

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

PEOPLE FOR THE ETHICAL TREATMENT )  
OF ANIMALS, INC. )  
)  
)  
Petitioner, )  
v. )  
)  
CITY OF NORFOLK; )  
)  
Serve: )  
Bernard A. Pishko )  
City Attorney )  
810 Union Street, Suite 900 )  
Norfolk, VA 23510 )  
)  
)  
Respondent. )  
\_\_\_\_\_)

**PETITION FOR DECLARATORY, MANDAMUS, AND INJUNCTIVE RELIEF**

1. This is an action under the Virginia Freedom of Information Act, Va. Code Ann. § 2.2-3700 to 3714 ("FOIA"), seeking declaratory, mandamus, and injunctive relief against the City of Norfolk ("City" or "Respondent"), for failure to preserve and/or make available for inspection public records in the form of text messages in violation of the FOIA and the Public Records Act, Va. Code Ann. § 42.1-76 to 91 ("PRA").
2. As described herein, the City has repeatedly failed to provide People for the Ethical Treatment of Animals, Inc. ("Petitioner" or "PETA") with public records in the form of text messages in response to Petitioner's FOIA requests. Further, the City has informed Petitioner that it has not established a system to retain public records in the form of text messages and has provided no indication that it intends to do so in the future.

### **JURISDICTION AND VENUE**

3. This Court has personal jurisdiction over this matter pursuant to Va. Code Ann. § 2.2-3713(A)(1).
4. This Court has subject matter jurisdiction over this matter pursuant to Va. Code Ann. § 2.2-3713(A)(1).
5. This Court is the proper Venue for this matter pursuant to Va. Code Ann. § 2.2-3713(A)(1).

### **PARTIES**

6. PETA is a Virginia non-stock corporation and tax-exempt charity pursuant to § 501(c)(3) of the Internal Revenue Code. PETA's headquarters are located at 501 Front Street, Norfolk, Virginia.
7. Respondent is the City of Norfolk, Virginia.

### **LEGAL FRAMEWORK**

#### **The Virginia Freedom of Information Act**

8. The FOIA defines public records as "all writings and recordings... however stored, and 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 Ann. § 2.2-3701.
9. The FOIA requires that custodians of public records "take all necessary precautions for their preservation and safekeeping." Va. Code Ann. § 2.2-3704(A).
10. The FOIA requires that "all public records shall be available for inspection and copying upon request," unless release is prohibited by law or the custodian has

properly invoked one of the limited exceptions set forth in the FOIA. Va. Code Ann. § 2.2-3700(B).

11. The FOIA requires that a public body inform a requestor in writing when public records are being withheld in part and mandates that the public body's response "identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records." Va. Code Ann. § 2.2-3704(B)(2).
12. Upon receiving a FOIA request, a public body that is the custodian of the requested records has five (5) business days to respond to the request. Va. Code Ann. § 2.2-3704(B).
13. A single instance of denial of the rights and privileges conferred by the FOIA shall be sufficient to invoke the remedies provided in the FOIA. Va. Code Ann. § 2.2-3713(D).
14. The FOIA provides that the petitioner is entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. Va. Code Ann. § 2.2-3713(D).

#### **The Virginia Public Records Act**

15. The PRA defines "public record" or "record" to mean "recorded information that documents a transaction or activity by or with any public officer, agency or employee of an agency. Regardless of physical form or characteristic, the recorded information is a public record if it is produced, collected, received or retained in pursuance of law or in

connection with the transaction of public business. The medium upon which such information is recorded has no bearing on the determination of whether the recording is a public record." Va. Code Ann. § 42.1-77.

16. The PRA states that "[n]o agency shall destroy or discard a public record unless (i) the record appears on a records retention and disposition schedule approved pursuant to § 42.1-82 [Duties and powers of Library Board] and the record's retention period has expired; (ii) a certificate of records destruction, as designated by the Librarian of Virginia, has been properly completed and approved by the agency's designated records officer; and (iii) there is no litigation, audit, investigation, requests for records pursuant to the Virginia Freedom of Information Act... or renegotiation of the relevant records retention and disposition schedule pending at the expiration of the retention period for the application records series." Va. Code Ann. § 42.1-86.1(A).

17. The Library of Virginia Board, through the authority granted to it by Va. Code Ann. § 42.1-82(a)(2), has promulgated a records retention schedule which mandates that all correspondence of city officials must be retained for at least two years. This includes: "incoming and outgoing letters, memoranda, faxes, notes, and their attachments, in any format including, but not limited to, paper and e-mail." Library of Virginia, Records Retention and Disposition Schedule, General Schedule No. GS-19, County and Municipal Governments, Administrative Records, Correspondence/Subject Files: Other Officials, Series 010038. Exhibit 1.

