

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VIRGINIA STATE CONFERENCE
NAACP,

Petitioner,

v.

GOVERNOR GLENN A. YOUNGKIN,
in his official capacity as Governor of
Virginia,

Service address:

Patrick Henry Building
Third Floor
1111 East Broad Street
Richmond, Virginia 23219

DENISE BURCH,
in her official capacity as FOIA Officer in
the Office of Governor Glenn Youngkin,

Service address:

Patrick Henry Building
Third Floor
1111 East Broad Street
Richmond, Virginia 23219

Respondents.

Case No. CL _____

PETITION FOR DECLARATORY JUDGMENT AND MANDAMUS

COMES NOW Petitioner, the Virginia State Conference of the NAACP (“Virginia NAACP”), by counsel, pursuant to the Virginia Freedom of Information Act (“VFOIA”), Va. Code §§ 2.2-3700 *et seq.*, and states as follows for its Petition for Declaratory Judgment and Mandamus, and other equitable relief:

1. This is an action under VFOIA against Respondents Governor Glenn A. Youngkin (the “Governor” or “Governor Youngkin”) and the Office of the Governor’s VFOIA Officer Denise Burch in their official capacities, for failure to make available for inspection public records in violation of VFOIA.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over the matter pursuant to Va. Code § 2.2-3713(A)(3).

3. This Court has personal jurisdiction over the parties in the matter pursuant to Va. Code § 2.2-3713(A)(3).

4. This Court is the proper venue for the matter pursuant to Va. Code § 2.2-3713(A)(3).

PARTIES

5. Virginia NAACP is an unincorporated membership organization organized and operating in the Commonwealth of Virginia.

6. Respondent Governor Youngkin is the Governor of Virginia.

7. Respondent Denise Burch is a VFOIA Officer in the Office of the Governor of Virginia.

FACTUAL BACKGROUND

8. A supporting declaration of Virginia NAACP President, Reverend Cozy Bailey (“Bailey Decl.”) is submitted herewith as Exhibit A, attesting to the facts showing good cause for the relief requested herein.

9. The Virginia NAACP is one of Virginia’s oldest and most prominent organizations that advocates for civil and voting rights in the Commonwealth.

10. On April 21, 2023, Martin Brown, Virginia’s Chief Diversity, Equity, and Inclusion Officer, appointed by Governor Youngkin, gave remarks at a mandatory training on diversity, equity, and inclusion (“DEI”) for the Virginia Military Institute’s faculty and staff. In these remarks, Brown said, “Let’s take a moment right now to kill that cow. DEI is dead. We’re not going to bring that cow up anymore. It’s dead. It was mandated by the General Assembly, but this governor has a different philosophy...” Martin D. Brown, Chief Diversity Officer, Virginia Governor’s Office, Address at Virginia Military Institute’s “Inclusive Excellence” Training (Apr. 21, 2023), *available at* <https://vmi.app.box.com/s/y9qjy1fgz5zlm6vg2ntv2kg6gupb6b>.

11. The Virginia NAACP was shocked and amazed at these remarks and reviewed publicly available records and news reports to obtain a better understanding but decided that it needed more information to determine whether Governor Youngkin, Brown, and the Commonwealth of Virginia were acting in accordance with statutorily required mandates related to DEI. *See* Va. Code § 2.2-435.12.

12. To obtain more information about Governor Youngkin’s Administration’s compliance with Virginia’s DEI statute, on August 31, 2023, the Virginia NAACP transmitted a letter to the Office of the Governor’s VFOIA Officer requesting public records and correspondence of the DEI office under VFOIA (“VFOIA request letter”).

13. After sending the VFOIA request letter, on September 8, 2023, the Virginia NAACP

was contacted by VFOIA Officer Denise Burch, who responded that the office was in receipt of the NAACP's request and invoked the seven-day provision under Va. Code § 2.2-3704(B)(4). Bailey Decl. ¶ 6.

14. On September 14, 2023, Burch, rather than responding to the requests as statutorily prescribed under VFOIA (*see* Va. Code § 2.2-3704B4), claimed the costs and time it would take to review the requested records were too substantial, without providing any specific estimate, and invited the Virginia NAACP to revise its requests. Burch also stated that “[s]hould you desire to stand on your current requests, we will promptly calculate an advance determination of the amount of a required deposit.” Bailey Decl. ¶ 7.

15. On September 22, 2023, the Virginia NAACP, acting in good faith, submitted a revised request with changes to further limit and clarify the records it was seeking. The Virginia NAACP also requested an estimate of the costs of providing the documents. Bailey Decl. ¶ 8.

16. On September 28, 2023, Burch responded by claiming the scope of the revised VFOIA request was overly broad and again failed to respond to the requests as statutorily prescribed under VFOIA. *See* Va. Code § 2.2-3704B4. Further, Burch failed to provide a calculation of the amount of a required deposit as previously promised. Bailey Decl. ¶ 9.

