another—not merely to log telephone calls—they are a form of "correspondence," and the PRA requires their preservation as such.

CONCLUSION

For the foregoing reasons, PETA respectfully requests that the Demurrer be denied.

Respectfully submitted,

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.

By: 

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[3] Of course, like any other medium, a text message might document a phone call if it says nothing more than that a phone call has been made. But the City has never asserted that the records requested by PETA fall under that category, or that they have only failed to retain text messages of that sort.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2014, I served a true and correct copy of the foregoing document by U.S. Mail, postage prepaid, addressed as follows:

Wayne Ringer
Chief Deputy City Attorney
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Norfolk, VA 23510

Rebecca K. Glenberg