#### **FACTS GIVING RISE TO PETITIONER'S CAUSE OF ACTION**

18. On August 1, 2012, PETA submitted a FOIA request (FOIA Request #1) to the City for, inter alia, copies of all text message correspondence to and from City Council Members



- Smigiel, Winn, Williams, Whibley, and Protogyrou, and several named members of the public dated from April 1, 2012 to the date the request would be processed. Exhibit 2.
19. On August 9, the City responded to FOIA Request #1 with a demand for a deposit to process PETA's request. That same day, PETA's counsel requested an itemized fee estimate, and on August 14, the City provided the estimate, and also stated summarily that "[the City does not] have access to text messages." Exhibits 3 to 5.
  20. On August 21, PETA's counsel sent a letter to the City asking why the City does not have access to public records in the form of text messages and did not receive a reply. On August 27, PETA's counsel followed up with the City and the latter responded only that Verizon retains text message content for 3-5 days and that the City does not have direct access to Verizon's text message data. The City did not explain why it had not established a system to retain public records in the form of text messages. Exhibits 6 to 8.
  21. On September 12, 2012, PETA's counsel sent a letter to the city attorney's office pointing out that the City was in violation of the FOIA and the PRA by failing to retain public records in the form of text messages, and consequently failing to ensure that these public records are available to the citizens of Virginia for inspection. On September 13, 2012, PETA was informed that its counsel's letter was forwarded to Marcus Jones, city manager, for a response. Exhibits 9 and 10.
  22. Nearly 5 months passed without a response from the City to PETA counsel's September 12 letter, despite numerous attempts to elicit a response to this letter, and two follow-up letters to the City that were sent by PETA's general counsel and deputy general counsel. Specifically:

- a. On September 28, 2012, PETA's counsel sent a follow-up letter to the city manager, inquiring when a response to the September 12 letter could be expected. PETA's counsel did not receive a reply to this letter. Exhibit 11.
- b. The same day, and on eight more occasions, on October 10, 16, 18, and November 2, 6, 9, 12, and 18, PETA's counsel called and left voice-mail messages or sent follow-up e-mails to the city manager's office, inquiring when a response to the September 12 letter could be expected. These calls and e-mails were not returned. Exhibits 12 and 13.
- c. On November 20, 2012, PETA's deputy general counsel sent a letter to the city manager's office, detailing all of PETA's previous attempts to contact the City and requesting a response from the City. Neither Petitioner nor its counsel received a reply. On or about December 11, 2012, PETA's deputy general counsel called the city manager's office to follow up on her correspondence and left a message. Her call was not returned. Exhibit 14.
- d. On January 14, 2013, PETA's general counsel sent a letter to the city attorney's office, asking, *inter alia*, whether the City has instituted a system to retain public records in the form of text messages. PETA received no response to that letter. On January 31, 2013, PETA's counsel sent an email to the city attorney's office asking when a response to PETA's general counsel's January 14 letter could be expected. The city attorney's office replied on the same day and indicated that a response would be provided "soon." Exhibits 15 and 16.
- e. On February 4, 2013, the city attorney's office finally replied to PETA's general counsel's January 14 letter, stating summarily that "the City has not been able to

identify a reasonably effective method to centrally log and retain text messages from the wide variety of models and manufacturers of wireless phones currently in use."

Exhibit 17.

23. On February 8, 2013, PETA's counsel submitted a FOIA request (FOIA Request #2) to the City for records concerning the recently established Animal Advisory Board. PETA's request expressly sought, inter alia, text message correspondence of Mayor Fraim and City Council Members pertaining to the subject matter of the request. Exhibit 18.
24. On February 15, 2013, because the City had not replied to FOIA Request #2, PETA's counsel contacted the City, which responded with a request for an additional seven working days to produce the records. On February 22, the City provided a \$136 fee estimate, which PETA paid promptly. Exhibits 19 to 21.
25. On February 26, 2013, PETA received public records in response to FOIA Request #2. The City's response failed to: 1) include text messages; 2) notify PETA that text messages had been withheld; 3) identify the subject matter of the text message that had been withheld; and 4) cite to any Code section that the City relied upon to withhold the records. Exhibit 22.
26. On April 26, 2013, PETA's counsel submitted a FOIA request (FOIA Request #3) to the City, requesting, inter alia, all cell phone text messages related to the public business identified in the request between City Council Members Smigiel, Winn, Williams, Whibley, and Protogyrou, and several named members of the public, dated from January 1, 2013, to the day the request would be processed. Exhibit 23.
27. On May 13, 2013, PETA received public records in response to FOIA Request #3. The City's response failed to: 1) include text messages; 2) notify PETA that text messages

had been withheld; 3) identify the subject matter of the text message that had been withheld; and 4) cite to any Code section that the City relied upon to withhold the records. Exhibit 24.