17. On October 4, 2023, the Virginia NAACP again asked Defendants for a cost estimate to provide the requested documents. Bailey Decl. ¶ 10.

18. On October 4, 2023, Burch responded by asking a vague question about whether the Virginia NAACP was providing “electronic search terms.” Once again Burch refused to respond to the requests as statutorily prescribed under VFOIA and did not provide a cost estimate. Bailey Decl. ¶ 11.

19. On October 10, 2023, the Virginia NAACP responded by asking Defendants for a cost estimate. Bailey Decl. ¶ 12

20. On October 27, 2023, the Virginia NAACP followed up by laying out the statutory requirements of VFOIA and requested a good faith estimate of the costs of providing the requested documents. Bailey Decl. ¶ 13.

21. On October 27, 2023, Burch’s response again failed to comply with VFOIA and did not provide a cost estimate. Instead, Burch suggested that the VFOIA statute requires the Virginia NAACP to submit “search terms” before a response or cost estimate must be provided. Burch added, “[W]e do not believe it would be a proper use of taxpayer funded time for state employees” to complete the request as submitted. Burch further stated, “We would be happy to submit the search term issue to a Court if that is your preference.” Bailey Decl. ¶ 14.

22. Throughout the entire correspondence between the Virginia NAACP and Governor Youngkin’s office and up to the filing of this Petition Defendants have failed to provide even a single record, even after the Virginia NAACP voluntarily revised its request at the Defendants’ behest. Furthermore, Defendants have failed at all times to provide a statutorily required response or estimate of the costs of production even though Burch promised that her office would promptly calculate a cost estimate.

23. Notice and a copy of this Petition were hand-delivered to the Defendants at the address above, along with a copy hand-delivered and sent by e-mail to the VFOIA Office, on April 9, 2024.

BASIS FOR RELIEF

1. Petitioner reincorporates the allegations contained in paragraphs 8 through 23 and the Bailey Declaration

2. Respondents are required to comply with all provisions of VFOIA.

3. Petitioner submitted VFOIA requests in compliance with the provisions enumerated in Va. Code §§ 2.2-3700 *et seq.*

4. Respondents have failed and continue to fail to comply with the requirements of VFOIA, specifically Va. Code § 2.2-3704(B), by failing to provide non-exempt, responsive records to the Virginia NAACP and by further failing to state the specific statutory exemptions providing the basis for their withholding of specific records.

5. Respondents' actions violate the requirements of VFOIA.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that the Court:

- A. Hold a hearing on this matter within seven days of the date of the filing of this Petition as required by VFOIA. *See* Va. Code § 2.2-3713(C);
- B. Issue a declaration that Respondents have violated VFOIA by failing to provide non-exempt records and by failing to state the specific statutory exemptions providing the basis for their withholding of specific records;
- C. Issue a writ of mandamus ordering Respondents to provide any and all records that are responsive to the Petitioner's VFOIA requests, including but not limited to the specific records identified herein, as soon as practicable;
- D. Award Petitioner its reasonable attorneys' fees and costs under Va. Code § 2.2-3713(D);
and
- E. Provide any other relief this Court deems legal, equitable, and appropriate.

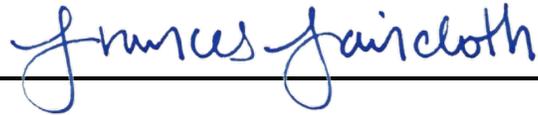
RULE 3:25 DEMAND

Petitioner seeks recovery of its attorneys' fees and costs in this matter under Va. Code § 2.2-3713(D).

Dated: April 9, 2024

Respectfully submitted,

VIRGINIA STATE CONFERENCE NAACP,



By counsel

Frances Faircloth (VA Bar 83873; DC Bar 1021834)

Jake Barr* (DC Bar 90017757)

ROPES & GRAY LLP

2099 Pennsylvania Avenue, NW

Washington, DC 20006

Telephone: (202) 508-4600

E-Mail: fran.faircloth@ropesgray.com

jake.barr@ropesgray.com

Kathryn J. Youker* (DC Bar 90004024; TX Bar
24014928) Lawyers' Committee for Civil Rights Under
Law

1500 K Street, Suite 900

Washington, DC 20005

Telephone: (202) 662-8375

E-Mail: kyouker@lawyerscommittee.org

Attorneys for Petitioner

**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Petition For Declaratory Judgment and Writ of Mandamus was served this 9th day of April, 2024, by electronic mail and hand delivery on counsel for the below Respondents:

Governor Glenn A. Youngkin

Service address:
Patrick Henry Building Third Floor
1111 East Broad Street
Richmond, Virginia 23219

Denise Burch

Service address:
Patrick Henry Building Third Floor
1111 East Broad Street
Richmond, Virginia 23219

By: 

Frances Faircloth