28. On October 29, 2013, the American Civil Liberties Union of Virginia (ACLU) sent a letter to the city attorney's office on behalf of PETA, reiterating that the FOIA and PRA mandate that public records in the form of text messages must be preserved and be made available to citizens upon request. The ACLU offered to meet with city officials and bring an expert in the field of e-discovery who would be able to recommend text message retention methods to the City. Exhibit 25.

29. On November 5, 2013, the ACLU received a letter from the city attorney's office stating that the City does not agree with the ACLU's interpretation of the FOIA and the PRA and that the City has not adopted a policy for the retention of text messages. The City requested a list of technologies recommended by the expert whom PETA retained but did not commit to a meeting. Exhibit 26.

30. On November 26, 2013, after consulting with the expert, the ACLU sent a letter to the city attorney's office on behalf of PETA which detailed numerous text message retention methods ranging from the very basic, such as transcription and screenshots, to a number of e-discovery software programs. The ACLU requested that the City confirm by December 13 that it will begin retaining text messages that concern public business. Exhibit 27.

31. On November 27, 2013, the ACLU received a letter from the city attorney's office thanking it for "the lengthy list of technologies [for text message retention]." The city



attorney's office indicated that the City's Department of Information Technology's review of the technologies may not be completed by December 13. Exhibit 28.

32. As of January 9, 2014, neither the ACLU nor PETA received a confirmation from the City that it has—or will—establish a system for the retention of public records in the form of text messages and to the best of their knowledge, public records in the form of text messages are still not being retained by the City's public officials.

**FIRST CAUSE OF ACTION: VIOLATION OF THE VIRGINIA FREEDOM OF INFORMATION ACT**

33. Petitioner reasserts and adopts by reference paragraphs 1 – 32.
34. Respondent has failed to take all necessary precautions, and on information and belief continues to fail to take all necessary precautions, for the preservation and safekeeping of public records in the form of text messages, in violation of Va. Code Ann. § 2.2-3704(A).
35. Respondent has failed to provide Petitioner with access to public records in the form of text messages in response to FOIA requests in violation of Va. Code Ann. §§ 2.2-3704(A) and 2.2-3700(B).
36. Respondent has failed to provide a written response to Petitioner's FOIA requests that: 1) notified PETA that text messages had been withheld; 2) identified the subject matter of the text message that had been withheld; and 3) cited to any Code section that the City relied upon to withhold the records, in violation of Va. Code Ann. § 2.2-3704(B)(2).

**SECOND CAUSE OF ACTION: VIOLATION OF THE PUBLIC RECORDS ACT**

37. Petitioner reasserts and adopts by reference paragraphs 1 – 36.

38. Respondent has failed, and on information and belief continues to fail, to prevent the destruction and ensure the preservation of public records in the form of text messages before the expiration of the two year retention period promulgated by the Library of Virginia, in violation of Va. Code Ann. §§ 42.1-86.1(A) and 42.1-85(B).

**PRAYER FOR RELIEF**

Wherefore, Petitioner prays that this Court will:

39. Issue a declaration that Respondent has violated the FOIA by failing to take all necessary precautions to preserve public records in the form of text messages, by failing to provide Petitioner with access to public records in the form of text messages, by failing to notify Petitioner that public records in the form text messages were being withheld, by failing to identify the subject matter of the text message that were being withheld, and by failing to cite to any Code section that the City relied upon to withhold public records in the form of text messages;
40. Issue a declaration that Respondent has violated the PRA by failing to ensure the preservation of public records in the form of text messages and by failing to abide by the two year retention period applicable to public records in the form of text messages promulgated by the Library of Virginia;
41. Issue a writ of mandamus ordering Respondent to produce to Petitioner all text messages responsive to Petitioner's FOIA Requests #1, #2, and #3 at the sole cost and expense of the City;
42. Issue a writ of mandamus ordering Respondent to establish procedures within thirty (30) days of the date of such writ to preserve, and make available to citizens of Virginia on

request, public records in the form of text messages that are sent or received on city-issued or personal devices;

43. Issue an injunction ordering Respondent to cease the illegal destruction and withholding of public records in the form of text messages;

44. Order Respondent to pay Petitioner's costs, including costs and reasonable fees for expert witnesses, if any, and attorneys' fees;

45. Any such further relief as this Court deems just and proper.

Respectfully submitted,

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.

By:



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